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## Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel

Burke W. Kappler

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# **SMALL FAVORS: CHAPTER 154 OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, THE STATES, AND THE RIGHT TO COUNSEL**

**BURKE W. KAPPLER\***

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## I. INTRODUCTION

*When one has been threatened with a great injustice, one accepts a smaller as a favor.*

Jane Welsh Carlyle, 19th-century Scottish poet<sup>1</sup>

On April 24, 1996, President Clinton signed Public Law 104-132 into effect as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>2</sup> This cumbersome title reflects the divided history and the purpose of the law. While the majority of the law is designed to provide federal law enforcement with increased powers to confront foreign and domestic terrorism in the aftermath of the Oklahoma City bombing, the law also contains provisions restricting habeas corpus which evolved from years of debate, scholarship, and legislation.<sup>3</sup> These habeas corpus reform provisions have been some of the most controversial aspects of the AEDPA. Condemned by many as draconian limitations on the abilities of prisoners to guarantee the constitutionality of their confinement or death sentence, they are lauded by others as a necessary and overdue step against duplicative and abusive litigation by condemned criminals.

In enacting this habeas corpus reform, Congress chose to make use of an innovative procedural device known as the state opt-in provisions. Contained in Chapter 154 of the AEDPA, Special Habeas Corpus Procedures in Capital Cases, these provisions mandate greater restrictions on *federal* habeas corpus review in exchange for appointing competent counsel to indigent capital defendants for *state* post-conviction review. Essentially, the opt-in provisions are a *quid pro quo*. If a state provides counsel, the opportunities of state prisoners for federal review are reduced, thus removing roadblocks to a state's effective and expeditious use of its death penalty.

This paper argues that the opt-in provisions are flawed and ensure finality at the cost of justice. Far from ensuring that prisoners receive qualified and skilled attorneys, the provisions

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<sup>1</sup> LAWYER'S WIT AND WISDOM 138 (Bruce Nash et al. eds., 1995).

<sup>2</sup> 110 Stat. 1214 (1996).

<sup>3</sup> *Id.* at 1217-27.

expose prisoners to ineffective counsel without remedy or protections. Furthermore, the opt-in provisions are creating federal-state tensions as states seeking to opt in feel thwarted by the federal judiciary. This paper will explore these and other issues in several different ways. Part II is a comprehensive examination of the history and background of the opt-in provisions. This Part looks at the developments in and debate over habeas corpus and shows how this culminated in the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases—the source of the opt-in provisions. This Part will also briefly review the legislative history to show how the recommendations of the Ad Hoc Committee became codified in the AEDPA. Part III reviews the litigation history of the opt-in provisions. To date, sixteen states have litigated their opt-in status, either through prisoner declaratory judgments against opt-in status or through normal habeas corpus review, and no state has qualified for the restrictions on federal habeas corpus review. This Part will look at these cases to show trends and themes in this litigation. Part IV is original research into state intent. The purpose of this section is to investigate whether states are still seeking opt-in status and, if so, by what means and why. Part V provides legal analysis and critique of the opt-in provisions given their history and the states' responses. This section will include both criticism and proposals for reform of the opt-in provisions.

## II. ORIGINS: BACKGROUND AND HISTORY OF THE OPT-IN PROVISIONS

### A. THE OPT-IN PROVISION MECHANISM AND THE AEDPA

The AEDPA is a major development in habeas corpus law within which the opt-in provisions operate. Before continuing with the analysis of the opt-in provisions, it is necessary to look at both the AEDPA and the opt-in provisions themselves.

The first major effect of the AEDPA is to establish a one-year period for filing a federal habeas corpus petition—the first

statute of limitations on federal collateral review.<sup>4</sup> This one-year limitation runs from: (1) the date of final judgment on direct review or the expiration of the time for seeking direct review; (2) the date of the removal of any unconstitutional state action which prevented petitioner from filing; (3) the date of the Supreme Court's recognition of a new, retroactive constitutional right as a basis for the petition; or (4) the date at which new facts supporting the petition could have been discovered through due diligence.<sup>5</sup>

Generally, a state prisoner may only seek federal habeas corpus review for violations of the Constitution, laws, or treaties of the United States, and can only do so after exhausting all state remedies. Violations of federal or state laws are not a basis for federal habeas corpus review unless they reach a constitutional magnitude. The AEDPA imposes additional requirements. To win federal habeas relief for a state conviction, a petitioner must show that the state's adjudication 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 that 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.<sup>6</sup>

The opt-in provisions in Chapter 154 of the AEDPA enforce and tighten these restrictions on habeas corpus. Section 2261(b) of title 28 of the United States Code states:

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

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<sup>4</sup> See RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1341 (4th ed. 1996 & Supp. 1997) [hereinafter *HART & WECHSLER*].

<sup>5</sup> 28 U.S.C. § 2244 (Supp. 1997).

<sup>6</sup> 28 U.S.C. § 2254 (Supp. 1997). This section also provides that a petition may be dismissed on the merits regardless of compliance with the exhaustion requirement. States may waive the exhaustion requirement through express waiver.

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.<sup>7</sup>

Chapter 154 further provides that the counsel mechanism must offer counsel to all state capital prisoners. Once counsel has been offered, the mechanism must make an order of court for each prisoner, declaring that (1) the prisoner is indigent and has accepted counsel or is incompetent to choose; (2) the prisoner knowingly rejected the provision of counsel; or (3) the prisoner is not eligible for counsel because the prisoner is not indigent.<sup>8</sup> The appointed counsel for post-conviction review may not be the trial counsel unless both prisoner and counsel expressly request it.<sup>9</sup> In laying out this mechanism, § 2261 is the heart of the opt-in provisions. Once the state has developed such a system, and has had the system approved by the appropriate federal district court, a number of additional restrictions apply to any federal habeas review the petitioner pursues.

Primarily, opting in under § 2261 results in a reduction of the time period for filing a federal habeas corpus petition from one year to 180 days, tolled only for (1) the date of the filing of a petition for certiorari to the Supreme Court for direct review of the state conviction until final disposition of the petition, (2) the filing of the first petition for state post-conviction review until its final disposition, or (3) the filing of a motion for an extension upon a showing of good cause.<sup>10</sup> In response, the district court must render a final determination within 180 days from the filing of the habeas petition, bringing the entire federal post-conviction review to a close within a year.<sup>11</sup> The district court must give all parties 120 days to prepare their claims, in-

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<sup>7</sup> 28 U.S.C. § 2261(b) (1994 & Supp. 1997). In addition, 28 U.S.C. § 2265 provides an identical mechanism for states with a "unitary review" procedure, a procedure whereby collateral claims may be raised in the course of direct review. In such a case, counsel must be offered at the completion of trial. All other opt-in provisions apply identically. This section was included to ensure that California, a unitary review state, could take advantage of the opt-in provisions.

<sup>8</sup> 28 U.S.C. § 2261(c) (1994 & Supp. 1997).

<sup>9</sup> *Id.* § 2261(c)-(d).

<sup>10</sup> *Id.* § 2263.

<sup>11</sup> *Id.* § 2266(b)(1)(A).

cluding briefs, pleadings, and hearings, before issuing a decision.<sup>12</sup> The court may delay for an additional 30 days based on a finding that a delay would better serve the "ends of justice."<sup>13</sup> Court congestion is expressly prohibited as a reason for delay.<sup>14</sup>

The opt-in provisions also specify a scope of review for a federal habeas petitioner who received state post-conviction counsel. The federal district court may only consider claims raised and decided on the merits in state courts, unless the failure to raise the claim was the result of (1) unconstitutional state action; (2) the development of a new, retroactive constitutional right; or (3) new facts that could not have been discovered through due diligence in time for state or federal post-conviction review.<sup>15</sup>

Once state post-conviction counsel has been appointed under an opt-in system, the petitioner may apply to the federal court for a stay of execution.<sup>16</sup> This stay will expire if the petitioner fails to file a federal habeas petition, waives the right to habeas corpus review, or fails to prove the denial of a federal right.<sup>17</sup>

Obviously the interaction of the AEDPA and the opt-in provisions on top of the state and federal post-conviction review procedures is complex. The key is maintaining the distinction between state post-conviction review and federal habeas corpus. Through opting in, states are volunteering to provide counsel in *state* post-conviction proceedings. In return, if the petitioner to whom counsel was appointed then chooses to pursue *federal* habeas review, that petitioner will face the tighter restrictions per Chapter 154. Thus, opt-in does not provide a direct benefit to a state, but serves to ensure that federal review, a roadblock to the state carrying out its death sentences, will be limited, expeditious, and final.

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<sup>12</sup> *Id.* § 2266(b)(1)(B).

<sup>13</sup> *Id.* § 2266(b)(1)(C).

<sup>14</sup> *Id.* § 2266(b)(1)(C)(iii).

<sup>15</sup> *Id.* § 2264. This standard is apparently more narrow than the standard for review when states have not opted in. See David Saybolt et al., *Habeas Relief for State Prisoners*, 85 GEO. L.J. 1507, 1544-45 (1997).

<sup>16</sup> 28 U.S.C. § 2262 (1994 & Supp. 1997).

<sup>17</sup> 28 U.S.C. § 2262(b) (Supp. 1996).



As a last note, both the AEDPA and the opt-in provisions expressly state that ineffective assistance of counsel in state or federal post-conviction proceedings shall not be grounds for relief in federal habeas review.<sup>18</sup>

#### B. BACKGROUND: FEDERAL HABEAS CORPUS

The history of the opt-in provisions must be traced back through the modern history of habeas corpus itself. Habeas corpus is shorthand for *habeas corpus ad subjiciendum* and refers to a writ used to attack the legality of one's detention or confinement.<sup>19</sup> While this paper focuses on the use of the writ of habeas corpus by state prisoners to challenge state convictions in federal courts,<sup>20</sup> there are multiple forms of the habeas corpus writ.<sup>21</sup>

Originally, habeas corpus was only available to federal prisoners held under "colour of the authority of the United States."<sup>22</sup> However, with the end of the Civil War and the Reconstruction, congressional distrust of state motives and commitment to constitutional guarantees led to the passage of the Act of 1867, extending habeas corpus to all persons held "in violation of the constitution, or of any treaty or law of the United States . . . ."<sup>23</sup> With this statute, Congress granted state prisoners access to federal courts for post-conviction review, as long as these prisoners could assert the violation of a federally protected right.<sup>24</sup> This statutory basis for federal habeas corpus for state prisoners remained largely undisturbed, although there were periodic amendments.<sup>25</sup> The AEDPA in 1996 marked the

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<sup>18</sup> 28 U.S.C.A. §§ 2254(i), 2261(e) (Supp. 1997).

<sup>19</sup> See HART & WECHSLER, *supra* note 4, at 1337 (quoting *McNally v. Hill*, 293 U.S. 131, 136-37 (1934)). Note that there are several other variants of habeas corpus pertaining to prisoner treatment within the legal system. See *id.* at 1337 n.1.

<sup>20</sup> 28 U.S.C. § 2254 (Supp. 1997).

<sup>21</sup> See HART & WECHSLER, *supra* note 4, at 1338-39. Other forms of habeas corpus are used to challenge federal detention in federal court or challenge deportation or denial of bail decisions.

<sup>22</sup> Judiciary Act, ch. 20, §14, 1 Stat. 81-82 (1789).

<sup>23</sup> Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

<sup>24</sup> *Id.*

<sup>25</sup> For example, in 1868, the right of appeal in federal habeas corpus proceedings was repealed. See Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44. In 1874, much of the

first major statutory amendment to habeas corpus in nearly fifty years.

Between 1948 and 1996, Supreme Court decisions themselves shaped the doctrinal contours of habeas corpus.<sup>26</sup> In particular, the Warren Court, known for its extension of federal protections, broadened the scope of federal habeas corpus review. Two decisions in particular embody the Warren Court approach. In the first decision, *Brown v. Allen*,<sup>27</sup> the Supreme Court greatly extended federal jurisdiction over habeas petitions by state prisoners. The case has come to stand for the principle that federal courts may give state courts little or no deference in questions of law or mixed questions of fact and law.<sup>28</sup> At its root, *Brown* permits relitigation of the state conviction in the context of the federal habeas review. The second decision, *Fay v. Noia*,<sup>29</sup> introduced an exception to the procedural default rule.<sup>30</sup> This rule holds that claims not properly raised on direct or state post-conviction review are unavailable for federal habeas review; by defaulting a state procedural rule, the petitioner forfeits the right to federal review.<sup>31</sup> In *Fay*, the Court amended the procedural default rule to apply only when petitioner had “*deliberately bypassed*” the state procedure (i.e., through “sandbagging”).<sup>32</sup> An indeliberate default would not prevent federal review.<sup>33</sup> The Court was also willing to be ex-

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existing habeas corpus law was codified in one body. See Title 13, Revised Statutes of 1874, §§751-66. In 1885, the right of appeal of habeas decisions to circuit courts was restored. See Act of Mar. 3, 1885, ch. 353, 23 Stat. 437. In 1948, habeas corpus was again codified into 28 U.S.C. §§ 2241-2255, with some alterations. HART & WECHSLER, *supra* note 4, at 1341.

<sup>26</sup> See HART & WECHSLER, *supra* note 4, at 1345.

<sup>27</sup> 344 U.S. 443 (1953).

<sup>28</sup> See *id.* at 504-09 (Frankfurter, J., concurring).

<sup>29</sup> 372 U.S. 391 (1963).

<sup>30</sup> *Id.* at 438.

<sup>31</sup> See HART & WECHSLER, *supra* note 4, at 1413. The procedural default rule is a corollary of the principle that federal courts may not review state court decisions resting on independent and adequate state law grounds. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>32</sup> *Fay*, 372 U.S. at 433-34, 438 (emphasis added); see also *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977).

<sup>33</sup> *Fay*, 372 U.S. at 433-34, 438.

pansive in defining "deliberate."<sup>34</sup> In this case, where the petitioner had failed to directly appeal his conviction out of fear of a more severe sentence on retrial, the Court found he had not deliberately bypassed state procedure but was instead coerced into default.<sup>35</sup> These two decisions greatly expanded the role of federal habeas corpus, allowing federal courts significant power to overturn state court decisions and permitting state prisoners great leeway to challenge their convictions with little regard for state law.

The end of the Warren Court brought an almost immediate stop to this broad definition of habeas corpus. In three subsequent cases, the Burger and Rehnquist Courts issued decisions that constricted the scope of federal habeas corpus review of state court decisions. First, in *Stone v. Powell*,<sup>36</sup> the Court held that where a habeas petitioner had an opportunity for full and fair litigation of a Fourth Amendment claim in state proceedings, federal habeas relief was not required.<sup>37</sup> *Stone* therefore reined in *Brown's* wide-ranging mandate of federal review of state court convictions. Second, in *Wainwright v. Sykes*,<sup>38</sup> the Court replaced *Fay's* deliberate bypass standard for procedural default with a requirement of cause and prejudice.<sup>39</sup> In other words, for a state prisoner to escape procedural default on a claim not raised in state court, *Sykes* requires that the petitioner show a cause for the noncompliance with state rules and actual prejudice resulting from the alleged constitutional violation to the prisoner.<sup>40</sup>

Third, in *Teague v. Lane*,<sup>41</sup> the Court completed the habeas corpus retrenchment with a complex holding on the retroactive application of constitutional rules. In *Teague*, a prisoner collaterally attacked his conviction by suggesting a new constitutional rule that the Sixth Amendment fair-cross-section requirement

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<sup>34</sup> *Id.* at 440.

<sup>35</sup> *Id.* at 439-40.

<sup>36</sup> 428 U.S. 465 (1976).

<sup>37</sup> *Id.* at 481-82.

<sup>38</sup> 433 U.S. 72 (1977).

<sup>39</sup> *Id.* at 87-88.

<sup>40</sup> *See id.* at 84.

<sup>41</sup> 489 U.S. 288 (1989).

should apply to the petit jury.<sup>42</sup> The Court rejected the prisoner's attempt, finding that it would be inequitable to other petitioners and harmful to finality to establish new rules of criminal procedure and apply them retroactively on collateral review.<sup>43</sup> The Court found that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."<sup>44</sup> However, the Court did enunciate two exceptions to this general rule.<sup>45</sup> First, the Court acknowledged that new rules could be applied retroactively on collateral review if such a rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"<sup>46</sup> Second, rules "which significantly improve the fact-finding procedures [and] implicate the fundamental fairness of the trial" must be applied retroactively.<sup>47</sup> Despite these two exceptions, *Teague* solidified the retrenchment of habeas corpus. Before *Teague*, habeas corpus petitions, like other litigation, could contribute to the development of precedent and new law. After *Teague*, however, habeas corpus petitioners were largely locked in to the body of law as it existed at the time of their convictions.

If *Brown* and *Fay* can be seen as two lines of habeas corpus expansion, then *Stone* and *Sykes* can be seen as ending and retracting those lines of expansion. *Teague* serves as a capstone to the retrenchment, limiting the possible avenues of collateral attack. The Burger Court's approach to habeas corpus can be accurately summarized by the language from a fourth case, *Barefoot v. Estelle*:

The role of federal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which the defendant is entitled to delay an

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<sup>42</sup> *Id.* at 293.

<sup>43</sup> *Id.* at 304-05.

<sup>44</sup> *Id.* at 310.

<sup>45</sup> *Id.* at 311-12.

<sup>46</sup> *Id.* at 311.

<sup>47</sup> *Id.* at 312.

execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has the right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.<sup>48</sup>

This Supreme Court dialogue regarding the scope of federal habeas corpus review was mirrored in debate among members of the academy and of Congress.<sup>49</sup> Generally, these debates seesawed between those who saw expansive federal habeas corpus review as necessary for guarding prisoners' constitutional rights and those who saw habeas corpus as permitting repetitive and never-ending litigation, despite often obvious guilt. An additional concern of those who favored limiting habeas corpus was that the continued availability of habeas corpus review and its concomitant stays of execution were functionally preventing the states from carrying out death sentences.

For example, Justice William Brennan argued in *Sanders v. United States*<sup>50</sup> that, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringe-

<sup>48</sup> *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983).

<sup>49</sup> See, e.g., *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing Before the Senate Committee on the Judiciary*, 104th Cong. (1996); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103rd Cong. (1994); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102nd Cong. (1992); *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. (1991); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1991); *Who is On Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases: Hearings Before the Subcomm. on Govt. Info., Justice, and Agriculture of the House Comm. on Govt. Operations, House*, 100th Cong. (1988); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. (1986); *Comprehensive Crime Control Act of 1983: Hearings Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary*, 98th Cong. (1984); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on the Separation of Powers of the Senate Committee on the Judiciary*, 98th Cong. (1984); *Habeas Corpus Reform Act of 1982: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong. (1983); *Habeas Corpus Procedures Amendments Act of 1981: Hearing Before the Subcomm. on Courts of the Senate Committee on the Judiciary*, 97th Cong. (1982); H.R. REP. NO. 104-518 (1996); H.R. REP. NO. 104-23 (1995); H.R. REP. NO. 103-470 (1994); S. REP. NO. 98-226 (1983); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 445 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

<sup>50</sup> 373 U.S. 1 (1963).

ment of constitutional rights is alleged.”<sup>51</sup> Brennan’s view that relitigation was a proportional necessity met strong resistance from Professor Paul Bator, who argued that instead of substantively evaluating the correctness of a state court’s conclusion, federal courts should only ensure that the state processes were enough to guarantee a “reasoned probability that the facts were correctly found and the law correctly applied.”<sup>52</sup> Bator mustered a number of arguments against invasive federal review, including redundancy and inefficiency, destruction of federal-state comity, and denial of deterrence from delayed finality.<sup>53</sup> Bator’s approach was backed by Judge Henry Friendly, who responded directly to Brennan’s argument:

Why do they have *no* place? One will readily agree that “where life and liberty is at stake,” different rules should govern the determination of guilt then when only property is at issue . . . . But this shows only that “conventional notions of finality” should not have *as much* place in criminal litigation as in civil litigation, not that they should have *none*.<sup>54</sup>

In contrast to both Brennan and Bator, Friendly’s view was that federal habeas corpus would be available only for “colorable showing” of innocence or where the state processes were unfair.<sup>55</sup>

#### C. REFORM PROPOSALS: THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES (“THE POWELL COMMITTEE”)

It was within the framework of these debates and developments in case law that Chief Justice William Rehnquist, as head of the Judicial Conference of the United States, formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases in 1988.<sup>56</sup> The Ad Hoc Committee soon became known as the

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<sup>51</sup> *Id.* at 8.

<sup>52</sup> Bator, *supra* note 49, at 455 (emphasis omitted).

<sup>53</sup> *See id.* at 451-53. These are now standard arguments for limiting habeas corpus.

<sup>54</sup> Friendly, *supra* note 49, at 149-50.

<sup>55</sup> *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 590-91 (1982).

<sup>56</sup> *See* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 CRIM. L. REP. (BNA) 3239 (Sept. 27, 1989) [hereinafter Powell Committee Report].

"Powell Committee" for its chair, retired Associate Justice Lewis F. Powell, Jr. The other members of the committee included Chief Judge Charles Clark of the Fifth Circuit, Chief Judge Paul H. Roney of the Eleventh Circuit, District Judge William Terrell Hodges of Florida, and District Judge Barefoot Sanders of Texas.<sup>57</sup> The mandate of the committee was to "inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases in which the prisoner had or had been offered counsel."<sup>58</sup>

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At the same time the Powell Committee was considering its reforms, the Criminal Justice Section of the American Bar Association formed a Task Force for the same purpose. This Task Force was composed of more members than the Powell Committee and included judges, lawyers, professors, and clerks. The Task Force made sixteen recommendations, seven of which pertain to counsel. See IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS, at 1-3 (1990) [hereinafter Task Force Report]. In general, the Task Force's recommendations are broader, allowing greater access to habeas review than the Powell Committee. While the Task Force recommends strong counsel standards, it also recommends increased funding and better opportunities for training capital post-conviction counsel. *Id.* at 1, ¶¶ 3-4. Finally, the Task Force turns the Powell Committee proposal on its head, suggesting that states should provide competent post-conviction counsel or *lose* the defenses of failure to exhaust state remedies, procedural default, or the presumption of correctness of state court factual findings against a prisoner's petition. *Id.* at 2, ¶ 6.

For a discussion of the Task Force proposal, see Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1674-1704 (1990) (comparing the Powell Committee and the ABA Task Force proposals).

<sup>57</sup> See Powell Committee Report, *supra* note 56, at 3245. While the Powell Committee Report stresses that these judges were selected because the Fifth and Eleventh Circuits have the greatest number of prisoners subject to death sentences, *see id.*, others have challenged the membership of the committee as a conservative plot by justices opposed to prisoner issues to eviscerate federal habeas corpus. An example of this view comes from Rep. Edwards, 136 CONG. REC. H8880 (1990):

In 1988, ignoring the separation of powers principle, Rehnquist appointed an ad hoc committee of the Judicial Conference to write proposed habeas legislation. The committee, chaired by former Justice Powell, was stacked with conservative judges from the two southern "death circuits" where more than three-quarters of the executions since 1976 have taken place. Ignoring the wishes of the full Judicial Conference, the Chief Justice adopted their recommendations. This amendment is solely the work of the Chief Justice and his handpicked opponents of habeas corpus. It is not the neutral, responsible product Mr. Hyde claims.

See also Berger, *supra* note 56, at 1675.

<sup>58</sup> Powell Committee Report, *supra* note 56, at 3239.

The Powell Committee issued its findings and a proposal for reform on September 21, 1989.<sup>59</sup> The Committee identified three problems with the existing system of habeas corpus review. First, the system led to "unnecessary delay and repetition."<sup>60</sup> Disconnections between state and federal authorities led to prisoners bouncing between state and federal courts in order to exhaust state remedies.<sup>61</sup> Given this system, prisoners had no incentive to seek habeas corpus review until an execution date was set.<sup>62</sup> Further, the lack of res judicata rules in the habeas setting produced repetitive and "piecemeal" litigation as prisoners would litigate individual claims separately to maximize their time in court and stave off their executions.<sup>63</sup> Second, the prisoners under capital sentence had a serious "need for counsel."<sup>64</sup> The Powell Committee noted that in light of the recent holding in *Murray v. Giarratano*<sup>65</sup> the right to counsel only extended as far as direct appellate review.<sup>66</sup> Furthermore, the counsel provisions in the Anti-Drug Abuse Act of 1988 were not seen to be effective because they did not apply to state proceedings.<sup>67</sup> The Committee observed that prisoners under death sentence were often illiterate or uneducated, facing a compli-

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 3240.

<sup>65</sup> 492 U.S. 1 (1989). See *infra* notes 682-84 and accompanying text for a more detailed discussion of *Giarratano*.

<sup>66</sup> Powell Committee Report, *supra* note 56, at 3240.

<sup>67</sup> *Id.* See 21 U.S.C. § 848(q)(4)(B) (Supp. 1997). These provisions provide counsel for indigent capital defendants seeking federal habeas corpus. The statute reads:

In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of other such services. . . .

*Id.*

However, federal habeas counsel is often too late to help a prisoner who unwittingly waived his constitutional claims at the state post-conviction level without counsel.



cated and difficult area of law.<sup>68</sup> As a result, these prisoners were often unable to appropriately raise their claims or exhaust remedies at the state level.<sup>69</sup> Though counsel was often appointed when execution became "imminent," this was often after the prisoner had effectively waived his constitutional claims by failing to present them adequately.<sup>70</sup> Third, the Powell Committee pointed to the phenomenon of "last-minute litigation" from habeas corpus petitions filed shortly before execution to obtain a stay and/or simply create delay.<sup>71</sup> The Committee stated that such last-minute litigation was not conducive to justice, because the judicial system was harmed by the strain of exceptionally tight deadlines, and because many of these petitions were without merit.<sup>72</sup>

In response to these problems, the Powell Committee's solution was legislation.<sup>73</sup> Due to the unique nature of capital punishment, the Committee proposed that separate procedures for review of capital sentences be enacted.<sup>74</sup> To prevent delay, prisoners should be entitled to only one full and fair review of their case.<sup>75</sup> Following the conclusion of this review, there would be no further litigation permitted.<sup>76</sup> To compensate for this truncation of post-conviction proceedings, the Committee proposed improving the availability of post-conviction counsel.<sup>77</sup> The mechanism the Committee suggested for doing so was the opt-in provisions.<sup>78</sup> In return for providing competent counsel in state post-conviction proceedings, and thereby "fill[ing] a gap"<sup>79</sup> between constitutionally-required counsel at trial and appeal and statutorily-provided counsel at federal habeas review,<sup>80</sup>

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<sup>68</sup> Powell Committee Report, *supra* note 56, at 3240.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(4)(B) (Supp. 1996).

states could “bring capital litigation by its prisoners” within additional proposed terms designed to ensure finality and repose and prevent last-minute petitions.<sup>81</sup> These additional terms proposed by the Committee included a six-month period for the filing of a federal habeas corpus petition, an automatic stay of execution to prevent last minute petitions, and the requirement that all claims raised in a federal petition be exhausted in state courts.<sup>82</sup> This proposed litigation is substantially the same as Chapter 154 of AEDPA. In fact, the Powell Committee even recommended their placement with the U.S. Code—the proposed measures would be designated Capital Cases: Special Procedures, and would follow 28 U.S.C. § 2255 as new Sections 2256 through 2260.<sup>83</sup>

The critical section of the Powell Committee proposal was section 2256, which laid out the foundation of the opt-in procedure. This section is virtually identical to 28 U.S.C. § 2261.<sup>84</sup> The comments to the proposed section 2256 explain how the Committee envisioned their function. The Powell Committee stated that the development of standards for competent counsel was “[c]entral to the efficacy of the scheme. . . .”<sup>85</sup> While the Committee explained that the opt-in provisions were meant to give states “latitude” to establish an appropriate mechanism, the federal judiciary would be the final arbiter of the “adequacy” of such a mechanism. The Committee stated:

If prisoners under capital sentence in a particular State doubt that a State’s mechanism for appointing counsel comports with subsection (b) [providing that the rule of court or statute will establish standards of

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<sup>81</sup> Powell Committee Report, *supra* note 56, at 3240. *See also* Berger, *supra* note 56, at 1678.

<sup>82</sup> *See* Powell Committee Report, *supra* note 56, at 3241.

<sup>83</sup> *See id.* at 3241-45.

<sup>84</sup> The only difference between the proposed section 2256 and adopted § 2261 is in subsection (b). Proposed section 2256 provided that the mechanism for appointing counsel come from statute or rule of court of last resort, while § 2261 also permits an agency authorized by state law to appoint counsel. This discrepancy has created a great deal of consternation, as illustrated by the discussion of *Booth v. Maryland* in Part III.A.1, *infra*.

<sup>85</sup> Powell Committee Report, *supra* note 56, at 3242.

competency], the adequacy of the system—as opposed to the competency of particular counsel—can be settled through litigation.<sup>86</sup>

However, within the same comment, the Powell Committee undercut its previous statement that federal courts and prisoners could effectively police the quality of appointed counsel. Subsection (e) of proposed section 2256 (as in § 2261) provided that ineffective assistance of counsel in state post-conviction proceedings was not a basis for relief in a federal habeas corpus proceeding.<sup>87</sup> The commentary states that this follows from the established precedents of *Murray v. Giarratano* and *Pennsylvania v. Finley*.<sup>88</sup> Instead, the comment suggests, the conduct of trial- and appeal-level counsel should be the proper focus of any claims of ineffective assistance. The comment states, “The effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process.”<sup>89</sup> Though the Committee was clear that it sought to avoid ineffective assistance of counsel claims against appointed counsel in state post-conviction proceedings, it ignored the fact that these claims are often the most effective way to guarantee attorney quality. Further, the Committee failed to offer either suggested standards of competence or proposed means of litigating the issue of the systemic inadequacies in attorney competence.<sup>90</sup> This leaves the matter entirely up to the state seeking to opt in. On a single page, the Committee stated both that litigation in federal courts would ensure quality of appointed counsel and that the appointment mechanism itself would serve this purpose.

#### D. LEGISLATIVE HISTORY OF THE OPT-IN PROVISIONS

The Powell Committee proposal was first adopted by Congress as the Hyde Amendment to the Comprehensive Crime

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing *Murray v. Giarratano*, 492 U.S. 1 (1989)); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). These two recent cases both support the principle that there is no right to counsel at the post-conviction stage. See Part V for a discussion of the right to counsel and its limits.

<sup>89</sup> Powell Committee Report, *supra* note 56, at 3242.

<sup>90</sup> See *infra* Part III for a discussion of the effectiveness of prisoner suits to challenge state systems for appointing counsel.

Control Act of 1990.<sup>91</sup> Described as the Powell Committee report verbatim,<sup>92</sup> this Amendment is simply the effectuation of the Powell Committee's legislative intent and was accepted by a vote of 285 to 146.<sup>93</sup> Though the Comprehensive Crime Control Act was passed by the House, the Senate amended the text to insert Senate Bill 1970 and sent the amended legislation to committee.<sup>94</sup> No further action was taken on House Bill 5269.

The House began a second attempt at a crime bill with habeas corpus reform in October 1991. On October 16 of that year, Representatives Brooks, Schumer, Edwards, and Hughes introduced House Bill 3371, which was called the Omnibus Crime Control Act of 1991.<sup>95</sup> In opening debate over the bill, Representative Henry Hyde again laid out his amendment to the bill adopting the Powell Committee proposals.<sup>96</sup> The House debated the amendment until time for debate expired and then considered House Bill 3371 as it had been originally set forth.<sup>97</sup>

The Omnibus Crime Control Act of 1991 was passed by the House on October 22, 1991.<sup>98</sup> When the bill was sent to the Senate, the Senate amended it by striking out the House's text.<sup>99</sup> The Senate inserted Senate Bill 1241, known as the Biden Bill,<sup>100</sup> and then returned the bill to the House and to conference.<sup>101</sup> The conference continued into March, 1992, as did debate on the bill and its counsel provisions.<sup>102</sup> No new amendments were offered. The bill was sent to conference again in May 1992 after the House and Senate failed to agree on a final product.<sup>103</sup> As

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<sup>91</sup> See 136 CONG. REC. H8876 (Oct. 4, 1990) (adopting H.R. 5259, 101st Cong., 2d Sess. (1990)).

<sup>92</sup> See 136 CONG. REC. H8878 (Oct. 4, 1990) (statement of Rep. Harris).

<sup>93</sup> See 136 CONG. REC. 8881 (Oct. 4, 1990).

<sup>94</sup> See 136 CONG. REC. S16,479-80 (Oct. 22, 1990) (statement of Sen. Glenn).

<sup>95</sup> See 137 CONG. REC. H7883 (Oct 16, 1991).

<sup>96</sup> See 137 CONG. REC. H7890 (OCT 16, 1991).

<sup>97</sup> See 137 CONG. REC. H7892-7912 (Oct. 16, 1991).

<sup>98</sup> See 137 CONG. REC. H8173 (Oct. 22, 1991).

<sup>99</sup> See 137 CONG. REC. S17,313 (Nov. 21, 1991).

<sup>100</sup> S. 1241, 102nd Cong., 1st Sess. (1991).

<sup>101</sup> See 137 CONG. REC. S17,313 (Nov. 21, 1991) (statement of Sen. Mitchell).

<sup>102</sup> See 138 CONG. REC. S3926 (Mar. 19, 1992) (failing to close further debate on bill).

<sup>103</sup> See 138 CONG. REC. S6695 (May 14, 1992).

with the Comprehensive Crime Control Act, the Omnibus Crime Control Act did not survive the conference committee.

The issue remained dormant until February 8, 1995, when the House passed House Bill 729, the Effective Death Penalty Act of 1995.<sup>104</sup> Representative McCollum described the purpose and effect of the bill:

The essence of H.R. 729 comes from the recommendations of the Habeas Corpus Study Committee, chaired a few years ago by retired Supreme Court Justice Lewis Powell. The Powell Committee established the basic quid pro quo approach to this bill with regard to death row inmates. If States provide legal counsel in State habeas review to indigent convicted murderers, even though such provision of counsel is not required by the Constitution according to the Supreme Court, then the States will receive the benefits of limited and expedited habeas corpus procedures when such prisoners bring their claims to the Federal courts. These procedures could help ensure that defendants are given competent counsel in post-conviction proceedings. If States enact these provisions, the time in which a habeas corpus petition must be filed following the conclusion of direct appeal of the conviction is reduced to 180 days. This portion of the bill would also require that Federal courts could not entertain any claims not raised in the prior State court proceedings unless certain exemptions apply. These optional provisions also certify that executions will be stayed while a habeas corpus petition is pending, but limits the granting of further stays if the petition is denied by the district court and the court of appeals.<sup>105</sup>

The Effective Death Penalty Act adopted the Powell Committee proposals nearly verbatim.<sup>106</sup> This act was passed, unamended,<sup>107</sup> marking the second time the Powell Committee proposals had been adopted and accepted by the House of Representatives.

Three months later, in May, 1995, the Senate began to discuss a potential crime bill and habeas corpus reform in light of Senate Bill 735, the Comprehensive Terrorism Prevention Act.<sup>108</sup>

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<sup>104</sup> See 141 CONG. REC. H1433 (Feb 8, 1995) (adopting H.R. 729, 104th Cong. (1995)).

<sup>105</sup> 141 CONG. REC. H1400-01 (Feb. 8, 1995) (statement of Rep. McCollum).

<sup>106</sup> See 141 CONG. REC. H1433 (Feb. 8, 1995).

<sup>107</sup> See *id.*

<sup>108</sup> See 141 CONG. REC. S7479 (May 25, 1995) (statement of Sen. Hatch); 141 CONG. REC. S7585 (May 26, 1993) (statement of Sen. Specter); 141 CONG. REC. S7805 (June

This act incorporated Senate Bill 623, which had been proposed by Senators Specter and Hatch to reform habeas corpus and provide for appointment of counsel at the discretion of the court.<sup>109</sup> It was Senate Bill 735 that would become AEDPA, incorporating the Powell Committee proposals into Sections 2261 to 2266 as the present law does.<sup>110</sup> While the Senate debate did focus on the need for strong counsel standards, the Senate ultimately backed away from any amendment stronger than the Powell Committee proposal. In one exchange, Senators Biden and Hatch sparred over counsel in habeas corpus cases and the appointment of counsel under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q). Senator Biden offered an amendment to include counsel competency requirements, but, faced with the possibility of a nullifying amendment from Senator Hatch to his own amendment, Biden backed off, and the bill remained as it was.<sup>111</sup> In that same Congress, the House toyed with adopting the Senate's version. The House went so far as to inject the habeas corpus provisions from Senate Bill 735 into House Bill 2586,<sup>112</sup> a bill focusing on debt.<sup>113</sup>

In the end, it was the bombing of the Alfred P. Murrah Building in Oklahoma City that supplied the needed political will to reform habeas corpus. Debate on this issue reopened in the 104th Congress' Second Session as the House considered House Bill 2703, the Comprehensive Antiterrorism Act of 1995,<sup>114</sup> a bill designed to enact measures to prevent and penalize future terrorist acts on American soil. As with House Bill 2586,<sup>115</sup> the House agreed to insert the habeas corpus language from Senate Bill 735 into the bill.<sup>116</sup> However, the next day, the House backed away from this action and passed Senate Bill 735,

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7, 1995) (statement of Sen. Specter); 141 CONG. REC. S7812 (June 7, 1995) (statement of Sen. Biden).

<sup>109</sup> See 141 CONG. REC. S7805 (June 7, 1995).

<sup>110</sup> See 141 CONG. REC. S7870 (June 7, 1995).

<sup>111</sup> See 141 CONG. REC. S7810-17 (June 7, 1995).

<sup>112</sup> H.R. 2586, 104th Cong., 1st Sess. (1995).

<sup>113</sup> See 141 CONG. REC. H11,991 (Nov. 9, 1995).

<sup>114</sup> H.R. 2703, 104th Cong., 1st Sess. (1995).

<sup>115</sup> H.R. 2586.

<sup>116</sup> See 142 CONG. REC. H2129, H2162 (Mar. 13, 1996).

which had been rechristened the Terrorism Prevention Act.<sup>117</sup> The bill was sent to conference, and was approved in April 1996.<sup>118</sup> President Clinton signed AEDPA, which united terrorism prevention with anti-crime measures, including restitution to victims, stronger penalties for crimes by aliens, and reform of habeas corpus.<sup>119</sup>

### III. PROGRESS: OPT-IN PROVISION LITIGATION HISTORY

#### A. AFFIRMATIVE CLAIMS BY PRISONERS

Since the passage of the AEDPA and the opt-in provisions, five states—California, Florida, Maryland, Pennsylvania, and Virginia—have had their post-conviction counsel system tested through affirmative claims by prisoners. Typically, these claims are filed by prisoners on death row seeking declaratory relief that the state's post-conviction counsel system does not qualify under the opt-in provisions and injunctive relief to prevent the state from claiming the benefits of opt in. These suits have had largely negative results. While inmates were often able to get the declaratory relief they sought in the district courts, this relief was often set aside in the courts of appeals on Eleventh Amendment or justiciability grounds. The utility of such affirmative actions was eliminated with *Calderon v. Ashmus*,<sup>120</sup> in which the Supreme Court overturned a suit by California prisoners on standing grounds.<sup>121</sup> However, in the long view, these claims have succeeded for these plaintiffs in definitively establishing their states had not opted in.

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<sup>117</sup> See 142 CONG. REC. H2247 (Mar. 14, 1996).

<sup>118</sup> See 142 CONG. REC. H3599 (Apr. 18, 1996) (statement of Rep. Frost).

<sup>119</sup> Vivian Berger, noting that Congress had the ABA Task Force recommendations before it as well, remarked that Congress had to select between a "band-aid" and "surgery" in treating habeas corpus. She observes that Congress chose the "band-aid." Berger, *supra* note 56, at 1674, 1684.

<sup>120</sup> 523 U.S. 740 (1998).

<sup>121</sup> *Id.* at 748-49.

1. *Maryland: Booth v. Maryland*

In *Booth v. Maryland*,<sup>122</sup> five death row prisoners sued for a declaratory judgment that Maryland did not qualify as an opt-in state and for injunctive relief preventing Maryland from asserting Chapter 154 as a defense to habeas corpus actions.<sup>123</sup>

Maryland contended that its Office of Public Defender (OPD) and associated counsel system qualified as post-conviction counsel under Chapter 154, without additional legislation, rules, or standards.<sup>124</sup> OPD is part of the executive branch of Maryland's state government and is required to appoint a deputy public defender and a district public defender for each district of the District Court.<sup>125</sup> OPD is given a share of the state budget to be allocated among staff salaries and investigative and support staff costs. The Public Defender, deputy public defenders, and district public defenders are required to be admitted to the Maryland Bar and to have practiced for five years.<sup>126</sup> Assistant public defenders are appointed by the Public Defender with the advice of the district public defenders and simply must be admitted to the Bar.<sup>127</sup>

Beyond OPD, the district public defenders maintain lists of private attorneys categorized into panels based on their qualifications.<sup>128</sup> Panel attorneys are to be appointed as much as possible.<sup>129</sup> The authorizing statute requires OPD to establish the qualification criteria for panel attorneys by considering "the nature and complexity of the type of offense requiring legal representation, the previous trial or appellate experience of the attorneys, and any other factors considered necessary to ensure competent legal representation."<sup>130</sup> Maryland regulations sort attorneys by skill and experience into four panels, with one panel (Panel A) providing counsel for defendants charged with

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<sup>122</sup> 940 F. Supp. 849 (D. Md. 1996).

<sup>123</sup> *Id.* at 850.

<sup>124</sup> *Id.* at 852.

<sup>125</sup> See MD. ANN. CODE art. 27A § 3 (1997).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 6.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



capital crimes.<sup>131</sup> To qualify for membership on Panel A, attorneys must have previously participated in two capital cases, or in ten cases where the penalty was ten years imprisonment or more.<sup>132</sup> Furthermore, OPD also establishes schedules for compensating and reimbursing expenses by panel attorneys.<sup>133</sup> Currently, panel attorneys receive \$30 per hour for out of court services and \$35 per hour for in-court services, with a maximum of \$500 for post-conviction or habeas corpus proceedings.<sup>134</sup> Mileage, lodging, and other expenses are reimbursed subject to limitations established by the OPD.<sup>135</sup>

From the start, Maryland argued that the prisoner suit was barred by its immunity from suits under the Eleventh Amendment.<sup>136</sup> While Maryland acknowledged that *Ex Parte Young* was an exception to this immunity designed to prevent violations of federal law, the state argued that *Ex Parte Young* did not apply because *Seminole Tribe of Florida v. Florida* upheld state immunity "where 'Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right.' . . ."<sup>137</sup> Maryland viewed Chapter 154 as the remedial scheme that allowed the state to retain its immunity.<sup>138</sup>

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<sup>131</sup> See MD. REGS CODE tit. 14, § 06.02.05 (1977 & Supp. 1998).

<sup>132</sup> *Id.*

<sup>133</sup> MD. ANN. CODE art. 27A, § 6 (1997).

<sup>134</sup> MD. REGS. CODE tit. 14, § 06.02.08.

<sup>135</sup> *Id.*

<sup>136</sup> *Booth v. Maryland*, 940 F. Supp. 849, 851 (D. Md. 1996).

<sup>137</sup> *Id.* (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996)). In *Seminole Tribe*, the tribe sued the State of Florida and its Governor, seeking to enforce provisions of the Indian Gaming Regulation Act (IGRA), which required the state to negotiate with the tribe in good faith to establish a compact regarding gaming on Indian lands. The Court rejected the tribe's claims, concluding that the Indian Commerce Clause, see U.S. CONST., art. I, § 8, cl. 3, did not give Congress power to abrogate state sovereignty by authorizing suits. See *Seminole Tribe*, 517 U.S. at 62. In doing so, the Court overruled *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which permitted Congress to abrogate state sovereignty from suit under the Interstate Commerce Clause. See *Seminole Tribe*, 517 U.S. at 65-66. Following *Seminole Tribe*, Congress may only set aside state sovereignty under its authority in the Fourteenth Amendment. See *id.* at 59 (stating that authority to abrogate has only been found in § 5 of the Fourteenth Amendment and the Interstate Commerce Clause); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (concluding that § 5 of the Fourteenth Amendment authorized abrogation).

The court disposed of this Eleventh Amendment argument in three quick steps. First, the court stated that state officials may be named in habeas corpus suits.<sup>139</sup> This simple fact of procedure negated Eleventh Amendment immunity, since the official, not the state, was the defendant.<sup>140</sup> Second, Maryland had implicitly waived its immunity by announcing its intention to seek the procedural benefits of Chapter 154.<sup>141</sup> Third, the court rejected Maryland's contention that Chapter 154 was a "detailed remedial scheme" under *Seminole*, finding the chapter completely silent on the mechanism of challenging a conviction through a state's post-conviction procedures.<sup>142</sup> Therefore, the court refused to apply the *Seminole* doctrine.<sup>143</sup>

The court then turned to the heart of the suit, understanding the issue to rest on four questions:

First, in order to meet the requirements of § 2261(b), must Maryland have adopted a rule of court or statute that "provides[s] standards of competency for the appointment of such counsel?" Second, if Maryland need not have established such a rule of court or statute, must Maryland's Office of the Public Defender (the agency that appoints counsel to represent petitioners) establish such standards of competency? Third, has the Office of Public Defender done so? Fourth, does the mechanism that Maryland has established provide for the "compensation and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings?"<sup>144</sup>

In formulating these questions, the court was cognizant that Maryland's Court of Appeals and General Assembly had taken

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For habeas corpus purposes, the Court also held that where Congress has created a detailed remedial scheme to enforce a federal right, there is no need to supplement that legislative remedy with a judicial one. See *Seminole Tribe*, 517 U.S. at 74. Thus, suits against state officers as in *Ex parte Young* are not permitted where Congress has already acted. In this case, other provisions of the IGRA provided such a remedy. Thus the tribe's suit against the Florida Governor was dismissed. See *id.* at 74-75.

<sup>138</sup> *Booth*, 940 F. Supp. at 851.

<sup>139</sup> *Id.* at 851-52.

<sup>140</sup> *Id.* at 851.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 851-52.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 852.

no action to establish new standards of competence.<sup>145</sup> Further, though the OPD did have existing standards of competency, previous fact-finding had shown that these standards were typically not applied in the post-conviction context.<sup>146</sup>

In tackling the first three questions, the court confronted the statute itself and the issue of who must specify standards of competency. The first sentence of 28 U.S.C. § 2261(b) provides that the post-conviction counsel mechanism be established by "statute, rule of [a state's] court of last resort, or by another agency authorized by State law." However, the last sentence of § 2261(b) only requires that standards of competency be provided by "rule of court or statute"—the reference to an authorized agency was dropped.<sup>147</sup> The prisoners contended that this omission was intentional and that standards could only come from rule of court or statute. As Maryland's Court of Appeals and General Assembly had not adopted any standards, the prisoners argued Maryland did not qualify.<sup>148</sup> Maryland responded that the omission was accidental and that the first and last sentences should be seen as parallel.<sup>149</sup> Thus, both the appointment mechanism and the standards of competency could come from rule of court, statute, or agency.

The court bemoaned the confusion, stating, "[i]t is unfortunate that a piece of legislation, particularly one of such widespread importance and legitimate public interest, is so poorly drafted."<sup>150</sup> The court acknowledged that either interpretation, though not completely satisfactory, could be seen as appropriate.<sup>151</sup> Either way, the court held, the prisoners would win.<sup>152</sup> If

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<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 853-54. The Code of Maryland Regulations section 14.06.02.05(B)(1) requires that OPD attorneys appointed in the post-conviction context have "previously participated in a circuit court in at least two capital cases or ten other cases where the maximum penalty was 10 years imprisonment or more." MD. REGS. CODE tit. 14, § 06.05(B)(1) (1977 & Supp. 1998).

<sup>147</sup> As the *Booth* court noted, the phrase referring to an authorized state agency was not present in the original Powell Committee proposal. *See Booth*, 940 F. Supp. at 853. The phrase was added in 1995 during Congressional consideration. *See id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 852.

<sup>150</sup> *Id.* at 852-53.

<sup>151</sup> *Id.*

the prisoners' interpretation was correct, they would prevail because Maryland's court and legislature took no action.<sup>153</sup> If the court's interpretation—agency standards as regulations—was best, the prisoners would win because the agency had not effectively implemented its existing standards with regard to post-conviction counsel.<sup>154</sup>

The court turned to the fourth question and found that Maryland had clearly failed to establish a compensation and expenses payment mechanism.<sup>155</sup> Previously adduced evidence showed that OPD had established budget limits hourly rates and fees for post-conviction counsel in capital cases.<sup>156</sup> This evidence also showed that OPD did not reimburse computerized research or photocopying expenses incurred by post-conviction counsel. In particular the court cited the case of one post-conviction lawyer who had received \$12,500 in fees plus \$3,212.99 for expenses from 756.5 hours of work.<sup>157</sup> However, the lawyers had also incurred an additional \$3,626.30 of expenses which were not reimbursed.<sup>158</sup> His effective hourly rate was therefore \$11.73.<sup>159</sup> Based on these facts, the court found that Maryland did not have a satisfactory compensation or reimbursement mechanism.<sup>160</sup> The court therefore held that Maryland had not qualified under Chapter 154.<sup>161</sup>

On appeal, the Fourth Circuit focused on the Eleventh Amendment issue, reviewing the history of the immunity doctrine and concluding, "[t]hus, the State of Maryland and the

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<sup>152</sup> *Id.* at 853-54.

<sup>153</sup> *Id.* at 852-53.

<sup>154</sup> *Id.* at 853-54.

<sup>155</sup> *Id.* at 854.

<sup>156</sup> *See id.* OPD requires two lawyers per post-conviction case. *Id.* at 853-54. The lawyers earn \$30 per hour for out of court time and \$35 per hour for in court time. *Id.* at 854. Any fees recovered are capped at \$12,500 for each lawyer for the trial. *Id.* The lawyers may then split \$6,250 for their service from appeal through petition for certiorari. *Id.* If the petition for certiorari is accepted, the lawyers may split an additional \$6,250. *Id.* A second post-conviction proceeding after certiorari allows the lawyers to split \$12,500. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 855.

<sup>161</sup> *Id.*

named officials are not subject to this suit unless the plaintiffs can demonstrate that this case falls within one of the exceptions to Eleventh Amendment immunity.<sup>162</sup> The plaintiffs responded with three contentions: (1) the suit concerned a continuing violation of federal law and therefore fell under *Ex Parte Young*,<sup>163</sup> (2) the suit fell under habeas corpus, a traditional exception to Eleventh Amendment immunity,<sup>164</sup> and (3) Maryland implicitly waived its immunity by announcing its intention to invoke Chapter 154 procedural defenses.<sup>165</sup>

The court first addressed the argument that the suit fell under *Ex Parte Young*. The court flatly rejected this argument, finding that, in simply stating its intention to claim procedural defenses stemming from Chapter 154, Maryland had violated no federal law.<sup>166</sup> The court went on to state that even if Maryland was found not to have opted in, seeking Chapter 154 defenses was not improper because the opt-in provisions are voluntary.<sup>167</sup>

The court also rejected the argument that the uncertainty over whether Maryland opted in harmed the prisoners, comparing the prisoners to any litigant faced with possible affirmative defenses.<sup>168</sup> If the prisoners wanted an answer, the court held, they should file for normal habeas review, and the issue would be determined in the course of those proceedings.<sup>169</sup>

The court then turned to the argument that habeas corpus proceedings were traditional exceptions to sovereign immunity. This was true, the court held, but the instant suit was not a habeas corpus action.<sup>170</sup> It was a suit for declaratory judgment and injunctive relief. It may have *involved* habeas corpus, but it was not meant to challenge their convictions nor contest their unlawful detention.<sup>171</sup>

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<sup>162</sup> *Booth v. Maryland*, 112 F.3d 139, 142 (4th Cir. 1997).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 144.

<sup>165</sup> *Id.* at 145.

<sup>166</sup> *Id.* at 143.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 144.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 144-45.

The court then discussed plaintiffs' argument that Maryland had implicitly waived its Eleventh Amendment immunity by raising the Chapter 154 issue. The court held that, under *Atascadero State Hospital v. Scanlon*, a state may waive its immunity through explicit statement or "by voluntarily participating in federal programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.'" <sup>172</sup> The court found that neither was present in this case. Maryland had taken no action explicitly waiving its immunity, and the AEDPA did not qualify as the type of program permitting implicit waiver. <sup>173</sup> In fact, the court stated that a clear purpose of the AEDPA was to "increase federal judicial deference toward the states." <sup>174</sup>

As a last ditch attempt, plaintiffs argued that litigating and resolving the issue of Chapter 154 compliance in a single action would serve policies of judicial economy, efficiency, and litigation cost reduction. <sup>175</sup> The court rejected this as well, finding that constitutional guarantees and the sovereignties of the various states were more compelling interests than efficiency. <sup>176</sup> After demolishing plaintiff's case, the Fourth Circuit vacated the district court's judgment and dismissed plaintiffs' complaint. <sup>177</sup>

## 2. *California: Calderon v. Ashmus*

In *Ashmus v. Calderon*, <sup>178</sup> Troy Ashmus filed suit against California authorities seeking a temporary restraining order and preliminary injunction against California asserting Chapter 154 defenses, and a declaratory judgment stating that California had not opted in. <sup>179</sup> Ashmus' suit also included certification for a

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<sup>172</sup> *Id.* at 145 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985)).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 145-46.

<sup>177</sup> See *id.* at 146. See *infra* Part IV for a discussion of the state of the case following the Fourth Circuit's decision and in light of the Ninth Circuit and Supreme Court decisions in *Calderon v. Ashmus*, 536 U.S. 740 (1998); see also *Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir. 1997).

<sup>178</sup> 935 F. Supp. 1048 (N.D. Cal. 1996).

<sup>179</sup> *Id.* at 1054.

class of 437 other capital prisoners.<sup>180</sup> Many of these class members had been offered and accepted post-conviction counsel under California's post-conviction counsel system, but administrative backlogs and delays prevented California from appointing counsel.<sup>181</sup>

In response to Ashmus, California contended that an "interlocking" web of statutes, rules, and regulations in existence since 1989 comprised a qualified "unitary review" system for appointing counsel.<sup>182</sup> This "interlocking" web included: (1) California Government Code Section 68511.5, (2) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" ("Rules of Court"), (3) Rule of Court 76.5, (4) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council, (5) the California Supreme Court Statement of Internal Operating Practices and Procedures ("IOPP"), (6) *In re Clark*,<sup>183</sup> and (7) the California Supreme Court Statement of Policies Regarding Cases Arising From Judgments of Death (the "June 6, 1989 Policies").<sup>184</sup>

In operation, this interlocking web creates a system of requirements and guarantees that, taken as a whole, ensure post-conviction counsel. For example, California Government Code Section 68511.5 provides that the State Judicial Council will adopt rules of court addressing appointment of counsel other than the State Public Defender in criminal appeals by indigents.<sup>185</sup> In turn, California Rule of Court 76.5 states that each appellate court will adopt procedures for the appointment of appellate counsel to indigents.<sup>186</sup> The Internal Operating Practices and Procedures are themselves the appointment mecha-

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<sup>180</sup> *Id.* at 1054-55.

<sup>181</sup> *Id.* at 1055.

<sup>182</sup> *Id.* at 1056. California is one of the few states that qualifies for unitary review. An excellent review of California's system and its claims to opt-in status can be found in Supplemental Memorandum re Applicability of Chapter 154, *Ashmus v. California*, No. C-93-0594-TEH, 1998 WL 919840 (N.D. Cal. 1998) (on file with author).

<sup>183</sup> 855 P.2d 729 (Cal. 1993).

<sup>184</sup> *Ashmus*, 935 F. Supp. at 1056.

<sup>185</sup> CAL. GOV'T CODE § 68511.5 (West Supp. 1997).

<sup>186</sup> CAL. RULES OF COURT 76.5.

nism.<sup>187</sup> These appointments are to be made considering section 20 of the Standards of Judicial Administration. Section 20 refers back to Rule 76.5 and requires that attorneys eligible for appointment in death penalty cases have:

(1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.<sup>188</sup>

In addition, appointed appellate counsel is guaranteed "a reasonable sum for compensation and necessary expenses,"<sup>189</sup> which is augmented in capital cases by compensation and reimbursement schedules established by the June 6, 1989 Policies.<sup>190</sup>

The district court's opinion of this system was evident from its tone in its findings of fact. Included among these were the facts that the prisoners were harmed by the uncertainty over whether the state had opted in, that prisoners were forced to "guess" whether Chapter 154 applied, and that prisoners would have to file "hasty" petitions to avoid any procedural bar and then would have to go back and refile with counsel's assistance.<sup>191</sup> This "piecemeal" solution was "unworkable," the court held, and resulted in an effective deprivation of the right to habeas corpus review.<sup>192</sup>

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<sup>187</sup> CAL. SUP. CT. INTERNAL OPERATING PRACTICES AND PROCEDURES XIV.A. (1996).

<sup>188</sup> APP. TO CAL. RULES OF COURT, JUDICIAL ADMINISTRATION STANDARDS (Div. I) § 20(c) (1996).

<sup>189</sup> CAL. PENAL CODE § 1241 (West 1982).

<sup>190</sup> See CAL. SUP. CT. POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, POLICY 3.2 (1996); CAL. SUP. CT. PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS, GUIDELINES II.A., II.I.3., III (1996); CAL. SUP. CT. GUIDELINES FOR FIXED FEE APPOINTMENTS, ON OPTIONAL BASIS, TO AUTOMATIC APPEALS AND RELATED HABEAS CORPUS PROCEEDINGS, GUIDELINES 1-4, 9 (1996).

<sup>191</sup> *Ashmus v. Calderon*, 935 F. Supp. 1048, 1057 & n.7 (N.D. Cal. 1996).

<sup>192</sup> *Id.* The Ninth Circuit affirmed these conclusions, characterizing the harm to plaintiffs as a double bind. See *Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir. 1997). Having accepted counsel without appointment actually occurring, prisoners were forced to choose. *Id.* at 1205. They could either file their own petitions pro se or they could await the appointment of counsel. In the first case, if a prisoner filed his



The court then turned to findings of law.<sup>193</sup> The first hurdle for the plaintiffs was demonstrating standing and ripeness.<sup>194</sup> The court applied the *Lujan v. Defenders of Wildlife* requirement for standing: "A plaintiff must show he has personally suffered some actual or threatened injury as a result of the conduct challenged in the lawsuit, that the injury can be fairly traced to the challenged actions, and that the injury is likely to be redressed by a favorable decision."<sup>195</sup> The fact that the plaintiffs were harmed by uncertainty caused by California's actions allowed the court to find standing easily.<sup>196</sup> In reviewing the ripeness of the claims, the court applied the *Abbott Laboratories v. Gardner* balancing test, weighing "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."<sup>197</sup> Given that the issue at stake was "virtually a pure question of law," the court found it sufficiently fit for review.<sup>198</sup> The fact of harm to the plaintiffs qualified as ample hardship.<sup>199</sup>

The court then turned to the fundamental question: whether California qualified under Chapter 154. While the court conceded that California's system was classified as a unitary review system, California failed to opt in for three reasons: (1) California's mechanism for compensating and paying reasonable litigation expenses was inadequate, (2) California lacked a rule of court or statute providing standards of compe-

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own petition, he would be unlikely to adequately raise all the relevant constitutional issues. However, once the petition was filed, the district court might not allow later amendment if counsel was then appointed. In the end, the prisoner would be stuck with an inadequate petition and would face severe restrictions on subsequent petitions. If the prisoner waited for counsel, he faced the possibility of not meeting the six month deadline. In either case, the prisoner would not receive appropriate federal review of his otherwise meritorious claims. *Id.*

<sup>193</sup> See *Ashmus*, 935 F. Supp. at 1059.

<sup>194</sup> See *id.*

<sup>195</sup> *Id.* at 1059 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>196</sup> *Id.* at 1059-60.

<sup>197</sup> *Id.* at 1060 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1060-61.

tency, and (3) California's counsel system failed to make the required offer and appointment of counsel.<sup>200</sup>

Turning to the first reason, the June 6, 1989 Policies of the California Supreme Court provided that counsel's responsibility to:

investigate [factual and legal grounds for the filing of a habeas petition] is *limited* to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, *nor does it authorize* the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment.<sup>201</sup>

Thus, counsel could only be compensated for investigation which stemmed from facts already available. This restriction, the court held, conflicted with § 2265(a)'s requirement that compensation be provided for counsel to "raise . . . *such claims as could be raised* on collateral attack."<sup>202</sup> Limitations on a counsel's duty to raise claims were also incompatible with Ninth Circuit case law, which required that meaningful assistance of counsel in collateral review meant "assert[ing] *all* possible violations of . . . constitutional rights" through "diligent investigation."<sup>203</sup> Based on these conflicts, the court found that California's compensation system was inadequate.<sup>204</sup>

The court then addressed California's standards of competency for post-conviction counsel. California argued that its standards flowed from section 20 of the Standards of Judicial Administration Recommended by the Judicial Council and from Rules of Court 39.5 and 76.5.<sup>205</sup> The court found these stan-

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<sup>200</sup> See *id.* at 1070-75.

<sup>201</sup> *Id.* at 1070-71.

<sup>202</sup> *Id.* at 1071.

<sup>203</sup> *Id.* (quoting *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1991)).

<sup>204</sup> *Id.* As an aside, the district court also discussed the petitioners' argument that opt-in provisions required a single rule of court or statute for the counsel mechanism and that therefore California's web did not qualify. The court found this argument "hypertechnical," but did state that the AEDPA's intention was for states to affirmatively create a new system. California's attempt to qualify an existing system was therefore inappropriate. *Id.* at 1072.

<sup>205</sup> See *id.* at 1072.

dards unsatisfactory. First, section 20 was not a rule of court or statute as required under § 2265(a) but was a “nonmandatory standard” employing the word “should” instead of “shall.”<sup>206</sup> Second, these standards were not binding on the courts.<sup>207</sup> Not only were the standards nonmandatory, but California could offer no proof that the Supreme Court had actually adopted these standards itself.<sup>208</sup> While California argued that Rules 76.5 and 39.5 did make these standards binding, the district court brushed these arguments aside. Rule 76.5, the court held, only required the California courts to *consider* the qualification standards, not apply them.<sup>209</sup> For its part, the district court found that Rule 39.5 did not apply to either Rule 76.5 or habeas corpus proceedings.<sup>210</sup> Third, section 20 did not require any experience with habeas corpus and thus conflicted with § 2265(a)’s focus on competent counsel in collateral appeals.<sup>211</sup> The court also rejected the idea that experience in criminal law necessarily involved experience in habeas corpus.<sup>212</sup>

Lastly, the court found that California’s mechanism did not adequately appoint counsel.<sup>213</sup> California itself admitted that: “Every inmate who is awaiting appointment of counsel *has* been ‘offered’ counsel and that offer has been accepted; what is pending is the appointment itself.”<sup>214</sup> Given that § 2265(a) requires appointment “upon a finding that the prisoner is indigent and accepted the offer,” California did not meet this standard.<sup>215</sup> Based on the harm to the petitioners from uncertainty and the holes in California’s “web,” the court found that California was not qualified under Chapter 154.<sup>216</sup>

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<sup>206</sup> *Id.* at 1073.

<sup>207</sup> *Id.* at 1073-74.

<sup>208</sup> *See id.*

<sup>209</sup> *Id.* at 1073 n.28.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1074.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1074-75.

<sup>214</sup> *Id.* at 1074.

<sup>215</sup> *Id.* at 1074-75.

<sup>216</sup> *See id.* at 1075-76.

California appealed the district court's holding in *Ashmus v. Calderon*,<sup>217</sup> only to be rebuffed as the Ninth Circuit affirmed the district court's opinion. The Ninth Circuit's opinion focused on two key issues: first, whether the suit was barred by the Eleventh Amendment and thus outside of the court's jurisdiction, and second, whether Ashmus was correct that California did not comply with the opt-in provisions.

With regard to the Eleventh Amendment claim, the court acknowledged that the Fourth Circuit had found that declaratory judgment and preliminary injunction suits violated the State's right to immunity.<sup>218</sup> However, in contrast to the Fourth Circuit, the Ninth Circuit found that Ashmus's suit fell within the *Ex Parte Young* exception for "prospective relief" against a "continuing or impending violation of federal law."<sup>219</sup> The violation, the court held, was loss of the right to federal review and to assistance of counsel in federal post-conviction proceedings.<sup>220</sup> The Ninth Circuit thus accepted both the district court's analysis of the harm to prisoners and the district court's rationale for finding that the unitary review system did not qualify.<sup>221</sup>

The split between the Fourth and Ninth Circuits on the Eleventh Amendment issue led the Supreme Court to grant certiorari.<sup>222</sup> However, in *Calderon v. Ashmus*,<sup>223</sup> the Court never reached the Eleventh Amendment issue, instead finding that declaratory judgment suits by inmates did not reach the level of a justiciable case or controversy.<sup>224</sup> The Court held that the issue in dispute was not whether Ashmus was entitled to federal habeas relief, but whether the opt-in provisions would apply.<sup>225</sup> As such, the Court stated, all Ashmus need do was petition for habeas review and the courts would determine whether the opt-in

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<sup>217</sup> 123 F.3d 1199 (9th Cir. 1997).

<sup>218</sup> *Id.* at 1204 (referring to *Booth v. Maryland*, 112 F.3d 139 (4th Cir. 1997)). See *supra* Part III.A.1 for discussion of *Booth v. Maryland*.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See *id.* at 1204-08.

<sup>222</sup> See 522 U.S. 1011 (1997).

<sup>223</sup> 523 U.S. 740 (1998).

<sup>224</sup> *Id.* at 746.

<sup>225</sup> *Id.*

provisions apply.<sup>226</sup> The Court viewed Ashmus's claim as an attempt to gain a litigation advantage over California by getting an advance ruling on one of the state's defenses (i.e., that Ashmus's claim is procedurally time-barred).<sup>227</sup> Furthermore, the Court held all collateral attacks on state convictions in federal courts must be litigated under the habeas provisions in Title 28 of the U.S. Code.<sup>228</sup> By filing a declaratory judgment action under a different statute, Ashmus would be able to litigate portions of his claim (the statute of limitations) without ever exhausting state remedies per the habeas laws.<sup>229</sup>

In general, the Court seemed to hold that since Ashmus was required to petition for habeas corpus to attack his conviction and the question of California's opt-in would naturally be determined through that procedure, this declaratory judgment action was not justiciable. In analogy, the Court argued that Ashmus was like a plaintiff who, instead of suing a defendant for damages, seeks a declaratory judgment that *were he to sue* he would be entitled to damages. Since the issue of damages would be resolved through a direct suit in the first place, there is no need for the declaratory judgment action.

The Court's opinion effectively ended the series of suits by prisoners to establish *ex ante* whether their states had opted in to the provisions of Chapter 154. At this point, the determination of whether a state had opted in would be made through the normal course of federal habeas corpus review as cases arose and the issue was litigated.

### 3. *Florida: Hill v. Butterworth*

In *Hill v. Butterworth*,<sup>230</sup> Clarence Hill, a Florida prisoner convicted of first-degree murder and sentenced to death for killing a police officer, sought declaratory relief that Florida had not opted in and a preliminary injunction against Florida's authorities to prevent them from asserting the privileges that

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 747.

<sup>228</sup> *Id.* (referring to 28 U.S.C. §§ 2241-2266 (1994)).

<sup>229</sup> *See id.* at 747-48.

<sup>230</sup> 941 F. Supp. 1129 (N.D. Fla. 1996).

accompany opt in.<sup>231</sup> The district court reasoned that, to obtain an preliminary injunction, the plaintiff must show (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that plaintiff's own injury outweighs any injury to defendants; and (4) that the injunction would not disserve the public interest.<sup>232</sup>

Florida had argued on the first element that Hill lacked both standing and the existence of a case or controversy, and had misinterpreted the opt-in provisions.<sup>233</sup> The court turned to examine these arguments. The court first found that Hill did have standing, having suffered an actual injury.<sup>234</sup> The injury was the same as articulated by the Ninth Circuit in *Ashmus*: Hill was caught between the choice of complying with the opt-in provisions and losing procedural rights if Florida did not qualify, or not complying and losing his rights if Florida did qualify.<sup>235</sup> Turning to the issue of whether plaintiff presented a case or controversy, the court applied the *Abbott Laboratories* test of fitness for review and hardship to the parties.<sup>236</sup> The court found that, under the first prong, the issue of whether Florida had opted in was sufficiently focused for review.<sup>237</sup> Under the second prong, the court found that continued confusion as to which procedure applied would handicap plaintiff and would create irreparable harm.<sup>238</sup> Thus, the court held that plaintiff had presented a justiciable case or controversy.<sup>239</sup>

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<sup>231</sup> *Id.* at 1132-33.

<sup>232</sup> *Id.* at 1137.

<sup>233</sup> *Id.* at 1137.

<sup>234</sup> *Id.* at 1138.

<sup>235</sup> *Id.* Essentially, the choice before the plaintiff was whether to file a petition for federal habeas corpus less than six months after final state review or to wait more than six months. If plaintiff filed after less than six months and Florida had not opted in, plaintiff would be losing the additional six months he would have to adequately prepare his petition. If plaintiff filed his petition more than six months after final review and Florida did opt in, his petition would be untimely.

<sup>236</sup> *Id.* at 1139 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977)).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 1140.

The court then turned to the question of opt-in. The court held that Florida had not opted in for two reasons. First, 28 U.S.C. § 2261(b) required that a "rule of court or statute must provide standards of competency."<sup>240</sup> The court found that Florida's standards were insufficient to qualify under this provision.<sup>241</sup> At the time, Florida had a statutory post-conviction counsel system known as the Capital Collateral Representative ("CCR").<sup>242</sup> This system also provided that, if a CCR was conflicted out of a case, a member of Florida's private bar would be appointed in his or her place.<sup>243</sup> To be appointed as a CCR, Florida required only that an individual be a member of the bar for five years.<sup>244</sup> To be an assistant CCR, only two years of bar membership were required.<sup>245</sup> No additional background was required for the CCRs and assistant CCRs, and there was no provision at all for replacement private counsel.<sup>246</sup> Similarly vague standards had prevented opt-in in other states; moreover, the court found that the legislative intent behind the opt-in provisions asked for better developed and more stringent standards.<sup>247</sup>

Second, the opt-in provisions require that states establish a mechanism for appointing, compensating, and paying reasonable litigation expenses of post-conviction counsel and that this counsel be offered to all capital prisoners.<sup>248</sup> The court pointed to recent studies of the CCR system which showed it to be overburdened with too few lawyers, too much work, and too few cases.<sup>249</sup> In fact, in a clash with Florida's Supreme Court and legislature over resource allocation issues, CCR itself had argued it was ill-equipped.<sup>250</sup> Because CCR was overburdened, there were

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<sup>240</sup> 28 U.S.C. § 2261(b) (Supp. 1997).

<sup>241</sup> *Hill*, 941 F. Supp. at 1142.

<sup>242</sup> *Id.* at 1140-41.

<sup>243</sup> *Id.* at 1141 (citing FLA. STAT. ch. 27.703 (1996)).

<sup>244</sup> *Id.* at 1142 (citing FLA. STAT. ch. 27.701 (1996)).

<sup>245</sup> *Id.* (citing FLA. STAT. ch. 27.704(1) (1996)).

<sup>246</sup> *Id.* (citing FLA. STAT. ch. 27.703 (1996)).

<sup>247</sup> *Id.* at 1142-43.

<sup>248</sup> *Id.* at 1141 (citing 28 U.S.C. § 2261(b)-(c)).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

prisoners who had accepted the offer of counsel but had not yet met with a lawyer.<sup>251</sup> The court held that the offer of counsel must be a meaningful offer and therefore Florida had not opted in.<sup>252</sup> Once the court had determined the extent of the injury to plaintiff and had established the public interest in resolving this issue through effective judicial process, the remaining three elements of the preliminary injunction test were easily met.<sup>253</sup>

The victory was short-lived for Clarence Hill. Shortly after this holding, in January 1997, the same district court approved certification of a class of similarly situated prisoners to take advantage of the holding in *Hill*.<sup>254</sup> The court stated that the injunction would stand until Florida showed it met all the opt-in provisions.<sup>255</sup> In June 1997, the Florida legislature amended its post-conviction counsel system to respond to the district court's criticism.<sup>256</sup> The single CCR office was split into three Capital Collateral Regional Counsels to cope with the backlog of cases.<sup>257</sup> Florida also adopted specific quality standards requiring post-conviction counsel "to have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings, or any combination of at least five of such proceedings."<sup>258</sup> In addition to the above requirements, assistant CCRs were required to be members in good standing of the Florida Bar, with three years of criminal law experience.<sup>259</sup> The state had appealed the earlier decisions in *Hill*'s favor, and in light of these new statutory developments, the Eleventh Circuit remanded the case back to the district court for a rehearing.<sup>260</sup> The case never made it back to the district court. Following the Supreme Court's holding in *Ashmus*,

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<sup>251</sup> *Id.* at 1144.

<sup>252</sup> *Id.* at 1147.

<sup>253</sup> *See id.* at 1148.

<sup>254</sup> *See Hill v. Butterworth*, 170 F.R.D. 509, 524 (N.D. Fla. 1997).

<sup>255</sup> *Id.*

<sup>256</sup> *See Hill v. Butterworth*, 133 F.3d 783, 785 (11th Cir. 1997) (citing FLA. STAT. ch. 27.701 (1996)).

<sup>257</sup> *Id.* at 785-86.

<sup>258</sup> *Id.* at 786 (quoting FLA. STAT. ch. 27.703(3) (1996)).

<sup>259</sup> *Id.* (citing FLA. STAT. ch. 27.704 (1996)).

<sup>260</sup> *See id.*



the Eleventh Circuit vacated the district court opinion, dismissing the complaint and dissolving the injunction for want of a justiciable case or controversy.<sup>261</sup>

4. *Pennsylvania: Death Row Prisoners of Pennsylvania v. Ridge*

The case of *Death Row Prisoners of Pennsylvania v. Ridge*<sup>262</sup> raises many of the same issues and reaches many of the same conclusions as the cases above. This case involved a class action under 42 U.S.C. § 1983 by capital prisoners seeking injunctive relief against Pennsylvania's use of Chapter 154 defenses and declaratory judgment that Pennsylvania had not opted in.<sup>263</sup> In particular, the prisoners argued that Pennsylvania's post-conviction counsel system could not qualify for opt-in status because the system lacked statewide standards of competence or funding for defense costs.<sup>264</sup> Instead of a single statewide defense system, Pennsylvania allows each county to appoint counsel.<sup>265</sup> The result of this decentralization, the prisoners contended, was that the individual counties failed to adequately compensate post-conviction counsel for time and expenses.<sup>266</sup>

This proceeding in the district court was slightly different than the other cases in that the named Pennsylvania officials had moved to dismiss the prisoners' suit for failure to state a claim.<sup>267</sup> The court's analysis therefore focused on whether the suit survived such a motion and not on whether Pennsylvania's system complies with the opt-in provisions. The defendant officials offered a series of procedural and substantive arguments designed to stop the prisoners' suit at the first stage.

Pennsylvania's first argument was that the claim was barred by the Eleventh Amendment.<sup>268</sup> As above, the plaintiffs responded, and the court agreed, that their claim fell within the *Ex Parte Young* exception because of the uncertainty of the ap-

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<sup>261</sup> See *Hill v. Butterworth*, 147 F.3d 1333, 1334 (11th Cir. 1998).

<sup>262</sup> 948 F. Supp. 1258 (E.D. Pa. 1996).

<sup>263</sup> See *id.* at 1262.

<sup>264</sup> *Id.* at 1263.

<sup>265</sup> See *id.*

<sup>266</sup> *Id.*

<sup>267</sup> See *id.* at 1262.

<sup>268</sup> *Id.* at 1264.

propriate time limits and their resulting impact on prisoners' decisions to exercise their rights to habeas review.<sup>269</sup>

Pennsylvania's second contention was that the abstention doctrine from *Younger v. Harris* should prevent federal review.<sup>270</sup> The *Younger* abstention doctrine holds that:

in a case challenging the constitutionality of a state criminal statute . . . if at the time the federal suit is filed there is a pending state prosecution against the federal petitioner under the challenged statute, a federal court must not stay or enjoin the pending state criminal proceedings, nor can the court issue a declaratory judgment that the statute is unconstitutional, except under special circumstances.<sup>271</sup>

The court added that the "Supreme Court has extended the *Younger* doctrine to prohibit federal courts from enjoining state civil proceedings that implicate important state interests."<sup>272</sup> The purpose of the *Younger* doctrine is to prevent unnecessary interference by federal courts in state court proceedings.<sup>273</sup> Given that the state court proceeding is an equivalent forum for raising constitutional issues, abstention prevents redundant and invasive federal court intervention.<sup>274</sup> The court acknowledged that the Third Circuit had developed its own standard: *Younger* abstention would be required where "(1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims."<sup>275</sup> Pennsylvania argued that the state post-conviction proceedings met all three prongs of the Third Circuit's abstention test and therefore that the federal courts should refrain from hearing this litigation.<sup>276</sup> The plaintiffs responded that the first and third prongs of the abstention test were not met.<sup>277</sup>

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<sup>269</sup> *Id.* at 1264-66.

<sup>270</sup> *Id.* at 1267.

<sup>271</sup> *Id.* at 1266 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

<sup>272</sup> *Id.*

<sup>273</sup> *See id.*

<sup>274</sup> *See id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1267.

<sup>277</sup> *Id.*

First, plaintiffs contended that the relief they sought did not involve a state judicial proceeding, rather a statute of limitations in a federal proceeding.<sup>278</sup> Second, the plaintiffs argued that the state courts were not an adequate forum because this issue—federally provided time limits—could not be raised in a state direct appeal or post-conviction proceeding.<sup>279</sup> Further, the plaintiffs argued that abstention was always “inappropriate” when a federal law was involved in a federal suit.<sup>280</sup> The court agreed with the plaintiffs on all counts.<sup>281</sup>

Pennsylvania’s third argument in support of its motion to dismiss was that the plaintiffs had no justiciable case or controversy because their claim was not yet ripe.<sup>282</sup> The court applied the Third Circuit standard for ripeness, which requires that a court examine “(1) the *adversity* of interest between the parties, (2) the *conclusiveness* of a final judgment, and (3) the practical help, or *utility*, of a judgment.”<sup>283</sup> Pennsylvania argued that the case could not be ripe until one of its officials first asserted a Chapter 154 defense.<sup>284</sup> Until that moment, however, no case or controversy existed.<sup>285</sup> Further, Pennsylvania argued that the plaintiffs had not shown that the probability of such an assertion occurring was even “real and substantial.”<sup>286</sup> The prisoners responded by raising the dilemma issue.<sup>287</sup> Until the issue of opt-in and appropriate time limits was resolved, prisoners were

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *See id.* at 1268.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 1269 (citing *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298-1300 (3d Cir. 1996)).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 1270.

<sup>287</sup> *See id.* The court explained the dilemma issue as follows:

[E]ither plaintiffs have to assume that the 180-day limitation applies and give up the extra six months to which they would be entitled under Chapter 153 to prepare a habeas petition if Pennsylvania does not fulfill Chapter 154’s opt-in requirements, or plaintiffs have to assume that Pennsylvania does not meet the Chapter 154 requirements, take the full year to file a habeas petition, and risk a “serious penalty,” i.e. dismissal of their petition for untimeliness.

*Id.*

caught between two unsatisfactory alternatives for exercising habeas corpus.<sup>288</sup> Based on the prisoners' arguments, the court found that the case was ripe.<sup>289</sup> The harm to the prisoners from the uncertainty created the necessary adversity between the parties.<sup>290</sup> Further, a determination of opt-in status by the court would conclusively settle the matter for the parties.<sup>291</sup> Lastly, judicial resolution would be useful to the parties in planning what to do next.<sup>292</sup>

Pennsylvania then argued that the prisoners could obtain the relief they sought through normal federal habeas corpus review.<sup>293</sup> Pennsylvania based this argument on two Supreme Court cases, *Seminole Tribe of Florida v. Florida*<sup>294</sup> and *Preiser v. Rodriguez*.<sup>295</sup> Like Maryland had argued in *Booth*, Pennsylvania contended that *Seminole* held the *Ex Parte Young* exception did not apply where Congress has provided a "detailed remedial scheme."<sup>296</sup> Pennsylvania argued that the federal habeas corpus laws were exactly this type of scheme.<sup>297</sup> Further, Pennsylvania argued that *Preiser* held that "when a state prisoner is challenging the fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from such imprisonment, the prisoner's sole federal remedy is a writ of habeas corpus."<sup>298</sup> While Pennsylvania acknowledged that the plaintiffs' claim was not a direct challenge to their imprisonment, Pennsylvania saw it as a necessary first step in a habeas action.<sup>299</sup> Therefore, Pennsylvania argued

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<sup>288</sup> *Id.* at 1270-71.

<sup>289</sup> *See id.* at 1271.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 1272.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> 517 U.S. 44 (1996).

<sup>295</sup> 411 U.S. 475 (1973) (stating that habeas corpus is the exclusive means by which a state prisoner may challenge the fact or duration of his confinement). *Preiser* thus distinguishes habeas corpus from civil actions under 42 U.S.C. § 1983, which are used to challenge the *conditions* of confinement.

<sup>296</sup> *Ridge*, 948 F. Supp. at 1272.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* (citing *Preiser*, 411 U.S. at 490).

<sup>299</sup> *Id.* at 1272-73.

that federal habeas corpus was the only possible means for plaintiffs to obtain relief.<sup>300</sup> The court rejected this argument, turning *Preiser* around on the Commonwealth. The court stressed that the plaintiffs were not challenging the facts of their detention, but were seeking a declaration on the statute of limitations for a federal statute.<sup>301</sup> Therefore, a habeas corpus action would be inappropriate for the type of relief plaintiffs sought.<sup>302</sup> Essentially the court replied that if challenges to detention can only proceed through habeas petitions, then habeas petitions can only be used for challenging detention. Further, the court again raised the dilemma issue. The court reasoned that, in effect, by being required to file habeas corpus petitions in order to get a determination of the statute of limitations, the prisoners would be "forced to concede the point, in order to contest it."<sup>303</sup>

Lastly, Pennsylvania argued that, because plaintiffs' claim was based on 42 U.S.C. § 1983, plaintiffs must show both a violation of federal law and that the violations were committed by a state actor acting under color of law.<sup>304</sup> Pennsylvania asserted there was no violation of federal law because (1) the habeas corpus law and its statute of limitations created no federal right; (2) while prisoners may have a right not to be subjected to an unconstitutional statute of limitations, there is no right to know the statute of limitations; and (3) Pennsylvania has no obligation to inform prisoners of the applicable statute of limitations.<sup>305</sup> In support of this last contention, Pennsylvania pointed to *Texaco, Inc. v. Short*, in which owners of mineral leases challenged an Indiana statute that provided for unused leases to lapse after twenty years unless the owner filed a statement of claim.<sup>306</sup> The statute in *Texaco* did not require Indiana to notify each holder of a lease as to when the statute had run.<sup>307</sup> The

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<sup>300</sup> *Id.* at 1272.

<sup>301</sup> *Id.* at 1273.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 1274.

<sup>306</sup> *See id.* (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

<sup>307</sup> *See id.*

Supreme Court upheld the statute, finding that due process did not require notification and that Pennsylvania could require that an owner stay informed about the status of his or her property.<sup>308</sup> Similarly, Pennsylvania argued it bore no burden of informing prisoners when the statute had run on their habeas petitions.<sup>309</sup>

The court rejected these contentions, stating that Pennsylvania had misinterpreted *Texaco*.<sup>310</sup> The court explained that due process did not require *individual* notices to affected parties that the statute of limitations was about to run.<sup>311</sup> Further, the court reasoned that because the law was not settled in Pennsylvania, in contrast to Indiana, no one, no matter how well informed, could possibly know what statute of limitations applies.<sup>312</sup> In addition, the court held that Pennsylvania's stance was unconstitutional.<sup>313</sup> It was a violation of the Eighth Amendment under *Woodson v. North Carolina* to withhold statute of limitations information from capital prisoners.<sup>314</sup> It was also a violation of the Equal Protection Clause<sup>315</sup> because capital prisoners were being treated different from non-capital prisoners who had adequate notice of the limitations period because, not being subject to opt in, they could only fall within the AEDPA's one year limitations period.<sup>316</sup>

Lastly, the court found that the named parties to Pennsylvania's suit, Governor Thomas Ridge, Commissioner of the Pennsylvania Department of Corrections Martin Horn, and Attorney General Thomas Corbett, were sufficiently involved in

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<sup>308</sup> *See id.*

<sup>309</sup> *See id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *See id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976)) (holding that state's mandatory death sentence for first-degree murder violated Eighth and Fourteenth Amendments upon finding inter alia, that because of the qualitative difference between death and life imprisonment, there is corresponding difference in the need for reliability in determining that death is appropriate punishment in specific case).

<sup>315</sup> U.S. CONST. amend. XIV. § 1.

<sup>316</sup> *Ridge*, 948 F. Supp. at 1274-75.

the processes of criminal conviction, sentencing, detention, capital punishment, and habeas corpus that they qualified as state actors acting under color of law.<sup>317</sup> In a final sweep, the court found that its previous findings had established the necessary elements for injunctive relief.<sup>318</sup> Based on these conclusions, the court denied the motion to dismiss.<sup>319</sup>

Three and half months later, the issue went before the Third Circuit for oral argument. In a brief order entitled *Death Row Prisoners of Pennsylvania v. Ridge*<sup>320</sup> the court stated that though it was prepared to consider the Eleventh Amendment issue, it considered the issue of whether Pennsylvania's system opted in far more important. The court also stated that it saw the prisoners' action as a means for resolving this issue and not rooting out misconduct among Pennsylvania state officials. Lastly, the court held that Pennsylvania's system would be evaluated as a single statewide unit, and not on a county-by-county or case-by-case basis.<sup>321</sup> With this final statement, Pennsylvania conceded that it did not qualify as an opt-in state and it had not done so before.<sup>322</sup>

#### 5. *Virginia: Wright v. Angelone*

In contrast to *Ridge*, in which every issue was litigated except the critical one, in *Wright v. Angelone*<sup>323</sup> the district court focused exclusively on whether Virginia's post-conviction counsel system met the statutory requirements for opt in. Also in contrast to Pennsylvania and the other states above, Wright did not sue for declaratory or injunctive relief. Rather the determination of Virginia's opt-in status came through a motion for stay of execu-

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<sup>317</sup> See *id.* at 1275-77.

<sup>318</sup> *Id.* at 1277. These elements are (1) violation of a federal right; (2) an adequate remedy at law; (3) irreparable harm to plaintiffs; and (4) equitable relief requested by plaintiffs. *Id.*

<sup>319</sup> See *id.* at 1278.

<sup>320</sup> 106 F.3d 35 (3d Cir. 1997).

<sup>321</sup> *Id.* at 36.

<sup>322</sup> *Id.* Failing dismissal of the prisoners' suit, Pennsylvania was apparently seeking a determination that individual counties had opted in. There is no provision in Chapter 154 for governmental entities other than states to opt in.

<sup>323</sup> 944 F. Supp. 460 (E.D. Va. 1996).

tion and appointment of counsel prior to the filing of any habeas corpus action.<sup>324</sup>

Virginia has had a system of providing indigents defense counsel since 1992.<sup>325</sup> Virginia's statute provides that indigent defendants on trial for a capital crime may request and have counsel appointed from a list maintained by the Public Defender Commission.<sup>326</sup> This counsel represents the defendant through trial, and on appeal, if the defendant receives a death sentence.<sup>327</sup> If the sentence is affirmed on appeal, the defendant will be appointed new counsel within thirty days for state habeas proceedings.<sup>328</sup> From its inception until June 30, 1995, the system required that defendants request post-conviction counsel; from July 1, 1995, appointment of post-conviction counsel was automatic.<sup>329</sup> This switch created issues for Wright's claim because he was appointed post-conviction counsel on June 8, 1995, prior to automatic appointments.<sup>330</sup> The court therefore decided to determine if Virginia opted in based on the state of its system on June 8, 1995.<sup>331</sup>

In evaluating Virginia's counsel system, the court held that it failed to qualify for opt-in on three grounds: (1) Virginia does not have a mechanism for appointment, compensation, and reimbursement of litigation expenses under § 2261(b); (2) Virginia does not have standards of competency provided by rule of court or statute under § 2261(b); (3) Virginia fails to affirmatively provide counsel and enter an order of court regarding appointment of counsel.

First, the court found that the system as it existed on June 8, 1995, appointing post-conviction counsel at defendant's request, was not a satisfactory mechanism for appointing counsel.<sup>332</sup> Section 2261(b) clearly intends that all indigent capital

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<sup>324</sup> *Id.* at 461-62.

<sup>325</sup> *Id.* at 463.

<sup>326</sup> *Id.* (citing VA. CODE ANN. §19.2-163.7 (Michie Supp. 1995)).

<sup>327</sup> *See id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 464.



defendants be provided counsel. While the court conceded that the system at present did not suffer from this problem, the court found it was still not in compliance for failure to adequately compensate or reimburse post-conviction counsel.<sup>333</sup> Virginia's statute mandating appointment of counsel was silent on issues of payment for time or expenses.<sup>334</sup> Virginia attempted to argue that its Appropriations Act filled this gap by providing that "[t]he state's share of expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner, including payment of counsel fees as fixed by the Court . . . shall be paid upon receipt of an appropriate order from circuit court."<sup>335</sup> However, the court rejected the argument that this was an effective mechanism based on evidence that post-conviction counsel in Virginia were unaware of the steps necessary to receive payment and did not even know which court had jurisdiction over such a request.<sup>336</sup> This system for payment was clearly inadequate in light of the mechanism intended in Chapter 154.

Second, the court found that Virginia had not established standards of competence for post-conviction counsel.<sup>337</sup> The court first confronted the issue raised in *Booth* regarding the inconsistencies between authorities establishing the appointment mechanism and authorities laying out standards of competence. In contrast to *Booth*, the district court in Virginia harmonized the two sentences to permit a state agency authorized by state law to promulgate standards of competence.<sup>338</sup> Virginia had taken such an approach. In Virginia Code Section 19.2-163.8, the state authorized the Public Defender Commission to develop standards:

The Public Defender Commission . . . shall adopt standards for the appointment of counsel in capital cases, which take into consideration, to the extent practicable, the following criteria: (i) license or permission to

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 464-65.

<sup>336</sup> *Id.* at 465.

<sup>337</sup> *Id.*

<sup>338</sup> *See id.* at 466.

practice law in Virginia; (ii) general background in criminal litigation, (iii) demonstrated experience in felony practice at trial and appeal, (iv) experience in death penalty litigation, (v) familiarity with the requisite court system, (vi) experience in death penalty litigation [sic]; and (vii) demonstrated proficiency and commitment to quality representation.<sup>339</sup>

The court rejected this statutory formulation, finding that these were not standards, but were guidelines for the development of standards.<sup>340</sup> Further, these guidelines lacked any indication as to how each qualification should be met.<sup>341</sup> In addition, the court pointed out that the guidelines for the Public Defender Commission did not require any familiarity with habeas corpus in death penalty cases.<sup>342</sup>

Third, the court found that Virginia's system had no mechanism for the entry of an order of court once counsel appointments had been made.<sup>343</sup> The system as it existed on June 8, 1995, also failed to affirmatively provide counsel to defendant after conclusion of the direct appeal.<sup>344</sup> For these reasons, the court concluded that Virginia had failed to opt in to the provisions of Chapter 154. There was no additional appeal on this case as there were in the above cases. Moreover, such an appeal is unlikely because other cases confirmed that Virginia's system is inadequate to qualify under the opt-in provisions.<sup>345</sup>

## 6. Summary

Two separate themes can be seen from the litigation history above. The first is that prisoner attempts for an *ex ante* determination of opt-in status are doomed to fail. The Supreme Court's holding in *Ashmus v. Calderon*<sup>346</sup> denied such attempts on the grounds of standing, and most of the lower federal courts see

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<sup>339</sup> *Id.* (quoting VA. CODE ANN. §19.2-163.8 (Michie Supp. 1995)).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 467.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 467-68.

<sup>345</sup> See, e.g., *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996) (holding, in the context of a standard § 2254 petition, that Virginia did not qualify as an opt-in state).

<sup>346</sup> 523 U.S. 740 (1998).

the Eleventh Amendment as an additional block. The result is that prisoners will only learn whether their state post-conviction counsel qualifies after state post-conviction review when the prisoner files for federal habeas relief and the court must determine the appropriate time frame. As a result, state post-conviction counsel are effectively immune from any sort of quality control. Prisoners may not challenge in advance the standards of competence for the class of potential appointed counsel, and there is no right to challenge post-conviction counsel after the fact.

The second theme that arises from the history of this litigation is that federal courts generally will scrutinize, in depth, a state's chosen method of providing counsel. In four of the cases discussed above, the district courts conducted a thorough review of the laws and regulations underlying counsel, and in some cases, adduced additional oral evidence of standard practices. Further, these courts were willing to parse the meaning of individual words and phrases, as shown by the Northern District of California distinguishing between "shall" and "should," and the District of Maryland grappling with the inconsistencies in § 2261. The result of this depth of review was that in each of these cases, the state system failed.

#### B. FEDERAL HABEAS CORPUS PETITIONS

The second means by which states have settled the issue of opt-in to Chapter 154 has been through normal federal habeas corpus review, as was recommended by the Fourth Circuit and the Supreme Court above. The following states have had the opt-in issue addressed through federal habeas corpus review: Alabama, Arizona, Louisiana, Mississippi, Nebraska, North Carolina, Ohio, Oklahoma, Tennessee, and Texas.<sup>347</sup> In some of

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<sup>347</sup> See, e.g., *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998) (Arizona); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998) (Alabama); *Moore v. Reynolds*, 153 F.3d 1086 (10th Cir. 1998) (Oklahoma); *Duvall v. Reynolds*, 139 F.3d 768 (10th Cir. 1998) (Oklahoma); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (Oklahoma); *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996); *Ward v. French*, 989 F. Supp. 752 (E.D.N.C. 1997); *Lockett v. Puckett*, 980 F. Supp. 201 (S.D. Miss. 1997); *Mills v. Anderson*, 961 F. Supp. 198 (S.D. Ohio 1997); *Scott v. Anderson*, 958 F. Supp. 330 (N.D. Ohio 1997); *Williams v. Cain*, 942 F. Supp. 1088 (W.D. La. 1996); *Zuern v. Tate*, 938 F.

these cases, such as Oklahoma, the determination was brief because the state conceded it had not qualified. In other cases, a more detailed determination was required because the state contended it had opted in or otherwise contested the issue.

The typical reason a state may fail to qualify under Chapter 154 is a failure to establish sufficient competency standards. For example, in *Ryan v. Hopkins*, the federal district court found that while Nebraska's post-conviction statute created an adequate appointment and compensation system, Nebraska did not qualify because the statute did not specify competency standards.<sup>348</sup> The same reasoning prevented Tennessee from qualifying in *Austin v. Bell*. Though the court found Tennessee did have an appointment mechanism, the court also found the state's only requirement for competence—passing the bar—inadequate.<sup>349</sup> Texas was found not to qualify in *Mata v. Johnson* because the Texas Court of Criminal Appeals required counsel to submit questionnaires which the court used to determine competency on a case-by-case basis.<sup>350</sup> The court found that the intent of Chapter 154 was for states to establish explicit standards; Texas' individualized determination did not provide the kind of "specific, mandatory" standards sought.<sup>351</sup>

In contrast, though Ohio argued it qualified for opt-in in three cases: *Zuern v. Tate*, *Mills v. Anderson*, and *Scott v. Anderson*,<sup>352</sup> the federal district courts gave five reasons for the state's failure to qualify. First, the system did not provide counsel to all indigent capital prisoners under § 2261. The Ohio Public Defender Act provides trial, appellate, and post-conviction counsel

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Supp. 468 (S.D. Ohio 1996); *Austin v. Bell*, 927 F. Supp. 1058 (M.D. Tenn. 1996); *Ryan v. Hopkins*, No. 4:CV95-3391, 1996 WL 539220 (D. Neb. 1996).

<sup>348</sup> *Ryan*, 1996 WL 539220, at \*3-4. Nebraska also failed because there was no provision for entry of a court order. *Id.*

<sup>349</sup> *Austin*, 927 F. Supp. at 1061-62.

<sup>350</sup> *Mata*, 99 F.3d at 1267.

<sup>351</sup> *Id.* However, the court did find that *Mata* had not shown that Texas' cap on compensation and expense reimbursement for post-conviction counsel (\$7500 and \$2500 respectively) was systemically inadequate. *See id.*

<sup>352</sup> *Zuern v. Tate* and *Mills v. Anderson* employ nearly identical analysis to describe Ohio's failure to qualify under Chapter 154. For ease of reference, citations are to *Mills*, which contains a better description of Ohio's post-conviction counsel system.

through county public defenders.<sup>353</sup> The Ohio statute permitted the public defenders to refuse to represent prisoners whose claims lacked merit.<sup>354</sup> Because some prisoners would be without counsel, the system failed the § 2261 requirements. Second, the courts found that although Ohio courts may record the name of appointed counsel, there was no requirement that an order of court be entered.<sup>355</sup> Third, the Ohio statute set maximum fee amounts for county public defenders. The courts found that the lack of a minimum fee and the unreasonably low fees in general did not provide an adequate payment and reimbursement system under § 2261(b).<sup>356</sup> Fourth, the courts found Ohio did not provide sufficient standards of competency. Ohio argued that Ohio Supreme Court Rule 65 guaranteed such standards by requiring that counsel in death penalty cases be certified by a special committee.<sup>357</sup> However, the court responded by quoting an affidavit from a member of the committee, who declared that the committee had rejected requiring certification at the post-conviction stage.<sup>358</sup> Therefore, Ohio had no effective standards of competency. Fifth, Ohio did not offer counsel in the manner intended by Chapter 154. Given Ohio's system, an indigent prisoner might have to prepare his or her own petition for post-conviction relief before counsel would be appointed. Since the purpose of post-conviction counsel is to assist the prisoners in just such a manner, Ohio failed to "offer" counsel under § 2261.<sup>359</sup>

#### IV. FUTURES: STATE VIEWS AND INTENTS TOWARD THE OPT-IN PROVISIONS

Thirty-eight states provide for the death penalty, making them facially eligible for opt-in under Chapter 154. However, in the three years since passage of the AEDPA, no state has man-

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<sup>353</sup> See OHIO REV. CODE. ANN. § 120.16 (Banks-Baldwin 1984).

<sup>354</sup> *Mills v. Anderson*, 961 F. Supp. 198, 200-01 (S.D. Ohio 1997). See also *Scott v. Anderson*, 958 F. Supp. 330, 332 (N.D. Ohio 1997).

<sup>355</sup> *Mills*, 961 F. Supp. at 201-02.

<sup>356</sup> *Id.* at 202.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 202-03.

<sup>359</sup> See *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996).

aged to qualify. A critical step in understanding the impact and the future of the opt-in provisions is to examine the different state approaches through original research directly contacting state authorities. To this end, this section summarizes the results of a survey of state attorney general offices.<sup>360</sup> In general, the answers to the question of whether states intended to opt in were "Yes," "No," and "Maybe," though obviously these distinctions are simplistic. A more detailed discussion of the different state positions is described below, using these answers as basic organizational tools.

#### A. "YES": STATES THAT ARE PURSUING OPT-IN STATUS

Fifteen states have declared they are pursuing opt-in status, by affirmatively adopting measures to qualify under the requirements of § 2261 or by seeking acknowledgment that their current post-conviction counsel system is in compliance. These states include Arizona, Arkansas, California, Colorado, Idaho,

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<sup>360</sup> While this survey attempted to be methodical and consistent, it cannot be considered scientific, exhaustive, or definitive. As several attorneys general pointed out, taking the pulse of a state requires contacting not only the state's lawyers, but its judges, legislative representatives, executives, and its people, at least. However, this survey does illustrate the general position of the states and helps illustrate the relative attractiveness of the opt-in provisions.

While some respondents correctly observed that state legislatures, governors, and executive offices are critical, the survey focused on attorneys general as the best sources for information on state intent and reactions to the opt-in provisions for several reasons. First, as traditional members of the executive branch, attorneys general would be involved in policy discussions about the opt-in provisions. Second, given this position, they would also be cognizant of the legislature's attitude. Third, and most important, the attorneys general would be the ones responsible for carrying out a decision to opt in through their representation of the state at post-conviction and federal habeas corpus proceedings.

Alternative sources of information involved tradeoffs. Canvassing state legislators and committee heads would have been slow and likely duplicative. Similar problems prevented contacting governor's offices. Private defense attorneys and publicly supported indigent defenders would be good sources for judging the impact of the state's decision to opt in on the prisoner population and would provide useful critiques, but, given their position, these attorneys would not necessarily have been involved in the state's decision to opt in.

As a last methodological note, the quality of responses to the survey varied greatly, from handwritten "yes" and "no" answers to detailed letters providing cites and additional legal materials.

In addition, the following states did not respond: Alabama, Illinois, Kentucky, Louisiana, Mississippi, and Oklahoma.

Kansas, Maryland, Missouri, Montana, Nevada, New Jersey, Ohio, South Carolina, Utah, and Washington.

### 1. Arizona

Arizona has 120 prisoners under death sentence, with twenty-eight prisoners currently seeking federal review.<sup>361</sup> Because Arizona already provided post-conviction counsel and because federal review was averaging over ten years, the state judged that the additional cost in enacting competency standards was outweighed by the benefits of the expedited procedure after opt in.<sup>362</sup>

Based on this decision, in 1996 and 1998 the state legislature enacted several bills to amend the post-conviction counsel system and the Arizona Supreme Court passed a court rule requiring standards of competency.<sup>363</sup> Arizona now provides a statutory right to post-conviction counsel for indigent capital prisoners, though a competent prisoner may knowingly waive counsel.<sup>364</sup> This appointed counsel must be a member of the Arizona bar in good standing for five years, have practiced in state criminal appeals or post-conviction proceedings for three years, and have not represented the defendant before unless the defendant and appointed counsel specifically request appointment and waive all potential issues that are foreclosed by continued representation.<sup>365</sup> Beyond these standards, the statute requires the Arizona Supreme Court to maintain a list of qualified attorneys and permits the court to establish additional standards of competence.<sup>366</sup> In response, the Arizona Supreme Court additionally requires the appointed counsel to:

[w]ithin three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in

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<sup>361</sup> Questionnaire Response from Paul McMurdie, Arizona Office of the Attorney General, to Burke W. Kappler ¶ 1 (Nov. 30, 1998) (on file with author) [hereinafter Arizona Response].

<sup>362</sup> *Id.* ¶ 4.

<sup>363</sup> *Id.* ¶ 3.

<sup>364</sup> See ARIZ. REV. STAT. ANN. § 13-4234(D) (West 1990 & Supp. 1998).

<sup>365</sup> *Id.* § 13-4041(B).

<sup>366</sup> *Id.* § 13-4041(C).

which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings . . . . [In addition, appointed counsel must] [h]ave attended and successfully completed, within one year of the appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.<sup>367</sup>

However, Arizona's statutes and court rules do permit the appointment of counsel who do not meet these standards if qualified counsel is not available and the court is satisfied that replacement counsel both significantly exceeds these standards and the replacement counsel associates with a lawyer who does meet the standards.<sup>368</sup> Beyond the required standards of counsel, Arizona compensates appointed counsel, other than public defenders, at the rate of up to \$100 per hour for up to 200 hours, with \$7,500 as a presumptive fee.<sup>369</sup> Upon a showing of good cause, the court may authorize up to \$100 per hour for time worked over 200 hours.<sup>370</sup> The court will also reimburse investigative and expert expenses which are "reasonably necessary to adequately litigate" the defendant's claims.<sup>371</sup>

As a last note, the respondent from Arizona remarked that the defense bar had reacted negatively to these changes and that even qualified attorneys had refused to take capital post-conviction cases.<sup>372</sup> He predicted that continued resistance might result in the elimination of funding for post-conviction relief.<sup>373</sup> While such an outcome remains in doubt, it seems dire

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<sup>367</sup> ARIZ. R. CRIM. P. 6.8(c).

<sup>368</sup> ARIZ. REV. STAT. ANN. § 13-4041(D) (West 1989); ARIZ. R. CRIM. P. 6.8(d).

<sup>369</sup> See ARIZ. REV. STAT. ANN. § 13-4041(G); DONALD E. WILKES, JR., STATE POST-CONVICTION REMEDIES AND RELIEF app. A (1996 & Supp. 1998) (A Survey of Current Post-Conviction Remedies and Relief in Each of the Fifty States and the District of Columbia).

<sup>370</sup> ARIZ. REV. STAT. ANN. § 13-4041(H).

<sup>371</sup> *Id.* § 13-4041(J).

<sup>372</sup> See Arizona Response, *supra* note 361, ¶ 7.

<sup>373</sup> *Id.*



to eliminate post-conviction relief and thereby automatically disqualify one's state from opt-in status.

## 2. *Arkansas*

Arkansas has forty prisoners under sentence of death, with one seeking federal habeas corpus and two additional prisoners seeking certiorari in the Supreme Court for the denial of habeas corpus.<sup>374</sup>

In response to the opt-in provisions, the Arkansas General Assembly passed both Rule 37.5—Special Rule for Persons Under Sentence of Death—and a special subchapter on post-conviction entitled the Arkansas Effective Death Penalty Act of 1997,<sup>375</sup> laying out the required procedures to qualify under Chapter 154. Arkansas' goals were explicit: "The intent of this rule is to comply with the provisions of 28 United States Code § 2261 et seq[.]"<sup>376</sup> and:

[i]t is the express intent of this subchapter to comply with the requirements of the federal Antiterrorism and Effective Death Penalty Act of 1996 . . . in an effort to obtain the benefits of the act concerning time limitations in which federal habeas corpus proceedings<sup>377</sup> and appeals must be considered and decided, and for other purposes.

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<sup>374</sup> Questionnaire Response from Todd L. Newton, Assistant Attorney General, Attorney General of Arkansas, to Burke W. Kappler ¶ 1 (Feb. 11, 1999) (on file with author) [hereinafter *Arkansas Response*].

<sup>375</sup> See ARK. R. CRIM. P. 37.5; ARK. CODE ANN. § 16-91-206 (Michie 1987). The preface to the Arkansas Effective Death Penalty Act contains an emergency clause which further explains the reasoning of the General Assembly:

It is found and determined by the General Assembly of the State of Arkansas that the current system for carrying out a sentence of death is hopelessly fraught with endless litigation in state and federal court which undermines the deterrent value of the death penalty and imposes a needless financial burden on the state's resources, while depriving death row inmates of the right to obtain speedy relief on any meritorious constitutional claims . . . The most significant delay between sentencing and execution occurs while capital cases await decision in federal habeas corpus litigation. From 1990 through 1993, the average time that prisoners sentenced to death in this state awaited execution was ten years and two months for those prisoners who pursued federal habeas corpus litigation. However, if the states comply with the requirements of the Antiterrorism Act, the average time that prisoners will await execution in federal court will be reduced to less than three years in most cases.

*Id.* § 16-91-200 (Post-Conviction).

<sup>376</sup> ARK. R. CRIM. P. 37.5(a).

<sup>377</sup> ARK. CODE ANN. § 16-91-204. See also *Arkansas Response*, *supra* note 374, ¶ 2.

Arkansas is also explicit that Rule 37.5 and the Arkansas Effective Death Penalty Act are meant to be complementary, though occasionally the two diverge. While the Effective Death Penalty Act was passed in March 1997, the Rule was passed in August 1997.<sup>378</sup> A *per curiam* opinion of the Arkansas Supreme Court found that the Rule is intended to supersede all parts of the Act, except for provisions on education programs and compensation to appointed counsel.<sup>379</sup> Both the Rule and the Act require the circuit court issuing the sentence of death to convene a hearing, with the prisoner present, within twenty-one days of the Arkansas Supreme Court's affirmance of the prisoner's death sentence.<sup>380</sup> The purpose of this hearing is solely to appoint counsel for post-conviction proceedings and the court is required to make written finding and enter a written order specifying whether the prisoner is indigent, competent, and accepts counsel.<sup>381</sup>

While both the Rule and the Act provide competency standards, and while the language in the Act indicates that these are the "exclusive criteria counsel must satisfy" in order to be appointed, it is the requirements of the rule that apply.<sup>382</sup> At least one of the appointed counsel must have: (1) represented a capital prisoner in state or federal post-conviction within ten years; (2) served as defense counsel in five felony jury trials to completion, including one capital trial, within ten years; (3) represented prisoners in three state or federal post-conviction proceedings, one of which involved an evidentiary hearing and all of which involved violent felony convictions, including one murder conviction, within ten years; (4) represented prisoners in three appeals for violent felony convictions, including one murder, and represented a prisoner in one evidentiary hearing in state or federal post-conviction proceedings, within ten years; (5) actively practiced law for three years; and (6) completed six

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<sup>378</sup> ARK. CODE ANN. § 16-91-201; ARK. R. CRIM. P. 37.5.

<sup>379</sup> ARK. R. CRIM. P. 37.5 (Publisher's Note).

<sup>380</sup> ARK. R. CRIM. P. 37.5(b)(1)-(2); ARK. CODE ANN. § 16-91-202(a)(1).

<sup>381</sup> ARK. R. CRIM. P. 37.5(b)(2).

<sup>382</sup> ARK. CODE ANN. § 16-91-202(c).

hours of professional training in capital trials, appeals, and post-conviction proceedings, within two years.<sup>383</sup>

Both the Rule and the Act allow the court to appoint attorneys who do not meet these criteria but whose experience, background, and training are clear evidence of their competence upon a written finding.<sup>384</sup> However, the Act requires that even under these circumstances, the attorney must be licensed for five years, with three years trying capital murder cases or post-conviction proceedings in Arkansas courts, and must have six hours of training in capital trials, appeals, and post-conviction proceedings within the previous two years.<sup>385</sup> Both provisions also state that the circuit and appellate courts shall establish rates for compensation and fees for investigative, expert, and other reasonably necessary services, to be paid by the Arkansas Public Defender Commission.<sup>386</sup>

Besides the three prisoners involved in post-conviction review in the federal system, several prisoners are currently seeking state post-conviction review under the system established by Rule 37.5.<sup>387</sup> Depending on the status of these cases, Arkansas may be in a position to test the validity of this legislation within a few years.<sup>388</sup> Reaction from the defense community is difficult to judge, but defense attorneys were involved in drafting Rule 37.5.<sup>389</sup>

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<sup>383</sup> See ARK. R. CRIM. P. 37.5(c)(1)(A)-(B). In contrast, ARK. CODE ANN. § 16-91-202(c)(2) mandates that attorneys must have: (1) previously represented a prisoner in state or federal post-conviction proceedings within five years; (2) served as defense counsel within five years in three state or federal post-conviction proceedings on felony charges, two of which involved violent crimes and one of which involved murder; (3) conducted two evidentiary hearings in state or federal post-conviction proceedings within five years; (4) be licensed to practice law for five years, and be licensed in Arkansas for three years; and (5) completed six hours of professional training in capital trials, appeals, or post-conviction litigation within two years.

<sup>384</sup> See ARK. R. CRIM. P. 37.5(c)(4); ARK. CODE ANN. § 16-91-202(e).

<sup>385</sup> ARK. CODE ANN. § 16-91-202(e)(2)(A)-(B).

<sup>386</sup> See ARK. R. CRIM. P. 37.5(j); ARK. CODE ANN. § 16-91-202(f).

<sup>387</sup> See Arkansas Response, *supra* note 374, ¶ 3.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* ¶ 2.

### 3. California

California presently has 520 prisoners under sentence of death, with 165 seeking federal habeas corpus review.<sup>390</sup> Despite *Ashmus v. Calderon*,<sup>391</sup> California still asserts that it has had a qualified counsel system under Chapter 154 since 1989, when its unitary review mechanism for providing counsel became operative.<sup>392</sup> However, in 1997, California adopted a new Chapter 2.1 of the California Government Code and a new Rule of Court 76.6 to ensure that its interlocking web of statutes qualified.<sup>393</sup> Chapter 2.1 was renumbered Chapter 2.3 in 1998 and makes a number of important changes in California's post-conviction system. First, it established the California Habeas Resource Center, a group of up to thirty attorneys available for appointment for state and federal post-conviction proceedings.<sup>394</sup> Second, Chapter 2.3 requires the California Supreme Court to offer counsel to all capital prisoners and to appoint one or more lawyers as prisoner's counsel, unless the prisoner waives counsel or is not indigent.<sup>395</sup> This is subject to the limitation that the prisoner's trial and appellate counsel shall not be appointed unless expressly requested by both prisoner and counsel.<sup>396</sup> Third, Chapter 2.3 sets a compensation rate at a minimum of \$125 per hour; the California Supreme Court may also authorize up to \$25,000 in expenses.<sup>397</sup>

In turn, Rule of Court 76.6 establishes extensive qualifications for appointed appellate and habeas corpus counsel.<sup>398</sup> These standards of competence for habeas counsel include four years of practice in California; experience with five felony ap-

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<sup>390</sup> Questionnaire Response from Ronald S. Matthias, Special Deputy Attorney General, California Department of Justice, to Burke W. Kappler ¶ 1 (Feb. 25 1999) (on file with author) [hereinafter California Response].

<sup>391</sup> 31 F. Supp. 2d 1175 (N.D. Cal. 1998).

<sup>392</sup> See California Response, *supra* note 390, ¶¶ 4-5.

<sup>393</sup> *Id.* ¶ 2. See also WILKES, *supra* note 369, at 79 (Supp. 1998).

<sup>394</sup> See CAL. GOV'T CODE § 68661(a) (West 1997). The Center may also employ investigators and experts on staff. *Id.* § 68661(f).

<sup>395</sup> *Id.* § 68662.

<sup>396</sup> *Id.* § 68663.

<sup>397</sup> *Id.* § 68666.

<sup>398</sup> CAL. RULES OF COURT 76.6(d)-(e).

peals and two death penalty post-conviction proceedings; completion of nine hours of training on appellate criminal defense or habeas corpus issues; proficiency in briefing, research, oral and written argument (as demonstrated through writing samples), and recommendations from outside counsel.<sup>399</sup> This rule became effective on February 27, 1998.<sup>400</sup>

Unfortunately, it is unclear what effect these changes will have. On December 24, 1998, in a follow-up case entitled *Ashmus v. Calderon*,<sup>401</sup> the same federal district court judge who previously found that California had not opted in held that the state still failed to qualify under Chapter 154.<sup>402</sup> The case returned for a second hearing because the Supreme Court in *Calderon v. Ashmus*<sup>403</sup> vacated the Ninth Circuit's holding, but failed to reach the merits of California's system.<sup>404</sup> In response, the state has repeatedly asserted in different capital cases that it qualifies under Chapter 154, and, in *Ashmus* it requested supplemental briefing specifically on this issue.<sup>405</sup> The court accepted and heard oral arguments on November 9, 1998,<sup>406</sup> and, as before, concluded that California did not have an adequate offer and appointment mechanism, it did not adequately compensate or reimburse appointed counsel, and it did not have adequate standards of competence.<sup>407</sup> The reasoning behind these conclusions was largely the same as in the first *Ashmus* case.<sup>408</sup> However, the court did not discuss the effects of the new Rule 76.6 and it left the door to future opt in open with its conclusion: "Under the foregoing circumstances, the Court remains confident that, *at least until this year*, California had no qualifying

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<sup>399</sup> *Id.* at Rule 76.6(e).

<sup>400</sup> *Id.* at Rule 76.6.

<sup>401</sup> 31 F. Supp. 2d 1175 (N.D. Cal. 1998).

<sup>402</sup> See Supplemental Memorandum re Applicability of Chapter 154, *Ashmus v. California*, 31 F. Supp. 2d 1175 (N.D. Cal. 1998) (No. C-93-0594-TEH) (on file with author) [hereinafter Supplemental Memorandum, *Ashmus v. California*], for a thorough review of California's position.

<sup>403</sup> 523 U.S. 740 (1998).

<sup>404</sup> *Ashmus*, 31 F. Supp. 2d at 1177-78.

<sup>405</sup> See Supplemental Memorandum, *Ashmus v. California*, *supra* note 402, at 2.

<sup>406</sup> *Ashmus*, 31 F. Supp. 2d at 1177.

<sup>407</sup> *Id.* at 1177-78.

<sup>408</sup> See *id.* at 1178-79. See *supra* text accompanying notes 178-216.

mechanism in place for ensuring competent unitary review counsel."<sup>409</sup> California is currently in the process of appealing the district court's decision.<sup>410</sup>

Thus, the future of California's qualification under Chapter 154 is uncertain. California's failure with the *Ashmus* series of cases may stem from the fact that Ashmus litigated his post-conviction claims well before the existence of the AEDPA. As such, California's recent amendments were not considered in adjudicating his claims. A later petitioner who has received the benefit of counsel through California Government Code § 68661 and Rule 76.6 may see a different outcome.

#### 4. Colorado

Colorado currently has four prisoners under sentence of death, with one pursuing federal habeas corpus.<sup>411</sup> This prisoner began the review process before the AEDPA was enacted so the opt-in provisions do not apply.<sup>412</sup>

Colorado intends to opt-in and has established standards for appointed counsel and mechanisms for compensation.<sup>413</sup> In 1997, Colorado adopted a unitary post-conviction review system. Specifically, the legislature identified the following goals:

(a) Ensuring compliance with the requirements of the federal "Antiterrorism and Effective Death Penalty Act of 1996" . . . ;

(b) Improving the accuracy, completeness, and justice of review proceedings by requiring that post-conviction review commence immediately after the imposition of a sentence of death;

(c) Allowing for the full and fair examination of all legally cognizable post-conviction and appellate issues by the trial court and the Colorado Supreme Court; and

(d) Eliminating, to the fullest extent possible, unreasonable and unjust delays in the resolution of post-conviction issues by combining and reducing the number of proceedings in class 1 felony cases.<sup>414</sup>

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<sup>409</sup> *Ashmus*, 31 F. Supp. 2d at 1193 (emphasis added).

<sup>410</sup> See California Response, *supra* note 390, ¶ 6.

<sup>411</sup> Telephone Interview with Paul Wolf, Office of the Attorney General (Feb. 10, 1999) (notes on file with author) [hereinafter Colorado Unofficial Response].

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> COLO. REV. STAT. ANN. § 16-12-201 (West 1999).

In function, Colorado achieves unitary review by conducting a hearing in the trial court following imposition of a death sentence. The court is directed to advise the defendant that ineffective assistance of trial counsel may only be raised in post-conviction review, while ineffective assistance of appeal counsel may be raised through petition to the Colorado Supreme Court.<sup>415</sup> The court will also appoint post-conviction counsel if the defendant is indigent and does not waive counsel.<sup>416</sup> The court may appoint one or more attorneys, with the following qualifications individually or together: (1) membership in the Colorado Bar; (2) five years experience in criminal law, including trials and post-conviction proceedings; (3) three years experience in trying felony cases, with a minimum of five cases in the previous five years, or a total of twenty five cases; and (4) three years experience in appeals, with a minimum of five cases.<sup>417</sup> The court is also permitted to consider an attorney's previous experience in capital representation, the attorney's education and familiarity with capital cases, and the attorney's workload and diligence.<sup>418</sup> The Colorado statute provides for reasonable compensation and reimbursement of expenses, without establishing specific rates.<sup>419</sup>

The motivation for opting in is basically procedural speed.<sup>420</sup> While Colorado wants to guarantee competent counsel, the numbers of qualified counsel are few, which means that courts are well aware of which attorneys are competent and which are not.<sup>421</sup> Interestingly, the defense community did push to make the qualification standards tougher.<sup>422</sup> In the view of the respondent, this was based more on a desire to retain their "expert" status.<sup>423</sup> The respondent admitted that though Colorado

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<sup>415</sup> *Id.* § 16-12-204(2)(d).

<sup>416</sup> *Id.* § 16-12-205.

<sup>417</sup> *Id.* § 16-12-205(2).

<sup>418</sup> *Id.* § 16-12-205(3).

<sup>419</sup> *Id.* § 16-12-205(6).

<sup>420</sup> See Colorado Unofficial Response, *supra* note 411.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

wanted to opt-in, the size and status of death row made it not a "real issue."<sup>424</sup>

### 5. *Idaho*

Idaho presently has twenty-two prisoners under sentence of death, with fifteen of these in federal habeas corpus review.<sup>425</sup> Like California and Colorado, in order to opt in, Idaho developed a unitary review system for combining direct and collateral attack on capital sentences.<sup>426</sup> After a death sentence is pronounced, post-conviction counsel is appointed and given ninety days to prepare a petition.<sup>427</sup> This petition is then litigated in the district court.<sup>428</sup> Upon appeal of this hearing, the post-conviction appeal and the direct appeal are taken together to the Idaho Supreme Court.<sup>429</sup>

Idaho has guaranteed a statutory right to counsel in post-conviction proceedings.<sup>430</sup> By a new court rule, Idaho provides for mandatory appointment of counsel immediately after the pronouncement of a death sentence.<sup>431</sup> Those appointed to represent indigents must be licensed to practice in Idaho and must be "otherwise competent."<sup>432</sup> The state requires each county to establish a system for indigent defense, either through an office of public defender or through a system of appointed counsel, or both.<sup>433</sup> Counties are also permitted to create multi-county public defender offices.<sup>434</sup> Idaho has recently organized a state appellate defender's office to handle capital appeals and post-conviction cases.<sup>435</sup> Members of the state appellate de-

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<sup>424</sup> *Id.*

<sup>425</sup> Questionnaire Response from Ken Robinson, Office of the Attorney General, to Burke W. Kappler ¶ 1 (Feb. 16, 1999) (on file with author) [hereinafter Idaho Response].

<sup>426</sup> See *id.* ¶ 2; IDAHO CODE § 19-2719 (1997).

<sup>427</sup> See IDAHO R. CRIM. P. 44.2; IDAHO CODE § 19-2719(7).

<sup>428</sup> See IDAHO CODE § 19-2719(7).

<sup>429</sup> *Id.* § 19-2719.

<sup>430</sup> *Id.* § 19-852(b)(3).

<sup>431</sup> IDAHO R. CRIM. P. 44.2.

<sup>432</sup> IDAHO CODE § 19-855.

<sup>433</sup> *Id.* § 19-859.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* § 19-869 to -870.



fender office must be licensed to practice in Idaho and meet any other criteria established by the state appellate defender.<sup>436</sup> If private counsel is appointed due to a county's choice of system or conflict in the state appellate defender office, that counsel is entitled to reasonable compensation "with regard to the complexity of the issues, the time involved, and other relevant considerations" and reimbursement of necessary direct expenses.<sup>437</sup> Idaho believes that between the new counsel system and these rule changes, it qualifies for opt-in status.<sup>438</sup>

The respondent from Idaho explained the rationale for opt-in:

Our state has attempted to pursue opt-in status more as a public policy statement. These cases tend to drag on for long periods of time and delay seems to be built in to the current system. In fairness to both the families of the victims as well as the capital defendant, there needs to be a more timely method of resolving these cases.<sup>439</sup>

However, the respondent was also sanguine about the chances of success:

[I]t seems that many of the federal judges are resistant to the idea of expedited review of these cases. In my conversations with other Deputy Attorney's General [sic] from other states, many are skeptical that the federal court will ever find that a state has opted in under the requirements in this circuit.<sup>440</sup>

The criminal defense community is apparently conflicted in Idaho. While the community favors the attempt to qualify, they strongly disagree with the approach of the Idaho Supreme Court.<sup>441</sup>

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<sup>436</sup> *Id.* § 19-870.

<sup>437</sup> *Id.* § 19-860(b).

<sup>438</sup> See Idaho Response, *supra* note 425, ¶¶ 5-6.

<sup>439</sup> *Id.* ¶ 4.

<sup>440</sup> *Id.* ¶ 3.

<sup>441</sup> *Id.* ¶ 7.

### 6. *Kansas*

Kansas currently has two prisoners under death sentence since reinstating the death penalty in 1994.<sup>442</sup> Both of these cases are on appeal to the Kansas Supreme Court. Legislation was introduced in 1997 to bring the operation of the Kansas post-conviction statutes and the board in line with the opt-in provisions.<sup>443</sup>

To that end, once a prisoner files a petition attacking his conviction, the district court is required to make a finding on the record that either the prisoner is indigent and accepts counsel or is incompetent to adequately decide, in which case counsel is appointed, or that the prisoner is competent and rejected counsel, in which case counsel is not appointed.<sup>444</sup> Counsel is not appointed to those prisoners who are neither indigent nor incompetent.<sup>445</sup> The state board of indigents' defense has responsibility for providing counsel in the form of public defenders, contract attorneys, and appointed counsel.<sup>446</sup> The 1997 legislation delegated to this board the responsibility for developing standards of competence and standards for compensating attorney time and reimbursing litigation expenses.<sup>447</sup> The Assistant from the Kansas Attorney General's office explained the rationale behind this legislation:

Our decision to pursue legislation which will hopefully qualify us for the "opt-in" procedure was based primarily on policy reasons. The expedited system benefits the State in those instances where the writ might be granted and retrial is necessary. Over time, witness memories fade and unfortunately witnesses either move away or pass on. Expedited review will likely alleviate those problems, whereas under the prior system a case might languish for years before a decision is rendered, sometimes making retrial a virtual impossibility. The obvious advantage of the expedited review for the defendant is where constitutional error is apparent. Expedited review will allow for quicker resolution whereas in the

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<sup>442</sup> Questionnaire Response from Jared S. Maag, Assistant Attorney General, Criminal Litigation Division, Office of the Attorney General, to Burke W. Kappler ¶ 1 (Dec. 22, 1998) (on file with author) [hereinafter *Kansas Response*].

<sup>443</sup> *Id.* ¶ 3.

<sup>444</sup> See KAN. STAT. ANN. § 22-4505 (1995 & Supp. 1998).

<sup>445</sup> *Id.* § 22-4506.

<sup>446</sup> *Id.* § 22-4522.

<sup>447</sup> *Id.* § 22-4505.

past a prisoner might remain incarcerated for years waiting for a decision. The old adage that "justice delayed is justice denied" certainly rings true with this legislation.<sup>448</sup>

He further commented that there have been no challenges from the defense bar and the legislation to attempt opt-in was "well received" in the state legislature.<sup>449</sup> Despite these forward steps to seek opt-in, he acknowledged that with such a new and small death row population, it will be years before opt-in is an issue.<sup>450</sup>

### 7. Maryland

Maryland currently has fifteen prisoners under death sentence, with seven seeking federal habeas corpus review.<sup>451</sup> Maryland has taken the position that the counsel system at issue in *Booth v. Maryland*<sup>452</sup> does comply with the opt-in provisions and no amendment or alteration is necessary.<sup>453</sup>

Maryland relitigated the issue of the compliance of its counsel system twice in 1998. The first case, *Colvin-El v. Nuth*,<sup>454</sup> raised the issue through a federal habeas corpus petition. The second, *Oken v. Nuth*,<sup>455</sup> involved a "Motion for Order Declaring Maryland not to be an Opt-In State," filed by one of the former petitioners from *Booth*. In *Colvin-El*, the court reviewed and accepted Judge Motz's *Booth* opinion finding the counsel system not in compliance, in light of Maryland's failure to amend or alter its counsel system. First, the court concurred with Judge Motz that the system for compensating panel attorneys was "little more than adequate."<sup>456</sup> Turning to the issue of standards of

<sup>448</sup> Kansas Response, *supra* note 442, ¶ 4.

<sup>449</sup> *Id.* ¶ 7.

<sup>450</sup> *Id.* ¶ 1.

<sup>451</sup> See Questionnaire Response from Ann Bosse, Assistant Attorney General, Senior Counsel for Federal Habeas Corpus Litigation, Criminal Appeals Division, Office of the Attorney General, to Burke W. Kappler ¶ 1 (Nov. 23, 1998) (on file with author) [hereinafter Maryland Response].

<sup>452</sup> 940 F. Supp. 849 (D. Md. 1996), *rev'd*, 112 F.3d 134 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2063 (1998). See also *supra* Part III.A.1.

<sup>453</sup> See Maryland Response, *supra* note 451, ¶ 3.

<sup>454</sup> No. Civ. A. AW 97-2520, 1998 WL 386403 (D. Md. July 8, 1998).

<sup>455</sup> No. PJM 97-585, 1998 WL 897340 (D. Md. Dec. 18, 1998).

<sup>456</sup> *Colvin-El*, 1998 WL 386403, at \*4.

competence, the court also agreed with Judge Motz. While in practice, defendants were receiving skilled and experienced post-conviction counsel, the court found that the skimpy requirements and “catch-as-catch-can system” were not the type of mechanisms envisioned by the opt-in statute.<sup>457</sup> The court in *Colvin-El* also pointed out that the requirement of participation in ten felony cases for membership in Panel A (the capital defenders panel) was not sufficient because a lawyer who had plea bargained ten cases could be seen as “technically” competent; the fact that this bare bones minimum did not require any experience with habeas corpus or collateral attack was further proof of its inadequacy.<sup>458</sup> Further, the court correctly pointed out that no Maryland statute or regulation requires these standards to apply to the staff of the Office of Public Defender.<sup>459</sup> Lastly, the court found that Maryland had not provided for entry of an order of court.<sup>460</sup> The State had contended that this requirement was just a safeguard to ensure appointment of counsel.<sup>461</sup> Since the Office of Public Defender was available to appoint counsel, the State argued the entry of court order was unnecessary. The court rejected this argument, finding the Public Defender’s purpose not incompatible with requiring a court order and that such an order was useful for indicating when the statutory clock should run.<sup>462</sup> Because this requirement of an order not only started the clock, but guaranteed no unreasonable delays before counsel was appointed, the court upheld the need for such an order over Maryland’s objection.<sup>463</sup>

In *Oken v. Nuth*, the district court also followed *Booth* and *Colvin-El* in much more summary fashion. In a short opinion, the court found that Maryland had not offered any substantially new evidence of compliance and in light of this failure, reaf-

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<sup>457</sup> *Id.* at \*5.

<sup>458</sup> *Id.* at \*6.

<sup>459</sup> *Id.*

<sup>460</sup> *See id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *See id.* at \*7-\*8.

firmed the reasons why Maryland did not opt in.<sup>464</sup> The opinion did raise one new issue: Maryland contended that Council Order No. 113, adopted by the Fourth Circuit in 1996 and providing substantially the same limitations period for judicial review of habeas petitions as opt-in under Chapter 154, required the district court to follow the opt-in deadlines.<sup>465</sup> In response, the court cited *Truesdale v. Moore*,<sup>466</sup> a South Carolina case in which the Fourth Circuit held that the guidelines in Council Order No. 113 did not mandate that all courts within the Circuit adhere strictly to the timetable, but that it gave the Circuit Executive the ability to inquire into the reasons for delay. The order had no impact on the opt-in status of any state in the circuit, and did not give the states a cause of action for enforcing the order, such as mandamus.<sup>467</sup>

To date, Maryland has litigated the issue of compliance on three separate occasions, with the same result in each. Each court has identified the same problem areas in Maryland's counsel system and has refused to allow Maryland to opt in to Chapter 154. Maryland is currently appealing the decision in *Colvin-El*; obviously the state stands by its position that it is in compliance with Chapter 154 and seeks affirmation from the Fourth Circuit.<sup>468</sup>

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<sup>464</sup> See *Oken v. Nuth*, No. PJM 97-585, 1998 WL 897430, at \*2-\*3 (D. Md. Dec. 18, 1998). The opinion also described the procedural stance of *Booth* following the Fourth Circuit's decision. *Oken* had applied for a Motion for Stay of Mandate pending a petition for certiorari, but the Fourth Circuit's view changed after the Ninth Circuit's decision in *Ashmus v. Woodford*, 202 F.3d 1160, 1160 (9th Cir. 2000). After the *Ashmus* decision, the Supreme Court granted certiorari to *Ashmus*, while holding the *Booth* petition for certiorari under advisement. See *id.* The district court deferred any decision on opt-in until after the Supreme Court completed its review. The Supreme Court then overturned the Ninth Circuit, dismissed *Booth's* petition for certiorari, and the district court agreed to review the opt-in issue in *Oken*. See *id.* at \*2.

<sup>465</sup> *Oken*, 1998 WL 897430, at \*3. See *infra* Part IV.A.13 (discussing South Carolina's stance toward the opt-in provisions).

<sup>466</sup> 525 U.S. 1051 (1998).

<sup>467</sup> *Oken*, 1998 WL 897430, at \*3-\*4.

<sup>468</sup> Given the Fourth Circuit's willingness to adopt Chapter 154-like limitation periods through Council Order No. 113 and its perceived reputation as the most conservative circuit court, Maryland's decision to persist may be wise.

### 8. Missouri

Missouri currently has eighty-seven prisoners under death sentence, with fifty-five prisoners seeking federal habeas corpus relief.<sup>469</sup> Missouri intends to qualify under Chapter 154 and to that end in November 1996 enacted Supreme Court Rule 29.16 to establish the necessary procedures.<sup>470</sup> In essence, the rule contains four sections. The first establishes the entry of order of court, appointing counsel or recording the denial of appointment based on the prisoner's indigency and competency to accept or waive counsel.<sup>471</sup> The second section lays out the required standards of competence. Based on the rule, all appointed counsel must (1) be members of the Missouri bar; (2) have completed twelve hours of training on post-conviction and federal and state death penalty within the previous two years, and have at least three years experience in criminal litigation; (3) have been lead or co-counsel in at least five post-conviction motions for felonies; and (4) have participated as lead or co-counsel to completion in three felony trials or five direct appeals on the state or federal levels.<sup>472</sup> The third section specifies that appointed counsel cannot have represented the prisoner at trial.<sup>473</sup> The fourth section requires that the Office of State Public Defender pay "reasonable" compensation and reimburse "reasonable and necessary" litigation expenses.<sup>474</sup>

Missouri was offered a critical chance to litigate this new rule in *Roll v. Bowersox*,<sup>475</sup> however the district court avoided the issue. Petitioner Roll had exhausted his state post-conviction remedies before Rule 29.16 was enacted and the court refused to apply the rule in retrospect. In so holding, the court also refused to speculate on whether Missouri's new rule qualified un-

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<sup>469</sup> Questionnaire Response from Unnamed Respondent, Attorney General of Missouri, to Burke W. Kappler ¶ 1 (Dec. 15, 1998) (on file with author) [hereinafter Missouri Response].

<sup>470</sup> *Id.* ¶ 3.

<sup>471</sup> MO. R. CRIM. P. 29.16(a).

<sup>472</sup> See MO. R. CRIM. P. 29.16(b).

<sup>473</sup> See MO. R. CRIM. P. 29.16(c).

<sup>474</sup> MO. R. CRIM. P. 29.16(d).

<sup>475</sup> 16 F. Supp. 2d 1066 (W.D. Mo. 1998).

der Chapter 154.<sup>476</sup> Thus, Missouri is waiting for the next federal habeas petition by an inmate who has received counsel under Rule 29.16. As a last note, the Missouri respondent indicated that the defense community in Missouri has reacted "unfavorably" to Rule 29.16.<sup>477</sup>

### 9. Montana

Montana has six prisoners under sentence of death, with only one pursuing federal habeas corpus review. One other prisoner is in state post-conviction review and the others are still in direct state review.<sup>478</sup> In 1997, Montana passed legislation to reform its post-conviction review system to meet the standards in Chapter 154.<sup>479</sup> In particular, Montana added sections providing for the entry of order of court, directing that post-conviction counsel could not be trial or appellate counsel unless both prisoner and counsel expressly agree, and providing that all reasonable expenses and reasonable compensation shall be paid.<sup>480</sup> Competency standards have been drafted and are presently pending before the Montana Supreme Court.<sup>481</sup> The Montana respondent indicated that the purpose behind attempting to opt in was an "obligation to try and move cases more efficiently and bring finality to state court judgments."<sup>482</sup> She commented that the defense bar in Montana resisted passage of the legislation to opt in, but did participate in drafting the competency standards.<sup>483</sup>

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<sup>476</sup> See *id.* at 1071-72 & 1072 n.2.

<sup>477</sup> Missouri Response, *supra* note 469, ¶ 7.

<sup>478</sup> Questionnaire Response from Elizabeth S. Baker, Chief Deputy Attorney General, Legal Services Division, Montana Attorney General, Department of Justice, to Burke W. Kappler ¶ 1 (Dec. 28, 1998) (on file with author) [hereinafter Montana Response].

<sup>479</sup> *Id.* ¶ 3.

<sup>480</sup> See MONT. CODE ANN. § 46-21-201 (1997).

<sup>481</sup> See Montana Response, *supra* note 478, ¶ 6.

<sup>482</sup> *Id.* ¶ 4.

<sup>483</sup> *Id.* ¶ 7.

*10. Nevada*

Nevada has eighty-four prisoners under death sentence, with twenty-two seeking federal habeas corpus relief.<sup>484</sup> In addition, one inmate's mother is seeking federal relief as a "next friend" on the grounds that her son is incompetent.<sup>485</sup>

On December 30, 1998, the Nevada Supreme Court amended its Rule 250 laying out procedures for capital proceedings.<sup>486</sup> The amended Rule 250 requires that counsel in post-conviction proceedings in district court must have served as counsel in at least two post-conviction proceedings arising from felonies.<sup>487</sup> Counsel appointed for direct or post-conviction appeal must have served as counsel in two appeals of felony convictions, though the rule also provides for appointment of otherwise qualified counsel who do not meet these standards, after a thorough review.<sup>488</sup> Each judicial district is required to maintain a list of qualified attorneys, and all attorneys, including public defenders, are required to apply for membership.<sup>489</sup> In addition, the Supreme Court further amended the rule to provide for reasonable compensation to appointed counsel and reimbursement for expenses reasonably incurred, including investigative, expert, and other services.<sup>490</sup> By statute, Nevada compensates non-public defenders at a maximum rate of \$75 per hour, with a maximum fee of \$12,000 for a capital case and \$750 for a writ of habeas corpus or other post-conviction relief.<sup>491</sup> Reimbursement for expenses is also statutorily capped at

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<sup>484</sup> Questionnaire Response from David F. Sarnowski, Chief Deputy Attorney General, Criminal Justice Division, Office of the Attorney General, to Burke W. Kappler ¶ 1 (Jan. 13, 1999) (on file with author) [hereinafter Nevada Response].

<sup>485</sup> *Id.*

<sup>486</sup> Statutorily, Nevada provides that indigent prisoners filing post-conviction petitions may be appointed counsel. See NEV. REV. STAT. § 34.750 (1957 & Supp. 1998). The Nevada Supreme Court has held that this statute creates a right to effective post-conviction counsel. See *McKague v. Whitley*, 912 P.2d 255, 258 n.5 (Nev. 1996); *Bejarano v. Warden*, 929 P.2d 922, 925-26 (Nev. 1996) (holding in both cases that while there is no independent right to effective post-conviction counsel, the fact that such appointment was required by statute creates such a right).

<sup>487</sup> See NEV. S. CT. RULE 250.

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> See *id.*

<sup>491</sup> NEV. REV. STAT. § 7.125 (1998).



\$300.<sup>492</sup> Both compensation statutes provide escape clauses which permit the courts to set fee and expense caps aside.<sup>493</sup> Compensation for trial level representation is paid by the county through the trial court, but compensation for post-conviction review is paid through the State Public Defender.<sup>494</sup>

Nevada's reaction to the opt-in provisions has been positive. The response from the Nevada Attorney General, while cautioning that it represented only that office,<sup>495</sup> described its support for the AEDPA out of concern over "undue delays" with federal courts in Nevada.<sup>496</sup> Beyond supporting the amendment of Supreme Court Rule, the Attorney General's Office has been pushing for other measures to improve post-conviction representation of indigent prisoners.<sup>497</sup> First, the office successfully persuaded the 1997 Nevada legislature to allocate funds to the National Judicial College in Reno to create a three-day death penalty course aimed at educating prosecutors, defense counsel, and judges. The first class was held in December 1998, with another anticipated in February 1999, and two more in June 1999.<sup>498</sup> Second, the Attorney General intends to lobby the 1999 legislature to increase the statutory maximum fees for appointed counsel to track closely to the \$125 per hour rate for habeas counsel set by the federal district court for Nevada. The Attorney General's office believes increasing the fees will provide more incentive for skilled lawyers to accept these cases.<sup>499</sup> As a final note, the Attorney General's response expressed some frustration, not with defense counsel, but with the courts:

Frankly, the practical reality of cases past and present is that notwithstanding major disputes about the nature and extent of discovery in these cases, the lawyers on both sides, particularly this office, have com-

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<sup>492</sup> *Id.* § 7.135.

<sup>493</sup> *Id.* §§ 7.125, 7.135.

<sup>494</sup> *Id.* § 7.155.

<sup>495</sup> See Nevada Response, *supra* note 484, ¶ 4.

<sup>496</sup> *Id.* ¶ 3.

<sup>497</sup> *Id.* ¶ 4.

<sup>498</sup> *Id.* ¶ 6. See Letter from B. Phyllis Whittiker, Program Attorney, National Judicial College, to David Sarnowski, Chief Deputy Attorney General (Jan. 7, 1999) (on file with author).

<sup>499</sup> *Id.* ¶ 4.

plied with federal court requirements to provide state court records, briefs and other documents pursuant to deadlines imposed by the district and circuit courts. Getting the individual judges and panels of circuit judges to issue any substantive rulings on the merits, much less timely ones, is problematic. For example, the circuit court recently "granted" our motion to expedite its disposition of a prisoner's petition for rehearing and suggestion for rehearing en banc, but only after having the matter under consideration for nearly 18 months after its initial ruling in favor of the state.<sup>500</sup>

While the defense community has largely been quiet on this issue, because Nevada's lawyers have not raised the issue themselves, some members of the community did oppose the amendments intended to qualify Nevada.<sup>501</sup>

### *11. New Jersey*

New Jersey has fourteen prisoners under sentence of death, with one pursuing federal habeas corpus review.<sup>502</sup> While New Jersey apparently intends to opt in, it is still in the process of enacting the required measures to do so.<sup>503</sup> New Jersey has created a statewide Office of Public Defender which has primary responsibility for representing indigents at all stages of the criminal process, including post-conviction proceedings,<sup>504</sup> but has not specified standards for competence.<sup>505</sup> The Public Defender Act requires that the Public Defender ensure that outside counsel perform to the level of quality of the Public Defender's office itself.<sup>506</sup> As for the Public Defender, these attorneys are required to "adhere at all times to the standards and level of performance established from time to time by the Supreme Court of New Jersey."<sup>507</sup> At present, the Supreme Court has not enacted standards of competence for post-conviction counsel in capital

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<sup>500</sup> *Id.* ¶ 8.

<sup>501</sup> *Id.* ¶ 7.

<sup>502</sup> Questionnaire Response from Unnamed Respondent, Division of Criminal Justice, Department of Law and Public Safety, to Burke W. Kappler ¶ 1 (Jan. 14, 1999) (on file with author) [hereinafter *New Jersey Response*].

<sup>503</sup> *Id.* ¶ 6.

<sup>504</sup> *Id.* ¶ 2; N.J. STAT. ANN. § 2A:158A-5 (West 1985 & Supp. 1998).

<sup>505</sup> See *New Jersey Response*, *supra* note 502, ¶ 2.

<sup>506</sup> N.J. STAT. ANN. § 2A:158A-10.

<sup>507</sup> *Id.* § 2A:158A-13.

cases.<sup>508</sup> The response from New Jersey indicated that there is a bill before the legislature to establish guidelines for post-conviction relief in capital cases.<sup>509</sup> A fair analysis of New Jersey's ability to opt in can only proceed after this legislation is passed and evaluated.

## 12. Ohio

Ohio presently has 190 prisoners under sentence of death, with seventy-eight seeking federal habeas corpus review.<sup>510</sup> In 1997, following the decision in *Scott v. Anderson*,<sup>511</sup> the Ohio Legislature enacted S.B. 258, which revised the post-conviction petition proceedings contained in Ohio Revised Code § 2953.21.<sup>512</sup> The revision adds a section setting out the entry of order of court, determining whether the prisoner is indigent, competent, and able to waive or accept counsel.<sup>513</sup> An additional section prohibits trial or appellate counsel from serving as post-conviction counsel unless expressly requested, and provides that counsel will be certified under Rule 65 of the Rules of Superintendence for Courts of Common Pleas.<sup>514</sup> However, this rule has been superseded and it is not clear what standards for counsel will be required. Lastly, per the AEDPA, the amendment does not allow the ineffectiveness of appointed counsel to give rise to any claims for relief.<sup>515</sup>

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<sup>508</sup> See N.J. RULES OF COURT, CRIM. R. 3:22-6 (describing appointment of counsel as part of post-conviction relief proceedings, but without standards of competence). In fact, the only standards for public defenders identified in the annotations to the statute are the avoidance of conflicts of interest, and the ability to refuse representation on the grounds of substantial hardship. N.J. STAT. ANN. 2A:158A-13.

<sup>509</sup> See New Jersey Response, *supra* note 502, ¶ 6.

<sup>510</sup> Questionnaire Response from Stuart A. Cole, Assistant Attorney General, Capital Crimes Section, Attorney General of Ohio, to Burke W. Kappler ¶ 1 (Dec. 24, 1998) (on file with author) [hereinafter Ohio Response]. Of the 190 sentenced to death, one is incarcerated in another state and one case is on remand with no further action.

<sup>511</sup> See *supra* notes 352-59 and accompanying text.

<sup>512</sup> Ohio Response, *supra* note 510, ¶ 3-4. The respondent from Ohio specifically stated that the fact of revision does not in any way imply that Ohio was not previously in compliance. See *id.* ¶ 3.

<sup>513</sup> OHIO REV. CODE ANN. § 2953.21(I)(1) (Banks-Baldwin 1984 & Supp. 1999).

<sup>514</sup> *Id.* § 2953.21(I)(2).

<sup>515</sup> *Id.*

Ohio's respondent explained the rationale for the amendment:

In the interest of justice and in order to adjudicate sentences in a timely manner the State intends to continue to pursue all available options under 28 U.S.C. §§ 2261-2265. Additionally, the curtailment of frivolous claims and dilatory tactics would save countless sums expended on needless delays while still preserving the substantive right of habeas review.<sup>516</sup>

He noted that the defense community has opposed the amendment and Ohio's attempt to opt in because "it reduces the amount of options for enacting endless delays."<sup>517</sup>

### 13. South Carolina

South Carolina presently has sixty-six prisoners on death row, with sixty-one under active death sentences. Seven of this latter group are seeking federal habeas corpus review.<sup>518</sup> South Carolina provides appellate and post-conviction counsel through the Office of Appellate Defense.

In June 1996, South Carolina enacted the South Carolina Effective Death Penalty Act which amends the state's Uniform Post-Conviction Procedure Act in order to qualify for Chapter 154 status. South Carolina takes the position that with the passage of this Act, the state is in compliance.<sup>519</sup> The Act provides indigent prisoners a statutory right to two appointed attorneys, at least one of whom meets the standards for trial attorneys in capital cases above, has previously represented a capital prisoner in state or federal post-conviction proceedings, and has completed twelve hours of training in capital appellate or post-conviction defense within two years.<sup>520</sup> South Carolina also adopted the proscription against appointing trial or appellate counsel unless expressly requested.<sup>521</sup> Post-conviction counsel

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<sup>516</sup> Ohio Response, *supra* note 510, ¶ 4.

<sup>517</sup> *Id.* ¶ 7.

<sup>518</sup> Questionnaire Response from Don Zelenka, Assistant Deputy Attorney General, to Burke W. Kappler ¶ 1 (Feb. 5, 1999) (on file with author) [hereinafter South Carolina Response].

<sup>519</sup> *Id.* ¶¶ 3, 7.

<sup>520</sup> S.C. CODE ANN. § 17-27-160(B) (Law Co-op. 1976 & Supp. 1999).

<sup>521</sup> *See id.*

are compensated and reimbursed at the same rates as capital trial counsel.<sup>522</sup>

The respondent from South Carolina indicated the state's intent: "Historic delay in federal capital cases demanded that [South Carolina] take advantage of specific provisions that allow for expedited review."<sup>523</sup> He noted that the defense community was uncooperative, arguing for heightened competency standards in the debate over the Uniform Post-Conviction Procedure Act, then declaring that no attorney met the standards.<sup>524</sup> The issue of whether South Carolina has opted in is currently before the federal court in the case of *Richard Tucker v. Michael Moore*, a habeas corpus action to determine if the opt-in limitations apply to Tucker and to South Carolina generally.<sup>525</sup>

The fact that South Carolina chose to attempt to opt in is notable in light of the Fourth Circuit's Judicial Council Order No. 113. This Order, adopted on October 3, 1996, has two prongs.<sup>526</sup> First, Order No. 113 lays out guidelines to ensure that indigent defendants receive competent counsel. It directs the federal courts within the circuit to identify and list qualified attorneys, distinguishing between attorneys competent to serve as lead counsel and attorneys qualified to serve as co-counsel. Second, Order No. 113 imposes on the federal courts within the circuit time limits virtually identical to the time limits for consideration of habeas corpus petitions by prisoners in states *which have opted in*.<sup>527</sup> In *Truesdale v. Moore*, this order was challenged by a petitioner in the course of a federal habeas corpus action against his South Carolina death sentence. Truesdale argued that the Order was invalid because it conflicted with the goals of

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<sup>522</sup> *Id.*

<sup>523</sup> South Carolina Response, *supra* note 518, ¶ 4.

<sup>524</sup> *Id.* ¶ 7.

<sup>525</sup> *Id.* ¶ 5.

<sup>526</sup> See *Truesdale v. Moore*, 142 F.3d 749, 758 (4th Cir. 1998).

<sup>527</sup> *Id.* Order No. 113 directs district courts to render a decision within 180 days of the filing of the habeas corpus petition, with possible extensions up to 30 days. This is similar to 28 U.S.C. §2263(a)-(b), though Order No. 113 provides fewer grounds for tolling this time limits. Order No. 113 also directs the court of appeals to render a decision on appeal with 120 days of receiving the reply brief or after entering the order for rehearing, if a rehearing is required. This limit matches 28 U.S.C. §2266(c)(1)(A)-(B)(ii) (1994 & Supp. 1999).

the AEDPA. Essentially, by adopting the opt-in limitations period, the court gave the states in the Fourth Circuit the quo without requiring the quid—states received the procedural benefits without having to reform their counsel systems in any way.<sup>528</sup> The court disposed of this argument by noting that the Order had no impact on opt-in status under Chapter 154. Instead, the Order was to enable the Circuit Executive to monitor compliance with the limitations period and to police delays.<sup>529</sup> The Order did not decide the opt-in status of any state and incentives for states to opt in were still present.<sup>530</sup> Further, the court held that in expediting death penalty review, the Order was precisely in line with the purposes underlying the AEDPA.<sup>531</sup> At base, Order No. 113 appears to be an attempt by the Fourth Circuit to apply the AEDPA limitations period without tying their own hands to mandatory and inflexible deadlines.

#### 14. Utah

Utah has eleven prisoners under sentence of death, with three seeking federal habeas corpus review.<sup>532</sup> In 1996, in an attempt to opt in to Chapter 154, Utah passed the Post-Conviction Remedies Act, which guaranteed the right to post-conviction counsel for prisoners under sentence of death.<sup>533</sup> The Act requires that the court enter into the record findings of the prisoner's indigency and whether the prisoner accepts counsel.<sup>534</sup> The Act also states that "[c]osts of counsel and other reasonable litigation expenses" will be reimbursed.<sup>535</sup> Utah's reasons for at-

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<sup>528</sup> *Truesdale*, 142 F.3d at 759.

<sup>529</sup> *Id.*

<sup>530</sup> *Id.* The court has been shown to be mostly correct. Of the states in the Fourth Circuit, South Carolina and Maryland are pursuing opt-in. North Carolina is ambivalent, having amended its post-conviction procedures. See discussion on North Carolina, *infra*, Part IV.C.7. Virginia is also hesitant, largely based on the perception that Order No. 113 renders opt-in moot. See discussion on Virginia, *infra*, Part IV.C.12. The remaining state, West Virginia, does not have the death penalty.

<sup>531</sup> *Truesdale*, 142 F.3d at 759.

<sup>532</sup> Questionnaire Response from Unnamed Respondent, State of Utah Attorney General, to Burke W. Kappler ¶ 1 (Dec. 28, 1998) (on file with author) [hereinafter Utah Response].

<sup>533</sup> See UTAH CODE ANN. § 78-35a-202 (1995 & Supp. 1999).

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

tempting to qualify were "Public policy and popular sentiment. Capital cases languish for years with no resolution, enraging the public (especially the victims' families)."<sup>536</sup>

The contours of the Act were later defined through court rules and administrative regulations. Rule 8 of the Utah Rules of Criminal Procedure lays out the standards for competence. The court may appoint one or more attorneys and make a finding that at least one of the appointed counsel is qualified.<sup>537</sup> To be qualified, the attorneys must have tried four civil or felony trials in the past four years, or tried ten cases overall.<sup>538</sup> The attorney must have previous experience with three felony or post-conviction appeals, including one evidentiary hearing, or must have "demonstrated proficiency in . . . post-conviction litigation."<sup>539</sup> Lastly, the attorney must have completed eight hours of death penalty or capital post-conviction representation training in the previous five years.<sup>540</sup> Tellingly, the Rule also provides that "[m]ere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not [in and] of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal."<sup>541</sup>

The Utah Administrative Code describes the mechanism for compensating appointed counsel and reimbursing litigation expenses. In operation, attorneys are compensated in lump sums for completing certain services in the course of representation. For example, an appointed attorney would receive \$5,000 for correctly filing a petition for post-conviction relief, and would receive another \$5,000 for an evidentiary hearing.<sup>542</sup> In addition, appointed counsel may earn an extra \$100 per hour up to a maximum of \$5,000 for "extraordinarily legal services that were not reasonably foreseeable" and were "reasonable

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<sup>536</sup> Utah Response, *supra* note 532, ¶ 4.

<sup>537</sup> See UTAH R. CRIM. P. 8(e) (1998).

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* R. 8(f).

<sup>542</sup> UTAH ADMIN. CODE R25-14-4 (1996). The rules are rather specific. The attorney is eligible for the \$5,000 for an evidentiary hearing as of the swearing-in of the first witness.

and necessary for the presentation of the client's claims."<sup>543</sup> The Rules also reimburse reasonable and necessary litigation expenses for investigators experts, and consultants, up to a maximum of \$10,000.<sup>544</sup>

### 15. Washington

Washington currently has fifteen prisoners under sentence of death, with three seeking federal habeas corpus relief.<sup>545</sup> Washington guaranteed a right to post-conviction counsel to indigents prior to enactment of the AEDPA.<sup>546</sup> The responsibility for actually supplying the counsel was delegated to counties and cities, who were directed to choose between contract attorneys, assigned counsel, and public defender offices. Cities and counties were also directed to establish standards for this counsel, including compensation, caseload, reporting, and qualifications.<sup>547</sup> Through this counsel, indigent prisoners could seek a variety of post-conviction remedies and collateral attacks, including but not limited to the writ of habeas corpus.<sup>548</sup>

However, in 1997 Washington amended its post-conviction procedure to provide a single remedy known as the personal restraint petition. This personal restraint petition is explicitly designed to supercede the previous remedies of habeas corpus and other post-conviction applications, though jurisdiction for this petition limited is to the Court of Appeals.<sup>549</sup>

Prisoners are entitled to appointment of counsel to assist in filing the personal restraint petition if indigent. More than one

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<sup>543</sup> *Id.*

<sup>544</sup> UTAH ADMIN. CODE R25-14-5.

<sup>545</sup> Questionnaire Response from John Sansom, Attorney General of Washington, to Burke W. Kappler ¶1 (Mar. 5, 1999) (on file with author) [hereinafter Washington Response].

<sup>546</sup> See WASH. REV. CODE. ANN. §§ 10.73.150, 36.26.080 (West 1991 & Supp. 1999). Though public defenders have a statutory duty to "prosecute any appeals and other remedies, whether before or after conviction" the public defender is allowed to limit his representation to those cases he believes "to be in the interests of justice." *Id.* § 36.26.080.

<sup>547</sup> *Id.* § 10.101.030.

<sup>548</sup> WASH. R. APP. P. R. 16.3.

<sup>549</sup> *Id.* Despite this new remedy, writs of habeas corpus may still be filed in the Superior Court. *Id.*



counsel may be appointed, but at least one must have three years experience in criminal appeals or collateral attacks, knowledge of the laws governing capital punishment, and the "necessary proficiency and commitment" required for quality representation in capital cases.<sup>550</sup> A list of qualified attorneys will be kept by the Supreme Court. The rule appointing counsel additionally states that counsel will not be appointed if "the court is satisfied that petitioner's election [to proceed pro se] is knowing, intelligent, and voluntary."<sup>551</sup> Trial attorneys will not be appointed, but attorneys from the direct appeal may be appointed after an express request.<sup>552</sup> While this rule does not provide for compensation of counsel, a separate rule governing the personal restraint petition process allows the prisoner to move for investigative, expert, or other services upon a showing that the services will produce information that will support the prisoner's claim for relief.<sup>553</sup>

The language and the timing of these new rules for personal restraint petitions indicates they were adopted with an intent to qualify for opt-in status under Chapter 154.<sup>554</sup> However, the respondent from Washington refused to publicly speculate on Washington's motives for doing so, believing that this information might reveal the position the state would take in any litigation over opt-in prematurely.<sup>555</sup>

#### B. "NO": STATES THAT DO NOT INTEND TO PURSUE OPT-IN STATUS

Only three states, Delaware, Georgia, and Nebraska, declared they would not seek to opt in to, or were not in compli-

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<sup>550</sup> WASH. R. APP. P. R. 16.25. Special rules adopted for capital cases in the Superior Court establish similar standards of competency for attorneys representing capital defendants at trial and on appeal. In addition to the standards above, these attorneys must have five years experience in criminal law and must be familiar with evidence and expert witnesses. See WASH. REV. CODE. ANN. Super. Ct. Spec. P. Crim. Rules 2 (West 1991 & Supp. 1999).

<sup>551</sup> WASH. R. APP. P. R. 16.25.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* R. 16.27.

<sup>554</sup> Washington Response, *supra* note 545, ¶3.

<sup>555</sup> *Id.* ¶¶ 4, 6-8. See also Telephone Interview with John Sansom, Attorney General of Washington (Feb. 22, 1999).

ance with, Chapter 154. The states are in different positions and their answers are instructive.

### 1. Delaware

Delaware currently has seventeen prisoners under sentence of death, with two seeking federal habeas review in the district court and five appealing such review in the court of appeals.<sup>556</sup> While Delaware does provide a right to assigned counsel from the initial appearance through the first appeal as of right,<sup>557</sup> counsel will only be appointed to indigents in the post-conviction setting at the court's discretion upon a showing of good cause.<sup>558</sup> Delaware uses a statewide public defender office to provide counsel, supplemented by contract attorneys in the event of conflict. In addition, courts may appoint outside counsel if the list of contract attorneys is not sufficient.<sup>559</sup> Generally, in death penalty cases, two attorneys are appointed for trial, one or two are appointed on appeal, and two are appointed for post-conviction proceedings.<sup>560</sup> Unless the defendant requests it, new counsel is appointed between appeal and post-conviction.<sup>561</sup> Delaware's system does not specify standards of competency. Although the system does allow reimbursement for necessary expenses and although compensation is capped at \$50 per hour up to \$2000, as a practical basis, these are not followed.<sup>562</sup>

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<sup>556</sup> Unofficial Questionnaire Response from Unnamed Respondent to Burke W. Kappler ¶1 (Feb. 14, 1999) (on file with author) [hereinafter Delaware Unofficial Response].

<sup>557</sup> See DEL. R. SUP. CT. CRIM. R. 44(a).

<sup>558</sup> DEL. R. SUP. CT. CRIM. R. 61(e)(1).

<sup>559</sup> Delaware's criminal justice community is quite compact. The Attorney General is the only prosecuting agency. The Criminal Division handles all trials, while the Appeals Division, composed of seven attorneys, handles all appeals and all state and federal post-conviction litigation. Beyond the public defender office, there are only 10-12 attorneys on contract with the state and approximately 20 private criminal defense attorneys. See Delaware Unofficial Response, *supra* note 556.

<sup>560</sup> See Delaware Unofficial Response, *supra* note 556, ¶ 2.

<sup>561</sup> See *id.*

<sup>562</sup> See Delaware Sup. Ct. R. Crim. P. 44(e)(2); Delaware Unofficial Response, *supra* note 556, ¶ 2.

Delaware has not pursued opt-in status for several reasons.<sup>563</sup> First, there were concerns that establishing the necessary competency standards would be futile. It was obvious that based on the litigation history these standards would have to be high.<sup>564</sup> Given Delaware's small defense community, few of these attorneys would qualify, even under the minimal standards for federal post-conviction counsel in the Anti-Drug Abuse Act of 1988.<sup>565</sup> Moreover, it appeared that the standards could actually be used to prevent opt in by those opposed to capital punishment: either the standards could be set so high that no attorney qualified, or committed defense attorneys would simply avoid obtaining the required credentials.<sup>566</sup> The response expressed an additional concern:

[There is] a philosophical objection. [T]he regulation of the practice of law has traditionally been left to the states. [S]ection 2261, though well-intentioned, is a means by which the federal judiciary can supervise the qualifications of attorneys admitted to practice. [T]he criminal justice system already bears the heavy hand of federal intervention [beyond the] incorporation doctrine; one need only look at the requirements in the federal crime bills that the states register sex offenders in order to qualify for federal crime money. [T]he states should resist the invitation to invite the federal courts into yet another aspect of state criminal practice and procedure.<sup>567</sup>

Second, given the small size of the Attorney General's office, opting in created practical resource issues. The Appeals Division has seven attorneys bearing a caseload of 250-300 cases a year.<sup>568</sup> As such, Delaware simply does not have the manpower to undertake the complex and time-consuming litigation necessary to achieve opt-in. Moreover, even if Delaware succeeded in opting in, the resulting accelerated review period would simply

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<sup>563</sup> As a tangent, Delaware also litigated the issue of opt-in in a declaratory judgment suit by a prisoner. In an unreported opinion, the district court judge struck the motion down on ripeness grounds in line with *Death Row Prisoners v. Ridge*, 948 F. Supp. 1258 (E.D. Pa. 1996). Delaware Unofficial Response, *supra* note 556, ¶5.

<sup>564</sup> *Id.* ¶¶ 3, 4.

<sup>565</sup> *See id.* ¶ 3.

<sup>566</sup> *See id.*

<sup>567</sup> *Id.*

<sup>568</sup> *See id.*

increase the workload of the Division.<sup>569</sup> Furthermore, there appeared to be no need to opt in.<sup>570</sup> Generally, the federal courts were consistent in reviewing both capital and noncapital cases within a year and there were no indications of intentional or unreasonable delay.<sup>571</sup>

Arguably, Delaware may be in a unique position among death penalty states, given its small size, prosecutorial structure, and size of the criminal justice community, but the unofficial response provides useful criticisms of the opt-in provisions and their utility for expediting habeas corpus review.

## 2. Georgia

Georgia has between 115 and 120 inmates under death sentences, with twenty-one pursuing federal habeas corpus review as of December 1998.<sup>572</sup> While Georgia has created a multicounty public defender in order to represent all indigent defendants charged with a capital crime, the state does not provide for appointment of post-conviction counsel at all.<sup>573</sup> However, even the multicounty public defender is limited. For example, the regular county public defender may retain the case if he or she chooses.<sup>574</sup> Further, the multicounty public defender may only represent the client through trial and appeal to the Georgia Supreme Court; no post-conviction representation or assistance is permitted.<sup>575</sup> Lastly, there are no real standards for competency. Georgia's statutes only guarantee that, "[n]o person may . . . represent[] an indigent person . . . unless such person is authorized to practice law in this state and is otherwise competent to counsel and defend a person charged with a capi-

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<sup>569</sup> *See id.*

<sup>570</sup> *See id.*

<sup>571</sup> *Id.*

<sup>572</sup> Questionnaire Response from Mary Beth Westmoreland, Deputy Attorney General, Department of Law, to Burke W. Kappler ¶ 1 (Jan. 26, 1999) (on file with author) [hereinafter Georgia Response].

<sup>573</sup> *See id.* ¶ 2; GA. CODE ANN. §17-12-91 (1998). Organizations such as the Georgia Resource Center provide representation and assistance, but are not mandated by the state. *See* Georgia Response, *supra* note 572, ¶ 2.

<sup>574</sup> GA. CODE ANN. § 17-12-97 (1998).

<sup>575</sup> *Id.*

tal felony.”<sup>576</sup> If the multicounty public defender is unavailable, or is conflicted out of representation, another attorney may be appointed.<sup>577</sup> This attorney may be compensated no more than \$250 for his or her representation in a capital case, and may be reimbursed no more than \$500 for expenses.<sup>578</sup> The Georgia Attorney General refused to speculate on why Georgia had decided not to provide post-conviction counsel, deferring to the legislature or other state executive offices.<sup>579</sup> However, given the lack of any post-conviction counsel, Georgia has effectively declared that it will not pursue opt-in.

### 3. Nebraska

In contrast, Nebraska currently has ten prisoners under death sentence, none of whom are presently seeking federal habeas corpus review.<sup>580</sup> Nebraska guarantees counsel to indigent defendants at trial and direct appeal, but retains discretion to appoint post-conviction counsel.<sup>581</sup> While up to two counsel may be appointed in capital cases, there are no special requirements for these attorneys.<sup>582</sup> The Nebraska legislature proposed measures to meet Chapter 154 last session, but the bill was held over and has not been reconsidered.<sup>583</sup> In general, the Nebraska Attorney General is not seeking passage of the bill for three basic reasons. First, Nebraska is generally not losing ineffective assistance of counsel claims, an indication to the Attorney General that the present system of counsel provision is adequate. Second, Nebraska echoes many other states in believing that no federal court will ever allow a state to qualify, or will allow a state to qualify under objectively reasonable standards. Third, Nebraska has experienced an improvement in federal case man-

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<sup>576</sup> *Id.* § 17-12-96.

<sup>577</sup> *Id.* § 17-12-97.

<sup>578</sup> *See id.* §17-12-61.

<sup>579</sup> Georgia Response, *supra* note 572, ¶4.

<sup>580</sup> *See* Questionnaire Response from J. Kirk Brown, Office of the Attorney General, Nebraska Department of Justice, to Burke W. Kappler ¶ 1 (Jan. 26, 1999) (on file with author) [hereinafter Nebraska Response].

<sup>581</sup> *Id.* ¶ 2.

<sup>582</sup> *Id.*

<sup>583</sup> *Id.* ¶ 3.

agement.<sup>584</sup> As the survey response states, "Our successful litigation history on this issue, coupled with an observable hostility to standards by the federal courts, and the fact that we have seen a marked improvement in federal case movement just prior to AEDPA, makes opting in appear more trouble than its [sic] worth."<sup>585</sup>

C. "MAYBE": STATES THAT HAVE NOT DECIDED WHETHER TO PURSUE OPT-IN STATUS

Twelve states have not yet decided to pursue opt-in. These states include Connecticut, Florida, Indiana, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Virginia, and Wyoming. In general, this hesitation is because these states have few or no prisoners currently under death sentence and these prisoners are still in the process of exhausting their state remedies. In other cases, states are unconvinced that opt-in is possible in light of the experiences of the states who have tried. These states reserve the right to opt in, pending a shift in the attitudes of the federal judiciary.

1. *Connecticut*

Connecticut presently has five prisoners under death sentences, all of whom are in the direct appeal stage.<sup>586</sup> Connecticut's Public Defender provides two full time attorneys as post-conviction counsel to all capital defendants, except where the attorneys may be conflicted out of representation.<sup>587</sup> Connecticut's response to the survey indicated frustration with both the Public Defender and the courts. First, the respondent described how the Public Defender was expected to produce standards of competency, but had failed to do so yet. The respondent attributed this failure to an incentive problem; once the standards were in place and Connecticut opted in, the Pub-

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<sup>584</sup> *Id.* ¶ 4.

<sup>585</sup> *Id.* ¶ 8.

<sup>586</sup> Questionnaire Response from Unnamed Respondent, Division of Criminal Justice, Chief State's Attorney, to Burke W. Kappler (Dec. 22, 1998) (on file with author) [hereinafter Connecticut Response]. The response was incomplete because the respondent only returned the first page of the questionnaire.

<sup>587</sup> *Id.* ¶ 2.

lic Defender's clients would be greatly limited. Not producing standards was seen as a way of avoiding this outcome. Second, the respondent pointed to the reluctance of the courts and said, "most jurisdictions will never find a system in compliance. . . ." <sup>588</sup> The tone of the response indicated that Connecticut might pursue opt-in, but felt constrained by the courts and the Public Defender.

## 2. Florida

Florida has approximately 370 prisoners under sentence of death, with between forty and fifty seeking federal habeas review. <sup>589</sup> In 1997, Florida broke the single Capital Collateral Representative (CCR) office into three regional CCR offices. <sup>590</sup> The sole purpose of the CCR is to represent indigents pursuing collateral attack on their convictions in state and federal courts. <sup>591</sup> In the event of conflict, the sentencing court is to appoint one of the other regional CCRs, and if the conflict is still present, a private member of the Bar. <sup>592</sup> Members of the CCR offices are required to have not less than three years experience in criminal law practice and must have participated in five felony jury trials, five felony appeals, five capital post-conviction proceedings, or any combination of at least of these proceedings. <sup>593</sup> CCR offices may contract with private attorneys, who are required to have the same experience. <sup>594</sup> Private counsel appointed in the case of conflict must have participated in five felony jury trials, five felony appeals, or five capital post-conviction proceedings, or any combination of five such experiences. <sup>595</sup>

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<sup>588</sup> *Id.*

<sup>589</sup> Telephone Interview with Richard Martel, Florida Attorney General's Office (Feb. 10, 1999).

<sup>590</sup> See FLA. STAT. ANN. § 27.701 (West 1998).

<sup>591</sup> See *id.* § 27.702(1).

<sup>592</sup> *Id.* § 27.703(1).

<sup>593</sup> *Id.* § 27.704(2).

<sup>594</sup> *Id.*

<sup>595</sup> *Id.* § 27.703(3).

Though the Attorney General takes the position that Florida qualifies,<sup>596</sup> Florida has chosen the “wait-and-see” approach and is assessing the circumstances.<sup>597</sup> Several factors are weighing on Florida’s consideration. First, the 11th Circuit vacated the district court’s decision that Florida had not qualified under Chapter 154 in *Hill v. Butterworth*. Therefore, at present, Florida has a blank slate as far as Chapter 154 is concerned.<sup>598</sup> A second consideration is the nonretroactivity of the opt-in provisions. Effectively, a state may only argue that its present system of providing post-conviction counsel is in compliance; a state may not argue that a prior system was in compliance.<sup>599</sup> Florida has amended their post-conviction counsel system greatly over the past few years and is concerned that nonretroactivity will simply leave large numbers of their prisoners immune to opt-in status. Third, Florida is watching internal developments in the federal system. There have been recent indications that the federal courts in the state have accelerated their docket. If the trend continues, Florida may not see the need to opt in.<sup>600</sup>

### 3. *Indiana*

Indiana has forty-five prisoners under death sentence, with seven seeking federal habeas corpus review.<sup>601</sup> Beginning in September 1996, the Attorney General, Public Defender of Indiana, and the Indiana Supreme Court shared ideas for reform proposals which would bring Indiana into compliance. This exchange concluded on a negative, but open, note in June 1998.

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<sup>596</sup> Telephone Interview with Ed Hill, Florida Attorney General’s Office (Nov. 20, 1998).

<sup>597</sup> Telephone Interview with Richard Martel, Florida Attorney General’s Office (Nov. 20, 1998) [hereinafter Martel Interview—Nov.]; Telephone Interview with Richard Martel, Florida Attorney General’s Office (Feb. 10, 1999) [hereinafter Martel Interview—Feb.].

<sup>598</sup> Martel Interview—Nov., *supra* note 597; Martel Interview—Feb., *supra* note 597.

<sup>599</sup> Martel Interview—Feb., *supra* note 597. See also *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996).

<sup>600</sup> Martel Interview—Feb., *supra* note 597. However, Mr. Martel was unaware of Judicial Council Order No. 113 and asked this author for a cite where details on the Order can be located.

<sup>601</sup> Questionnaire Response from Jon Laramore, Chief Counsel, Appeals Division, Indiana Attorney General’s Office, to Burke W. Kappler ¶ 1 (Jan. 20, 1999) (on file with author) [hereinafter Indiana Response].



While Indiana's Criminal Rule 24 sets forth a comprehensive system for the appointment of trial and appellate counsel, including requiring years of experience, numbers of previous cases, hours of training, and a maximum caseload,<sup>602</sup> the Rule does not guarantee provisions of post-conviction counsel. Rather, the Rule provides that within thirty days from a rehearing on direct appeal, either private counsel or the State Public Defender may enter an appearance as post-conviction counsel.<sup>603</sup> Furthermore, there are no standards of competence for post-conviction counsel.<sup>604</sup>

Without an automatic offer of post-conviction counsel, Indiana was not eligible under § 2261. Based on this, the Indiana Supreme Court invited the State Public Defender to propose rule changes to bring Indiana into compliance.

In September 1996, the Public Defender submitted her proposal. First, the Public Defender recommended amending Rule 24 to offer post-conviction counsel to all prisoners under death sentence.<sup>605</sup> Indiana already provides that the Public Defender will represent all indigents,<sup>606</sup> the proposal recommends that the current requirement of filing an appearance substitute for the entry of an order of court under § 2261.<sup>607</sup>

Second, the Public Defender recommended that the Rule be fleshed out to provide standards of competence and a mechanism for compensation and reimbursement of expenses. Indigent defendants would be provided at least two attorneys.<sup>608</sup> These post-conviction counsel must be members of the Indiana Bar, or be admitted *pro hac vice*.<sup>609</sup> Lead post-conviction counsel would be required to have either represented a capital defendant through state post-conviction relief or federal habeas corpus, or failing that, have met the current standards for trial and

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<sup>602</sup> IND. R. CRIM. P. 24(B) (West 1996 & Supp. 1998).

<sup>603</sup> *Id.* at Rule 24(H).

<sup>604</sup> *Wallace v. State*, 640 N.E.2d 374, 376 (Ind. 1994).

<sup>605</sup> Memorandum from Susan K. Carpenter, Public Defender of Indiana 8 (date unknown) (on file with author) [hereinafter *Carpenter Memorandum*].

<sup>606</sup> IND. CODE ANN. § 33-1-7-2(a) (West 1996).

<sup>607</sup> *Carpenter Memorandum*, *supra* note 605, at 8.

<sup>608</sup> *Id.* at 31.

<sup>609</sup> *Id.*

appellate counsel under Rule 24.<sup>610</sup> Further, lead counsel would be required to have at least two years experience in post-conviction or habeas corpus criminal defense.<sup>611</sup> If lead counsel meets these standards, co-counsel would be required to have at least two years criminal law experience, including at least one death penalty trial, appeal, state post-conviction relief, or federal habeas corpus petition.<sup>612</sup> Both counsel would have to complete six hours training in capital post-conviction or federal habeas corpus within one year of appointment, and at least twelve hours within two years of appointment.<sup>613</sup>

Finally, appointed counsel must “[p]ossess demonstrated proficiency in and commitment to quality representation of capital . . . petitioners.”<sup>614</sup> In terms of compensation, the Public Defender’s proposal suggested that the Public Defender’s office would pay for reasonable and necessary litigation expenses, and would provide adequate office support for appointed counsel.<sup>615</sup> If counsel were outside attorneys appointed because of conflicts, the Public Defender would compensate the attorneys at \$70 per hour.<sup>616</sup>

In January 1997, at the invitation of the Indiana Supreme Court, the Attorney General responded to the Public Defender’s proposal, gently criticizing the proposal for lack of clarity and for suggesting post-conviction standards of competence that were lower than the standards for trial and appeal. This proposal, the Attorney General argued, “diminishe[d] the importance of post-conviction proceedings.”<sup>617</sup>

Instead, the Attorney General recommended adding sections to Rule 24(H) to more sufficiently develop the mechanism for post-conviction counsel. The first additional section pro-

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<sup>610</sup> *Id.*

<sup>611</sup> *Id.*

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* at 32.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 32-33.

<sup>617</sup> Letter from Jeffrey A. Modisett, Attorney General, State of Indiana, to the Hon. Randall T. Shepard, Chief Justice of Indiana 2 (Jan. 23, 1997) (on file with author) [hereinafter Modisett Letter].

vides for the entry of an order of the court determining that the inmate was indigent, competent, and knowingly accepted or rejected counsel.<sup>618</sup> The second additional section provides for standards of competence and compensation. This section requires that appointed counsel have at least five years of litigation experience, three years of post-conviction experience, prior experience in at least five felony post-conviction cases, including one capital case, and have completed twelve hours of training within the previous two years.<sup>619</sup> The section provides for the same basic compensation as the Public Defender proposal: the Public Defender will cover necessary and reasonable expenses for Public Defenders and outside attorneys; outside attorneys will receive \$70 per hour in compensation.<sup>620</sup>

On June 30, 1998, the Supreme Court formally communicated its decision. The Chief Justice wrote to both the Attorney General and the Public Defender, stating:

Initially, we thought it highly likely that Indiana's high-caliber post-conviction system would meet the opt-in requirements in § 2261 . . . . The materials provided by both of you and particularly the cases cited in Susan's September 1996 and March 1997 materials [which provide a summary of the opt-in litigation history, similar to Part II, *supra*], however, led us to conclude otherwise. In view of the apparent hostility of the federal courts to attempts by other states to opt in, we concluded at the time that it was not wise to invest the time and resources necessary to go forward.

. . . .

Decisions reported in the last year suggest continued lack of enthusiasm in the federal courts, and we still perceive that the likely results from an attempt to opt in do not merit the investment of time and expense that would be involved.<sup>621</sup>

Despite this pessimistic statement, the letter concluded on an open note, "[o]n the other hand, we would be glad to reconsider if either of you believe a set of rules could be developed that would satisfy the federal judiciary and have some specific

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<sup>618</sup> *Id.* at 3.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.* at 4.

<sup>621</sup> Letter from the Hon. Randall T. Shepard, Chief Justice of Indiana, to Jeffrey Modisett, Attorney General of Indiana and Susan K. Carpenter, Public Defender of Indiana 1 (June 30, 1998) (on file with author) [hereinafter Shepard Letter].

ideas.<sup>622</sup> The response from the Indiana Attorney General indicated that the Attorney General still favored opting in and believed the proposed amendment to Rule 24 would enable Indiana to qualify.

#### 4. *New Hampshire*

New Hampshire presently has no prisoners under death sentence. In fact, there was only one capital murder prosecution in 1998, which resulted in a guilty plea and life sentence.<sup>623</sup> In all criminal cases involving an indigent, the court will appoint counsel from the public defender's office. If the public defender is unavailable due to conflict, the court will appoint an attorney from a group of contract defense attorneys and then can appoint any competent counsel.<sup>624</sup> New Hampshire provides for the payment of reasonable compensation at a rate of \$60 per hour, with a maximum fee in homicide cases of \$15,000.<sup>625</sup> Reasonable and necessary expenses will also be reimbursed.<sup>626</sup> Given the absence of a death row, qualifying under Chapter 154 is a decision that is literally years away for New Hampshire, and the state has chosen to take no position on the matter.<sup>627</sup>

#### 5. *New Mexico*

New Mexico is in a similar position to New Hampshire, having a death row with only four prisoners, all of whom are still pursuing state remedies. Given this position, New Mexico anticipates not confronting opt-in for years in advance.<sup>628</sup> New Mexico provides post-conviction representation through a state public defender office with an appellate division, or through

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<sup>622</sup> *Id.* at 2.

<sup>623</sup> Questionnaire Response from N. William Delker, Assistant Attorney General, Criminal Justice Bureau, Attorney General, to Burke W. Kappler ¶ 1 (Jan. 7, 1999) (on file with author) [hereinafter *New Hampshire Response*].

<sup>624</sup> *Id.* ¶ 2; see also N.H. REV. STAT. ANN. § 604-A:2 (1986).

<sup>625</sup> N.H. SUP. CT. R. 47.

<sup>626</sup> *Id.*

<sup>627</sup> *New Hampshire Response*, *supra* note 615, ¶ 3.

<sup>628</sup> Telephone Interview with Elizabeth Blaisdell, New Mexico Attorney General's Office (Feb. 1, 1999).

outside counsel appointed through New Mexico's Indigent Defense Act.<sup>629</sup> The public defender has the authority to set the agency's own budget.<sup>630</sup> Private counsel appointed under the Indigent Defense Act receive a maximum of \$150 for a post-conviction proceeding, \$500 for an appeal to the supreme court, \$150 for a habeas corpus proceeding, and a sum determined by the court for a capital case.<sup>631</sup>

#### 6. *New York*

Likewise, New York only has two prisoners under death sentence since the death penalty was reinstated under Governor George Pataki in 1994.<sup>632</sup> As a trade-off for the reinstatement, New York statutorily established a capital defender office in 1995.<sup>633</sup> Defendants facing possible capital sentences are entitled to two attorneys from the capital defender office or from the public defender, legal aid society, or other non-profit legal organization with which the capital defender office has entered into an agreement.<sup>634</sup> The capital defender office is instructed to establish a screening panel to maintain a roster of qualified attorneys and will provide investigative, expert, and other reasonably necessary services to their clients and to defendants accused of first degree murder not represented by the capital defenders office. However, the responsibility of the capital defenders office does not extend to post-conviction representation and, in fact, the capital defenders are explicitly prohibited from helping capital prisoners prepare petitions for federal habeas corpus.<sup>635</sup> Given the recent adoption of the death penalty, New York takes no position and is years away from a decision.

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<sup>629</sup> N.M. STAT. ANN. § 31-15-8 (Michie 1978).

<sup>630</sup> *Id.* § 31-15-5.

<sup>631</sup> *Id.* § 31-16-8.

<sup>632</sup> Telephone Interview with Kevin Gagan, New York Attorney General's Office (Feb. 1, 1999).

<sup>633</sup> *Id.*; N.Y. JUD. LAW § 35-b (McKinney Supp. 1999).

<sup>634</sup> N.Y. JUD. LAW § 35-b(2).

<sup>635</sup> *Id.* § 35-b(1).

7. *North Carolina*

North Carolina has 188 inmates presently under death sentence, with twenty-one prisoners seeking federal habeas corpus review.<sup>636</sup> The state provides court appointed counsel to indigents at trial, appeal, and in post-conviction proceedings.<sup>637</sup> The state has established a public defender system organized by “defender districts” composed of one or two counties each.<sup>638</sup> In addition to the public defender, attorneys practicing in any part of a defender district may be assigned by either the public defender or by the court in the event of conflict with the public defender, to represent an indigent defendant.<sup>639</sup> North Carolina also has established an appellate defender office which represents indigents after conviction, serves as a clearinghouse for materials and educational resources, and recruits private counsel for indigents in state and federal post-conviction proceedings.<sup>640</sup> Appointed trial level attorneys are required to have five years of experience. Two attorneys are appointed for each post-conviction capital case.<sup>641</sup>

North Carolina’s position is unclear, because while the attorney general’s office does not take the position that the state qualifies for opt-in and does not speculate if the state will try, the legislature has made changes to its post-conviction review system which imply that it does seek to qualify under Chapter 154. In a brief response, the attorney general’s office indicated, “[w]e are not aware of any state that has qualified. Also not sure [sic] we have resources to deal with expedited time frame.”<sup>642</sup> This response implies that North Carolina is deterred by both the experience of other states, and, like Delaware, the possibility that the benefits of opt-in may be outweighed by the costs.

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<sup>636</sup> Questionnaire Response from William N. Farrell, Criminal Division Senior Deputy, Department of Justice, to Burke W. Kappler ¶ 1 (Mar. 15, 1999) (on file with author) [hereinafter North Carolina Response].

<sup>637</sup> See N.C. GEN. STAT. §§ 7A-450, 7A-451 (1999).

<sup>638</sup> *Id.* § 7A-465.

<sup>639</sup> *Id.* § 7A-467.

<sup>640</sup> *Id.* § 7A-486.3. Attorneys from the appellate defender office may represent indigents in federal proceedings only if the representation is fully federally funded. *Id.*

<sup>641</sup> North Carolina Response, *supra* note 636, ¶ 2.

<sup>642</sup> *Id.* ¶ 4.

However, in 1996, North Carolina passed the Act to Expedite the Post-conviction Process in North Carolina.<sup>643</sup> Among other changes, the Act altered the basic provision of post-conviction counsel. The Act required that two attorneys be appointed to indigent prisoners seeking to file motions for post-conviction relief.<sup>644</sup> The Act also requires that trial and appellate counsel be different from post-conviction counsel unless expressly requested.<sup>645</sup> The Act also provides that the North Carolina State Bar Council shall establish the rules and procedures for the appointment mechanism "as shall provide for the protection of the constitutional rights of all indigent persons and the reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this State."<sup>646</sup> While these changes do not appear to meet all the requirements under § 2261 (at least through direct state action instead of delegation to a state agency), in the eyes of one expert in post-conviction remedies, this appears to be an attempt to opt in.<sup>647</sup> As such, North Carolina's future is unclear. While the legislature may be taking steps to seek opt-in, the attorney general's office appears reluctant and perhaps resistant to these attempts out of a sense of futility and resource constraints.

#### 8. Oregon

Oregon has twenty-three prisoners under death sentence, none of whom have reached federal habeas corpus review.<sup>648</sup> Oregon provides counsel for indigent defendants at the trial, appeal, and post-conviction levels. Post-conviction counsel is available to any prisoner unable to afford the cost of the proceeding or the cost of a suitably skilled counsel.<sup>649</sup> Oregon also provides that when a petitioner has been determined to be in-

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<sup>643</sup> WILKES, *supra* note 369, at Supp. 268.

<sup>644</sup> *Id.* at Supp. 270; *see also* N.C. GEN. STAT. § 7A-451(c) (1999).

<sup>645</sup> N.C. GEN. STAT. § 7A-451(e).

<sup>646</sup> *Id.* § 7A-459.

<sup>647</sup> WILKES, *supra* note 369, at Supp. 270.

<sup>648</sup> Questionnaire Response from Janet A. Metcalf, Assistant Attorney General, Appellate Division, Department of Justice, to Burke W. Kappler ¶ 1 (Jan. 12, 1999) (on file with author) [hereinafter Oregon Response].

<sup>649</sup> *Id.* ¶ 2; *see also* OR. REV. STAT. § 138.590 (1997).

digent, counsel's fees and expenses, in addition to post-conviction proceeding fees, will be paid by the courts.<sup>650</sup> Oregon further provides extensive standards for post-conviction counsel in capital cases. Such standards include: (1) demonstrated proficiency and years of experience in criminal defense trying major felony cases, including homicides; (2) experience as post-conviction counsel in three major felony cases; (3) legal training or education on defending capital cases; (4) a written statement from the attorney explaining why she believes she is competent to handle these cases; and (5) five certifications of competence from judges and district attorneys familiar with the attorney.<sup>651</sup> Oregon provides counsel through an overlapping system of a state public defender office, county public defenders, and available private counsel. Despite the breadth of its counsel appointment statutes and because Oregon has no prisoners currently seeking federal review, it has postponed any decision on seeking opt-in.<sup>652</sup>

### 9. *Pennsylvania*

Pennsylvania currently has 223 prisoners under sentence of death, with twenty-four prisoners seeking federal habeas review.<sup>653</sup> Pennsylvania provides counsel to prisoners for the first motion for post-conviction relief after a showing of indigency. The Commonwealth will provide counsel on a second or subsequent motion only if an evidentiary hearing is required.<sup>654</sup>

Pennsylvania does not have standards of competency.<sup>655</sup> The Capital Unitary Review Act, which went into effect in January 1996, required the Pennsylvania Supreme Court to develop such standards as part of establishing a unitary review mecha-

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<sup>650</sup> See OR. REV. STAT. § 138.590 (1997).

<sup>651</sup> Oregon Qualification Standards for Court-Appointed Attorneys, Standard 3.1(J).

<sup>652</sup> Oregon Response, *supra* note 648, ¶ 3.

<sup>653</sup> Questionnaire Response from Christy H. Fawcett, Deputy Attorney General, Capital Litigation Unit, Office of Attorney General, to Burke W. Kappler ¶ 1 (Jan. 4, 1999) (on file with author) [hereinafter Pennsylvania Response]. The response notes that 121 of these prisoners, or more than half, were convicted in the Philadelphia Court of Common Pleas. *Id.*

<sup>654</sup> *Id.* ¶ 2; see also PA. R. CRIM. P. 1504.

<sup>655</sup> Pennsylvania Response, *supra* note 653, ¶ 2.



nism. However, the Court permanently suspended the Act in August 1997, prior to establishing any standards. In *Commonwealth v. Albrecht*, the Court held that Rule 1504 of the Pennsylvania Rules of Criminal Procedure guaranteed an enforceable right to effective post-conviction counsel, with standards identical to U.S. constitutional standards for effective counsel under *Strickland v. Washington*.<sup>656</sup>

Pennsylvania has adopted a unique approach to Chapter 154. The Commonwealth's system of criminal defense and prosecution is highly decentralized. Indigent defense services are provided through county-level public defenders offices, funded by the individual counties.<sup>657</sup> In turn, county district attorneys bear the responsibility for litigating federal habeas corpus actions on convictions from their jurisdictions.<sup>658</sup> The Office of Attorney General does not supervise the county district attorneys. As a result, Pennsylvania implies that individual counties may make the decision to opt in under Chapter 154.<sup>659</sup> In fact, the Philadelphia District Attorney's Office argues that appointed defense counsel in Philadelphia County do meet the criteria for opt-in.<sup>660</sup> This county-by-county approach was rejected by the Third Circuit in *Death Row Prisoners v. Ridge*, discussed above, in which the Court held that opt-in status was to be made by a statewide authority, not individual counties.<sup>661</sup> While Pennsylvania has taken no affirmative steps to opt in following the court's decision, it has also not clearly ruled out the

<sup>656</sup> *Id.*, (citing *Commonwealth v. Albrecht*, 720 A.2d 693, 699 (1998)).

<sup>657</sup> See PA. STAT. ANN. tit. 16, § 9960.3 to -.5 (West Supp 1999).

<sup>658</sup> Pennsylvania Response, *supra* note 645, ¶ 3.

<sup>659</sup> *Id.* In answering the question, "What is your State's position, if any, regarding 28 U.S.C. §§ 2261-66?" the respondent stated:

[I]t is not possible to answer, in a precise fashion, your question regarding what is my "State's position, if any, regarding 28 U.S.C. §§ 2261-2266" without a clearer definition of what is meant by "State." Are you referring to the Governor's Office, the State Legislature, the Office of Attorney General or the district attorneys in the 67 counties of Pennsylvania? Each of these entities potentially has an interest in a decision to opt in or out of the provisions under 28 U.S.C. §§ 2261-2266.

*Id.* ¶ 3.

<sup>660</sup> *Id.* ¶ 5.

<sup>661</sup> *Death Row Prisoners of Pa. v. Ridge*, 106 F.3d 35, 36 (3d Cir. 1997). See also *supra* Part III.A.4.

possibility of pursuing either statewide or county-by-county opt in through alternative means. Given the ambivalence of this stance, Pennsylvania falls into the "Maybe" category.

#### 10. South Dakota

South Dakota has two prisoners sentenced to death seeking to exhaust their state remedies.<sup>662</sup> The state provides counsel to indigent defendants up to and including post-conviction petitions through county public defenders and contract attorneys.<sup>663</sup> Although the system does not specify standards, South Dakota's respondent states that the competency of counsel is a practical reality—all recent capital defendants have had at least three lawyers during the trial, two during the appeal, and one "highly experienced" habeas corpus lawyer.<sup>664</sup> South Dakota codified law provides for "reasonable and just" compensation and for repayment of "necessary expenses and costs."<sup>665</sup> The respondent states that courts have granted "nearly unlimited funds" for post-conviction defense and cites a recent case where the amount exceeded \$250,000. Since federal review of the death sentences is years away, South Dakota has not yet taken a position on the opt-in provisions.<sup>666</sup>

#### 11. Texas

Texas currently has 492 prisoners under death sentence.<sup>667</sup> Texas provides counsel to indigent defendants at trial and on direct appeal on a county-by-county basis. The legislature has specified the means by which each county is to ensure such representation to indigents.<sup>668</sup> Texas provides post-conviction

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<sup>662</sup> Questionnaire Response from Craig M. Eichstadt, Deputy Attorney General, Office of Attorney General, to Burke W. Kappler ¶ 1 (date unknown) (on file with author) [hereinafter South Dakota Response].

<sup>663</sup> See S.D. CODIFIED LAWS §§ 21-27-4, 23A-40-7 (Michie 1998).

<sup>664</sup> South Dakota Response, *supra* note 662, ¶ 2.

<sup>665</sup> S.D. CODIFIED LAWS § 23A-40-8 (Michie 1993 & Supp. 1998).

<sup>666</sup> See South Dakota Response, *supra* note 662, ¶ 3.

<sup>667</sup> Questionnaire Response from Unnamed Respondent, Office of the Attorney General, to author, ¶ 1 (Mar. 11, 1999) (on file with author) [hereinafter Texas Response].

<sup>668</sup> See TEX. GOV'T. CODE ANN. § 26.049 (West 1988 & Supp. 2000); TEX. CRIM. P. CODE ANN. §§ 26.041-26.050 (West 1989 & Supp. 2000).

counsel to capital prisoners only. The prisoner will be appointed counsel unless the prisoner elects to proceed pro se and this decision is "intelligent and voluntary." This finding is to be made on the record.<sup>669</sup> The post-conviction counsel must not be the same as trial or appellate counsel, unless both parties request it or the court finds good cause.<sup>670</sup> Post-conviction counsel will be reasonably compensated.<sup>671</sup> However, no standards of competence are specified for this counsel.<sup>672</sup>

After *Mata v. Johnson*, in which the Texas counsel system was found not to qualify for opt-in due to the absence of competency standards on the post-conviction level,<sup>673</sup> the Texas Attorney General has taken no further action. In the words of the response, "We are aware of the provisions, have litigated and lost the issue of their appealability, and are currently awaiting action by the judicial and/or legislative branches to meet the opt-in requirements."<sup>674</sup> The Attorney General appears to be deferring to the other branches to decide if opt-in is appropriate for Texas.<sup>675</sup>

## 12. Virginia

There are currently forty prisoners under sentence of death in Virginia.<sup>676</sup> Virginia takes an ambivalent, yet pessimistic stance toward the opt-in provisions.<sup>677</sup> While Virginia takes the

<sup>669</sup> TEX. CRIM. P. CODE ANN. § 11.071(2)(a) (Supp. 2000).

<sup>670</sup> *Id.* § 11.071(2)(e).

<sup>671</sup> *Id.* § 11.071(2)(f).

<sup>672</sup> Texas Response, *supra* note 667, ¶ 2.

<sup>673</sup> 99 F.3d 1261, 1266-67 (5th Cir. 1996).

<sup>674</sup> See Texas Response, *supra* note 667, ¶ 3.

<sup>675</sup> Given statistics that show Texas leads the nation in executions in 1998 and in total executions since 1976, opt-in may be unnecessary for Texas. See *Death Penalty Information Center*, (visited March 12, 1999) <<http://www.essential.org/dpic/dpicreg.html>>, <<http://www.essential.org/dpic/percapita.html>>.

<sup>676</sup> See *Death Penalty Information Center* (visited Feb. 7, 1999) <<http://www.essential.org/dpic/virginia.html>>. A description of Virginia's post-conviction counsel system can be found, *supra*, Part III.A.5.

<sup>677</sup> Telephone Interview with Unnamed Respondent, Virginia Attorney General's Office (Nov. 20, 1998); Telephone Interview with Unnamed Respondent, Virginia Attorney General's Office (Feb. 1, 1999) [hereinafter Virginia Interviews]. This individual refused to return the questionnaire, stating that he did not believe he could speak for either the Attorney General's office or the Commonwealth of Virginia. The

position that it qualifies under the opt-in provisions, the respondent expresses doubts that it will ever be officially approved by the federal courts.<sup>678</sup> In particular, the respondent points to the mandatory timelines required for federal habeas corpus review once a state has opted in. The respondent believes that federal judges are reluctant to bind themselves to these external deadlines.<sup>679</sup> Further, given that the Fourth Circuit has adopted timelines virtually identical to the AEDPA in Judicial Council Order No. 113, opting in becomes a moot issue. Generally, federal habeas corpus review for Virginia prisoners already follows the same course as if Virginia had opted in.

### 13. Wyoming

Wyoming currently has two prisoners under sentence of death. Both prisoners are currently pursuing state remedies.<sup>680</sup> Wyoming provides counsel to indigents through a public defender through the direct appeal, but does not provide post-conviction counsel. By statute, appeal in death penalty cases is mandatory.<sup>681</sup> Wyoming's respondent describes its position: "At present, there has been *no* attempt to 'opt-in.' The 1999 legislative session *might* take a look at it. The 'expiditing' [sic] available seems minimal at best and illusory as a practical matter."<sup>682</sup> The respondent continues, "Not clear that a decision has been made at this point. Appears that the debate has just barely opened."<sup>683</sup> Like other states with small death row populations, Wyoming's decision to opt in remains in the future. Also like other states, Wyoming's respondent implies that it perceives reluctance among the federal judiciary.

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following remarks come from these two telephone conversations and should be considered personal and unofficial.

<sup>678</sup> Virginia Interviews, *supra* note 677.

<sup>679</sup> *See id.*

<sup>680</sup> Questionnaire Response from Hugh Kenny, Senior Assistant Attorney General, Attorney General's Office, to Burke W. Kappler ¶ 1 (Dec. 29, 1998) (on file with author) [hereinafter Wyoming Response].

<sup>681</sup> *Id.* ¶ 2.

<sup>682</sup> *Id.* ¶ 3 (emphasis in original).

<sup>683</sup> *Id.* ¶ 4.

## V. QUESTIONS: LEGAL ANALYSIS, CRITIQUES, AND REFORM PROPOSALS

This section offers two critiques of the opt-in provisions and a suggestion for reforms. The first critique is that the opt-in mechanism effectively exposes indigent prisoners to post-conviction counsel without providing a remedy for incompetent or ineffective counsel. As a result, the *quid pro quo*, the centerpiece of the Powell Committee proposal, is empty. If prisoners cannot challenge the quality of counsel, states can reap the benefit of the bargain without paying the price. Second, relying on federal courts to determine whether states have effectively opted in is creating tensions in the federal system. Many states resent the federal intrusion into state prerogatives created by requiring federal approval of counsel systems. In addition, the opt-in provisions foster tension between branches of government as the judiciary's reluctance to approve opt-in thwarts Congress' intent to accelerate habeas corpus petitions.

The solution for reform is to discard the opt-in mechanism and to recognize a constitutional right to effective assistance of counsel at the post-conviction stage, both in state and federal courts. The opt-in provisions would be replaced by the one year period currently laid out in § 2254. This solution would protect prisoners, while guaranteeing effective assistance of counsel to allow for meaningful collateral attack. States would get the benefit of an expeditious and limited review period, without the cost, effort, and uncertainty involved in designing and implementing a post-conviction system subject to federal court review. A simple alternative is to adopt the ABA Task Force proposals, which achieve many of the same ends as the Powell Committee, but do so more comprehensively and effectively.

### A. EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

#### 1. *Background*

The right to effective assistance of counsel under the Sixth Amendment was first recognized by the Supreme Court in

*Gideon v. Wainwright* in 1963.<sup>684</sup> Beyond defining *when* the right accrues, the Court has also defined *in what manner*. In 1984, in *Strickland v. Washington*, the Court announced standards for ensuring that appointed counsel would provide effective representation.<sup>685</sup> The Court held that a petitioner alleging ineffective assistance must prove two elements. First, a petitioner challenging counsel must show that counsel performed below an objective standard of reasonable attorney performance. This showing alone may be difficult, because the Court instructs the lower courts to give deference to the attorney and his or her judgments during trial or appeal.<sup>686</sup> Second, the petitioner must show that counsel's performance resulted in actual prejudice and deprived the petitioner of a fair trial. The required showing is a reasonable probability that but for counsel's errors, the result would be different.<sup>687</sup>

The right to counsel, and to proceedings to enforce it, end with the conclusion of the first appeal as of right and the Court has strongly resisted any attempts to extend the right to counsel beyond this point.<sup>688</sup> In particular, the Court has denied any

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<sup>684</sup> 372 U.S. 335 (1963). The *Gideon* holding overruled the previous rule in *Betts v. Brady*, which made appointment of counsel a case-by-case decision, subject to the "totality of facts in a given case." *Betts v. Brady*, 316 U.S. 455, 462 (1942). Abe Fortas, appointed counsel for Clarence Earl Gideon, repeatedly referred to the *Betts* rule as "corrosive" for federal-state relations because multiple layers of the federal judiciary could second-guess the factual judgments of the trial court judge. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 127, 172 (1964).

<sup>685</sup> 466 U.S. 668 (1984).

<sup>686</sup> *Id.* at 687-89.

<sup>687</sup> *Id.* at 692-94. "Reasonable probability" is defined by the Court as "a probability sufficient to undermine confidence in the outcome" which has been interpreted in later cases as somewhat less than a preponderance of the evidence. *Id.* at 694. See also *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>688</sup> See, e.g., *Ross v. Moffitt*, 417 U.S. 600 (1974) (finding no right to counsel in discretionary appeals); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (finding no right to counsel where the actual sentence did not involve incarceration); *Douglas v. California*, 372 U.S. 353 (1963) (holding that the right to counsel extends to the first appeal as of right). In *Ross v. Moffitt*, the Court explained why neither due process nor equal protection required counsel in these proceedings. First, due process did not require such a right to counsel because instead of needing counsel as a "shield" against state power, a defendant would use counsel as a "sword" to initiate proceedings and overturn a conviction. This was significant because while a state could not waive the requirement of a trial, it did not have to provide an appeal. *Id.* at 610-11. Second, due

implication of a right to counsel in post-conviction proceedings. For example, in *Pennsylvania v. Finley*,<sup>689</sup> the Court held that neither the Due Process clause nor the right of access to courts required the state to appoint post-conviction counsel. The Court seemed to lay the matter to rest in 1989 with *Murray v. Giaratano*.<sup>690</sup> In this case, a group of capital prisoners in Virginia argued that the state's system of assisting with access to courts was inadequate. Virginia allowed prisoners time in the prison law library, permitted taking books back to cells, and even provided "unit attorneys" to assist in preparing documentation.<sup>691</sup> The key issue for the Court was whether the fact of the prisoners' death sentences required a different standard of review than *Finley*, a non-capital case. The Court ruled that, unlike at the guilt and sentencing phase where capital cases required special procedures to ensure "reliability," no special standards were required at the appellate and collateral attack phases:

We have . . . refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. . . . We think that these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.<sup>692</sup>

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process was only offended if indigent defendants were "singled out" for denial of counsel because of their indigency. *Id.* at 611. Third, the denial of counsel did not violate equal protection because North Carolina's system of providing transcripts, a Court of Appeals brief laying out errors, and the Court of Appeals opinion provided sufficient information to the defendant to allow him to adequately present his case pro se. *Id.* at 614-15. Fourth, North Carolina's procedures and the Supreme Court's discretionary review satisfied equal protection because they guaranteed both wealthy and indigent defendants roughly the same right to review. *Id.* at 616. Lastly, equal protection did not require that the state duplicate all possible counsel services available to a wealthy defendant, but just ensure an "adequate opportunity" for a defendant to present his claims. *Id.*

<sup>689</sup> *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

<sup>690</sup> *Murray v. Giaratano*, 492 U.S. 1 (1989).

<sup>691</sup> *Id.* at 3-5. As in *Ross v. Moffitt*, the Court argued that since post-conviction procedures are optional—for the state to offer and for the prisoner to use—provision of counsel should not be compelled. See *supra* note 688.

<sup>692</sup> *Murray*, 492 U.S. at 9-10.

The Court's holding in *Giarratano* seems definitive, but subsequent cases have affirmed the importance of post-conviction counsel to capital prisoners, at least on the federal level. For example, the case of *McFarland v. Scott*<sup>693</sup> involved the statutory guarantee of post-conviction counsel in federal habeas corpus under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(4)(B). This statute provides for appointment "[i]n any post conviction proceeding under section 2254 or 2255 of title 28."<sup>694</sup> The issue before the Court was at what point could a stay of execution be issued? 28 U.S.C. § 2251 provides any federal judge "before whom a habeas corpus action is pending" the power to stay executions. The Fifth Circuit read this statute to require the actual filing of a habeas petition and found that a motion for counsel under 21 U.S.C. § 848(q)(4)(B) was insufficient.<sup>695</sup> The Supreme Court reversed the Court of Appeals, finding that because 21 U.S.C. § 848(q)(4)(B) specifically referred to habeas corpus proceedings under Sections 2254 and 2255, the terms "post-conviction proceeding" and "habeas corpus" were interchangeable, and thus a motion for post-conviction counsel qualified as a pending habeas corpus petition for purposes of a stay of execution.<sup>696</sup> The Court also noted that this decision made logical sense, because requiring a prisoner to file a federal habeas petition without counsel, subject to the stringent requirements of stating a claim and not abusing the writ, created a "substantial risk" that petitioner's habeas claim would never be heard on the merits.<sup>697</sup>

For purposes of the opt-in provisions, *McFarland v. Scott* is interesting, but subsidiary. The opt-in provisions are concerned with post-conviction counsel at the state, not federal, level. However, the Court's acknowledgment of the importance of counsel to effectively present a prisoner's claims strikes a different note than *Giarratano*. In fact, one commentator has strongly criticized *McFarland* for undoing *Giarratano*'s and *Finley*'s hold-

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<sup>693</sup> *McFarland v. Scott*, 512 U.S. 849 (1994).

<sup>694</sup> 21 U.S.C. § 848(q)(4)(B) (1994).

<sup>695</sup> *McFarland*, 512 U.S. at 853.

<sup>696</sup> *Id.* at 858.

<sup>697</sup> *Id.* at 856.



ings that death sentences do not require special procedures.<sup>698</sup> In effect, by allowing a motion for appointment of counsel to qualify as a post-conviction proceeding for purposes of a stay of execution, the Court allows capital prisoners to obtain counsel earlier than noncapital prisoners who have nothing to stay.<sup>699</sup> This commentator sees this distinction as a "total departure" from previous post-conviction jurisprudence and an "abol[ition of] death penalty conservatism [with] a greater sensitivity to the plight of indigent capital defendants."<sup>700</sup> While the point may be overstated, *McFarland* does illustrate a recognition that death is different and that prisoners under death sentence, by virtue of their position, require a set of procedures distinct from non-capital prisoners.<sup>701</sup>

To sum up, while the Constitution provides a right to counsel at trial and first appeal, along with an enforcement mechanism to guarantee effective counsel, there is no parallel right to post-conviction counsel. Such counsel may be statutorily provided, either by Congress or by the states, but without constitutional recognition of the right, *Strickland's* enforcement mechanism does not apply to conduct of counsel in post-conviction proceedings. However, indigent capital prisoners

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<sup>698</sup> See Steven M. Latino, Comment, *Reversing Twenty Years of Supreme Court Post-conviction Jurisprudence: Enlarging the Indigent Capital Defendant's Right to Post-conviction Counsel in McFarland v. Scott*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 327, 346 (1996).

<sup>699</sup> *Id.* (citing *McFarland*, 512 U.S. at 872 n.3 (Thomas, J., dissenting)).

<sup>700</sup> *Id.* at 331-32.

<sup>701</sup> *McFarland*, 512 U.S. 849. In *Harris v. Alabama*, Justice Stevens, in his dissenting opinion, stated "[o]ur opinions have repeatedly emphasized that death is a fundamentally different kind of penalty from any other that society may impose." 513 U.S. 504, 516 (1978). In a second case, *Weeks v. Jones*, involving a battle over attorneys' fees, the Eleventh Circuit solidified the holding in *McFarland* by finding that 21 U.S.C. § 848(q)(4)(B) provided an absolute right to counsel. Three attorneys had been appointed to represent Varnall Weeks in prosecuting a federal habeas corpus claim under 21 U.S.C. § 848(q)(4)(B). After the petition was denied, the attorneys submitted vouchers to the district court for reimbursement. The district court refused to pay the attorneys and issued an order reversing their appointment on the basis that the attorneys had filed frivolous claims on behalf of Weeks. In reversing, the Eleventh Circuit found that 21 U.S.C. § 848(q)(4)(B) provided an absolute right of counsel unrelated to the merits of any petition counsel may prepare. The court echoed *McFarland* in finding an attorney's assistance critical to ensuring that a prisoner's claims was properly heard on the merits. 100 F.3d 124 (11th Cir. 1996).

have an absolute right to appointed counsel in federal habeas corpus from the filing of a motion for appointment, a right unique to this class due to their status.

## 2. Arguments

The language of the opt-in provisions statute and the litigation history together have effectively removed any opportunity for prisoners to ensure they are receiving qualified and competent counsel. As such, though states may opt in, prisoners may still receive less than adequate counsel, yet be exposed to accelerated timelines for federal habeas corpus review. The state thus reaps the benefit of the bargain while prisoners pay the price.

Practically speaking, a prisoner has two opportunities to contest the quality of appointed post-conviction counsel. He can either do so *prior* to appointment on the grounds that the state's system is inadequate in regard to competence, compensation, or both, and thus *no* post-conviction counsel is guaranteed effective. Alternatively, the prisoner can challenge the appointed counsel's performance during the state proceedings *after* the fact in federal habeas corpus review, arguing that *this* post-conviction attorney was ineffective. However, as a result of the language of the opt-in provisions and the litigation history, neither of these approaches is cognizable. As *Ashmus*, *Booth*, *Hill*, and *Death Row Prisoners of Pennsylvania* show, pre-appointment actions to contest counsel standards by prisoners are barred by issues of standing, ripeness, and the Eleventh Amendment.<sup>702</sup> In turn, the explicit language of 28 U.S.C. § 2261(e) and *Murray v. Giarratano* specify that there is absolutely no right to post-conviction counsel flowing either from the Constitution or the opt-in provisions themselves, and thus claims that appointed counsel were ineffective have no merit. In essence, a prisoner filing a claim *ex ante* is told he has not been injured yet, while raising the issue *ex post* he is told he has not been injured at all. This is troublesome, because the Powell Committee clearly believed that federal courts would be a re-

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<sup>702</sup> See *supra* Part III.A.

source for litigating the issue of attorney quality.<sup>703</sup> Together, the litigation history of the opt-in provisions and the development in the right to effective counsel have undercut the Powell Committee's assumptions and left prisoners without the protection they were intended to have.

## B. FEDERALIST TENSIONS

### 1. *Background*

In response to the questionnaire, several states indicated frustration with federal courts for their apparent reluctance to approve opt-in. The fact that California failed to opt in, when the provisions for unitary review were crafted with the state in mind,<sup>704</sup> seemed a signal to states that federal courts would hold states to standards higher than the statutory bar. States with this sentiment tend to believe that courts are reluctant to bind themselves to the mandatory timelines in the opt-in provisions. The Fourth Circuit's action in enacting Judicial Council Order No. 113 can be seen as emblematic of this approach. While this court was obviously concerned that habeas corpus petitions must be expedited, it chose to adopt a discretionary order which it could disregard when necessary.

The term "federalism" is a catch-all term for relations between governmental entities on both a vertical and a horizontal axis. The vertical axis is federal-state relations, and focuses in particular on the relations of federal courts to state courts. The general principle on this vertical axis is restraint. Out of respect and comity, federal courts are advised to avoid intruding on state court decision-making except when federal issues are at stake. While this is particularly obvious in the area of habeas corpus review, doctrines such as federal question jurisdiction, abstention, and deference to independent and adequate state grounds all express a similar notion of limiting federal review. The horizontal axis can be thought of as separation of powers and focuses on intragovernmental relations in the federal system. The guiding principle here is one of respect and defer-

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<sup>703</sup> See Powell Committee Report, *supra* note 56, at 3242.

<sup>704</sup> See 137 Cong. Rec. 6013 (1991).

ence for each branch's actions, with interbranch supervision or control only allowed to the extent specified in the Constitution. This principle is embodied in such doctrines as standing and Congress' Article III power to establish federal tribunals and amend federal court jurisdiction.

## 2. *Arguments*

The result of the federal courts' reluctance to qualify any state under Chapter 154 is tension along both these axes. On the vertical axis, states are frustrated that federal courts have subjected their post-conviction counsel systems to often excruciatingly detailed levels of review and have rejected systems which were designed to qualify or were presumed in compliance at the time of passage.<sup>705</sup> As many of these systems were adopted through state legislatures or through rules enacted by elected state judges, refusing opt-in status has an antidemocratic touch as well. Ironically, by refusing to qualify any state, the federal courts have given states, such as Virginia, an incentive *not* to improve their post-conviction counsel systems. It is also ironic that the opt-in provisions, which were designed to reform habeas corpus by reducing federal intrusion into state decision-making, has resulted in greater invasiveness.

Similarly, though this paper focuses on federal-state relations, it is reasonable to expect tension on the horizontal axis between Congress and the federal courts as the continued failure of states to opt in amounts to denial of congressional intent.

To be sure, it is a sweeping generalization to say that federal courts, as a unit, are hostile or opposed to opt-in. However, given that federal courts have a critical role in certifying that states qualify under Chapter 154, the potential for delay or obstruction based on institutional incentives remains. The fact that no state has yet opted in is also indicative of the federal judiciary's receptivity, in an informal, anecdotal way.

However, it may be too early to indict federal courts entirely. The majority of cases in which a state's opt-in qualifications were rejected came in the initial rush after passage of the

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<sup>705</sup> California's experience is notable here. See *supra* Part IV.A.3.

AEDPA, in which states effectively submitted previously enacted and unaltered post-conviction counsel systems for approval.<sup>706</sup> After the failure of these systems to opt in, a second generation of states has developed or amended systems with an awareness toward the statute and its interpretations as announced in the case law. This second generation is now waiting for the first test cases to emerge from state post-conviction review to federal habeas corpus—a wait which in many cases is years away. Thus, some states may presently be in compliance, and may be recognized as such by the federal courts when such cases come before them.

Lastly, a strong argument can also be made that this federal tension is not significant in light of the overall deference granted to states under the AEDPA. This argument posits that the return of authority and sovereignty to states under the AEDPA vastly outweighs any encumbrance imposed by the opt-in provisions. While states may not be entirely content with the vestigial federal control imposed by the opt-in provisions, the states are much freer than they were before the Warren Court.

While this argument has force from a federal perspective, it is weaker when viewed from the position of the states. First, it is true that after the AEDPA, federal courts have much less authority over state convictions and post-conviction procedures, but the particular authority federal courts still wield is galling. Federal courts have been placed in position as monitors of a state court's counsel system, which strikes at the heart of the opt-in provisions: state independence and freedom to experiment in meeting the opt-in goals. This authority is even more irritating from the perspective of states who may have taken steps to opt in and have failed. To have a single federal judge overturn the collected efforts of legislators, judges, and lawyers can only be extremely frustrating for states.

Second, federal authority over opt-in is corrosive because the AEDPA implicitly trusts states to render accurate judgments on all other constitutional issues. The return of federal deference to state court decisions means that state courts have been

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<sup>706</sup> Maryland is an excellent example of this approach. *See supra* Part III.A.1.

re-established as equivalents to federal courts in interpreting constitutional guarantees—except with regard to state post-conviction counsel systems. It is possible to envision an opt-in system in which *state* courts have final approval over a state's post-conviction counsel system. Instead, the AEDPA sends states the message that while they may be competent to judge Fourth Amendment issues, for example, counsel issues remain best left under federal control.

Finally, it is clear from such states as California, Florida, Maryland, Virginia, and Delaware, among others, that there is great frustration with federal courts. These opinions should be given due consideration as the statements of state officials grappling with post-conviction procedures, the AEDPA, and federalism on a daily basis. While Congress and other federal authorities may think they have done enough to restore state authority, the responses of the states themselves belie this perception.

### C. SOLUTIONS FOR REFORM

The underlying principle behind the opt-in *quid pro quo* is that effective post-conviction counsel can solve the problem of balancing the need to prevent constitutional errors in death sentences with the need to expedite federal review and achieve finality. By appointing qualified counsel, states and the federal courts can rest assured that all of a prisoner's meritorious claims will be raised and adjudicated in his single opportunity for federal habeas review.<sup>707</sup> However, as described above, the opt-in provisions guarantee no such thing. As written and as implemented, there is no opportunity for prisoners to ever challenge the quality of appointed counsel and therefore there is no real guarantee that counsel is effective. An even deeper flaw in the opt-in provisions is the logic of making necessary reform voluntary. As Vivian Berger observes, "[I]f death penalty administration is unsatisfactory, as most agree, it seems misguided to allow

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<sup>707</sup> Berger, *supra* note 56, at 1695 ("[The Powell Committee has] implicitly premised [its] scheme on the false assumption that qualified counsel, significantly aided only by an automatic stay, can without any further reforms ensure that prisoners on death row receive fair and rational treatment.").

the system, or portions of it, to remain enmired in its serious problems."<sup>708</sup>

For this reason, this paper proposes two separate reforms. First, Congress should abolish the opt-in provisions in favor of the existing time frames within the AEDPA. This innovative mechanism should be recognized as a costly experiment in creative statutory drafting and should be retired. Second, Congress and the federal courts should recognize a constitutional right to effective post-conviction counsel and should provide appropriate statutory procedures for implementing it, amending the AEDPA as necessary.

A third possibility is simply to adopt the recommendations of the ABA Criminal Justice Section Task Force on Death Penalty Habeas Corpus. These proposals not only provide a comprehensive and detailed mechanism for ensuring competent post-conviction counsel, but also recommendations for reforming other doctrinal areas of habeas corpus, including procedural default, stays of execution, and successive petitions. The solutions below are simply meant to correct the Powell Committee proposals, but the ABA Task Force recommendations are more effective for truly systemic reform.

### *1. Abolition of the Opt-In Provisions*

The first idea for reform is to abolish the opt-in provisions by essentially repealing 28 U.S.C. §§ 2261-2266. The federal habeas corpus statutes would then remain as amended by the AEDPA, with the one year limitations period for petitions, limits on successive petitions, and limits on the availability of the writ itself. One necessary change would be to include language expressly permitting claims on the basis of ineffective assistance of counsel in state and federal post-conviction proceedings. The result would be a statute which is substantially closer in spirit to the ABA Criminal Justice Task Force's report than to the Powell Committee. Without the opt-in provisions and with these minor changes, the statute would be faithful to the legislative intent to

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<sup>708</sup> *Id.* at 1686.

reform and accelerate habeas corpus, though the reforms allow greater protection of constitutional rights while doing so.

The opt-in provisions have been an expensive and ultimately futile experiment in habeas corpus reform. Three years after passage of the AEDPA, no state has yet to opt in and qualify for the procedural benefits under Chapter 154. The opt-in provisions remain, in a sense, uncharted territory. However, the time and money poured into attempting and adjudicating opt-in has been inestimable. The provisions have been raised in almost twenty states, with five states litigating the issue through multiple layers of the federal judiciary. This litigation involves significant time and effort spent by state officials, legislators, and judges debating the merits of seeking opt-in and constructing the necessary counsel systems. The sheer drain of resources poured into an as-yet fruitless quest is remarkable.

In addition, abolishing the opt-in provisions would automatically remove the growing federalist tensions described above. States would be freed from intrusive federal review, and federal courts would no longer be seen as the roadblock to expeditious habeas corpus adjudication. However, federal courts would still maintain their traditional role as guardians of constitutional rights through the habeas corpus process.

## 2. *The Right to Post-conviction Counsel*

Beyond abolition of the opt-in provisions, federal courts and Congress should both recognize a constitutional right to effective post-conviction counsel. The federal courts should confirm that there is such a right and should develop the doctrinal basis behind it. In turn, Congress should make necessary changes in the habeas corpus statutes and rules to accommodate this right.

### a. Arguments for Post-conviction Counsel

The logic behind a right to post-conviction counsel is powerful. First, prisoners acting pro se are simply unable to effectively assert their rights without assistance of counsel. These individuals are often indigent and poorly educated, even illiterate. Many of these prisoners suffer “mental pain” which pre-



vents them from adequately representing themselves.<sup>709</sup> In preparing their petitions, they face sharp time limits under the psychic pressure of their own impending death. Habeas corpus and post-conviction remedies are extremely complex areas of law, and effectively presenting a claim requires substantial familiarity with the doctrines as well as the opportunity for ample research and additional investigation.<sup>710</sup> As Joseph Giarratano explains:

Picture yourself in this situation. You've been convicted of capital murder and sentenced to death. You are indigent, functionally illiterate and mildly retarded. Your court-appointed lawyer tells you that you have a right to appeal your conviction and sentence but that he will no longer represent you. . . . You've been moved into the death house. Your only choice is for you to represent yourself. You must file something with the court or be executed in less than 14 days. You have the right to file a petition for certiorari and a petition for habeas corpus and a motion for a stay of execution. But before you can file you must learn to read, write, overcome your retardation, obtain your trial transcript, understand the science of law, learn how to conduct legal research, analyze vast amounts of case law, formulate your issues, learn all the procedures, learn all the various court rules, understand civil procedure, constitutional law, criminal law and acquire the art of legal writing. You must do all of this and much more in less than 14 days. . . .<sup>711</sup>

For these reasons, prisoners simply cannot effectively prepare and present their own claims, a fact illustrated by the success rates—while prisoners who were represented by counsel won in 13.7% of their cases, pro se petitioners won in 0.9% of theirs.<sup>712</sup> The complexity of this area of the law doubly pushes

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<sup>709</sup> Brian L. McDermott, Comment, *Defending the Defenseless: Murray v. Giarratano and the Right to Counsel in Capital Post-conviction Proceedings*, 75 IOWA L. REV. 1305, 1324-26 (1990).

<sup>710</sup> *Id.* at 1326-27. See also "You Don't Have Be a Bleeding Heart," *Representing Death Row: A Dialogue Between Judge Abner J. Mikva and Judge John C. Godbold*, HUMAN RIGHTS, Winter 1987, at 22.

<sup>711</sup> Alice McGill, Comment, *Murray v. Giarratano: Right to Counsel in Post-conviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L. Q. 211 (1990) (quoting IRA P. ROBBINS, *Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases*, A.B.A. SEC. CRIM. JUSTICE, TASK FORCE ON DEATH PENALTY HABEAS CORPUS 45 n.85 (1989) (quoting McCarthy, *A Defender on Death Row*, WASH. POST, Apr. 15, 1989, at A21)).

<sup>712</sup> TASK FORCE REPORT, *supra* note 56, at 65.

for a right to effective post-conviction counsel—not only to remove the responsibility from the shoulders of prisoners who are unable to bear it, but to ensure that their appointed attorneys can.

Second, post-conviction proceedings are an accepted and conventional stage in capital litigation and the need for post-conviction counsel is widely recognized. One of the standard arguments against a right to post-conviction counsel, first employed in *Ross v. Moffitt*, is that these proceedings are not constitutionally required. While states may not convict and impose punishment without a trial, states are under no obligation to offer post-conviction proceedings to allow prisoners to test their convictions and sentences. To use the *Ross* metaphor, states must provide a “shield” against a trial, but need not provide a “sword” for a prisoner to brandish at will.<sup>713</sup> However, on a practical basis, every state offers some form of post-conviction remedy and post-conviction litigation has become a standard part in the lifecycle of a capital case. Furthermore, the analogy to a sword which the prisoner uses at his discretion to initiate the collateral attack is inapt, because the federal habeas corpus statute requires exhaustion of state remedies.<sup>714</sup> For a prisoner to choose not to pursue state post-conviction remedies is a procedural default and a bar to federal habeas corpus review. Direct appeal and post-conviction attack are not simply options for the capital prisoners; they are required steps he must take to be vindicated.

Third, beyond the mandatory and pervasive nature of post-conviction review, it is a widely recognized fact that post-conviction counsel is a necessary and critical component to making this review meaningful and effective. Congress announced such a view through establishing the right to such counsel in federal habeas corpus through the Anti-Drug Abuse Act of 1988 and through passage of the AEDPA. President Bill Clinton acknowledged this need through signing the AEDPA. The Supreme Court has expressed its view that post-conviction counsel is especially important to the capital prisoner in *McFar-*

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<sup>713</sup> *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974).

<sup>714</sup> 28 U.S.C. § 2254(b)(1)(A) (1994 & Supp. 1997).

*land v. Scott*.<sup>715</sup> Two separate bodies with the mission of reforming habeas corpus, the Powell Committee and the ABA's Criminal Justice Task Force on Death Penalty Habeas Corpus, both proposed varying levels of counsel provision.<sup>716</sup> Scholars, academics, judges, practitioners, and students have also argued for post-conviction counsel.<sup>717</sup> While popular acclaim alone cannot make a measure constitutional, it can illustrate a widespread understanding that post-conviction counsel is consistent with, and required for, constitutional guarantees.

The case of *Gideon v. Wainwright*<sup>718</sup> and the context surrounding the decision to extend the right to counsel to all criminal defendants are striking in their parallels to the issue of post-conviction counsel. In *Gideon*, recognition of the right was compelled by the realization that the average layperson would be unable to effectively defend himself at trial.<sup>719</sup> Similarly, it is clear that the average capital prisoner is unable to effectively present his claims in a post-conviction proceedings. The *Gideon* decision was also compelled by the fact that the majority of states had already seen the value of providing counsel and adopted systems.<sup>720</sup> Likewise, a significant portion of the states with the death penalty provide for post-conviction counsel. In addition, *Gideon* was prompted by a desire to avoid overly intrusive federal review of state trial court decisions.<sup>721</sup> Extending a right of post-conviction counsel similarly obviates the need for intrusive federal court review of opt-in compliance. Lastly, the

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<sup>715</sup> 512 U.S. 849 (1994).

<sup>716</sup> See *supra* note 56 and accompanying text.

<sup>717</sup> See, e.g., Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455 (1989); McGill, *supra* note 710; McDermott, *supra* note 708; Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Post-conviction Proceedings*, 107 YALE L.J. 2211, 2211-12 (1998); Donald P. Zeithaml, Jr., Note, *Sixth and Fourteenth Amendments—Constitutional Right to State Capital Collateral Appeal: The Due Process of Executing a Convict Without Attorney Representation*, 80 J. CRIM. L. & CRIMINOLOGY 1190, 1208 (1990); William H. Brooks, Recent Development, *Meaningful Access for Indigents on Death Row: Giarratano v. Murray and the Right to Counsel in Post-conviction Proceedings*, 43 VAND. L. REV. 569, 591 (1990).

<sup>718</sup> 372 U.S. 335 (1963).

<sup>719</sup> See *id.* at 344-45; LEWIS, *supra* note 682, at 126, 170-71, 187-89.

<sup>720</sup> LEWIS, *supra* note 682, at 132.

<sup>721</sup> *Id.* at 126-27, 172.

fact that the right to counsel enjoyed widespread support across the field of law was a factor militating for its recognition.<sup>722</sup> Similarly, the right to post-conviction counsel enjoys such widespread support.

b. Arguments against Post-conviction Counsel (and Responses)

Despite this, strong arguments against post-conviction counsel remain. First, though the involved parties are convicted, incarcerated criminals, federal habeas corpus is technically a civil proceeding. One concern is that requiring mandatory appointment of counsel in an effectively civil proceeding will open the door to claims for counsel in other, more traditional civil law settings, such as personal injury litigation. At the extremes, this argument could be seen as trying to prevent a constitutional right to a lawyer, for any and all purposes. While it is true that creating a right to post-conviction counsel conjures images of a slippery slope, the nature of the habeas corpus proceeding is sufficiently different from other civil proceedings to enable firm distinctions and to cabin the right to post-conviction counsel from a general right to a lawyer. The fact that audiences must be reminded that habeas corpus is a civil proceeding, shows the common perception that this is a facet of criminal law. The participants in post-conviction proceedings—prisoners, wardens, criminal lawyers, and prosecutors—confirm this impression.<sup>723</sup> Habeas corpus procedures are entirely unique and specific to habeas corpus itself. Finally, the interests at stake are qualitatively different. The normal civil plaintiff argues she has been physically or emotionally injured and she deserves monetary compensation for her damages. In contrast, the habeas corpus petitioner contends she is currently being injured through an ongoing constitutional violation. Instead of money, she demands liberty or her life—items without price. These distinctions are significant enough to enable courts to draw a firm line

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<sup>722</sup> *Id.* at 146-52.

<sup>723</sup> This is also confirmed by the fact that most attorneys general specializing in post-conviction review or habeas corpus can be found in offices with titles like "Criminal Division," "Criminal Bureau," or "Criminal Appellate Division." Post-conviction and habeas corpus issues are almost never considered part of the civil attorneys' general duties.

between a right to post-conviction counsel and a right to general counsel.

A second criticism of the right to post-conviction counsel is the implied lack of finality. On a simple level, creating a right to post-conviction counsel creates yet another claim that a petitioner can raise to delay final adjudication. On a more complex level, there is a fear that, like an Escher drawing, the right to post-conviction counsel would always permit another layer of review and would prevent any ability to finalize a petitioner's sentence. This fear emerges from the fact that rights to effective counsel can only be enforced through a subsequent proceeding. Therefore, to effectively enforce a right to post-conviction counsel, courts will have to develop multiple levels of post-conviction proceedings solely to address counsel claims.

However, this argument exaggerates the threat posed by such a right. The right to post-conviction counsel can be easily prevented from spiraling out of control. Again, the right to trial counsel provides a useful parallel because this right is not absolute and is limited where it might pose excessive costs or inefficiencies, as when the defendant is not facing incarceration. Prisoners can be required to accept appointed counsel, as are defendants at trial. Opportunities to raise a claim of ineffective counsel can be limited to the first habeas hearing and its appeal, with possible discretionary review by the Supreme Court. This would ensure that the prisoner could defend his right to counsel, without allowing this right to swamp the system. It is more important to provide some form of guaranteed post-conviction counsel, even if limited by the nature of the proceeding, than none at all.<sup>724</sup>

The third argument against post-conviction counsel is that there has never been a right to post-conviction counsel. As such, the denial of counsel or the ineffectiveness of appointed counsel does not harm the prisoner. Since there is no right, there can be no injury from its deprivation; the prisoner is insisting on protecting an entitlement he simply does not possess. While *Giarratano* makes this point all too clear, the right to post-

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<sup>724</sup> See *infra* Part V.C.2.d for alternatives for limiting repetitive review.

conviction counsel has come to be seen as a critical procedural necessity. As post-conviction law has grown more complex and as the numbers of prisoners have increased, the need for experienced and competent counsel to help both the petitioners and the system is significant.<sup>725</sup> The importance of counsel at the post-conviction stage cannot be underestimated; ensuring access to a lawyer is the critical focus of the Powell Committee Report. Providing such a privilege without ensuring its quality is tantamount to not providing it at all.

Fourth, the litigation battles between the states and the federal courts to opt in show the commitment of the federal judiciary to maintaining high quality post-conviction representation. In light of this commitment, there is no need to enable prisoners to protect themselves; the courts will do this for them. It is true that the federal courts have required high standards for states to qualify. This is one reason no state has. However, the state of the law is always in flux and mounting political and federalist pressures may encourage federal courts to start lessening the required standards. Furthermore, several states, such as South Carolina, have enacted post-conviction counsel statutes and rules specifically with an eye to the language of the opt-in provisions and the established precedents.<sup>726</sup> These states are simply waiting for the first case to go through state post-conviction review and on to federal habeas corpus to test their systems. The level of the bar could change dramatically.

An additional problem with depending on court enforcement of counsel standards is that states have little incentive to "over-qualify" their capital post-conviction attorneys. Given the probable standards necessary, it takes time to develop a group of attorneys with the requisite experience and training to qualify

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<sup>725</sup> An additional consideration is the role of post-conviction counsel if the opt-in provisions remain in effect. If so, the provision of counsel would be a critical procedural linchpin. Before the enactment of the opt-in provisions, incompetent or unqualified counsel could only substantively prejudice a prisoner's claim. Now, following establishment of strict rules against second or successive petitions, counsel bears responsibility not only for success or failure on the state level, but also during a prisoner's single opportunity for federal review of his state conviction. See 28 U.S.C. § 2244(b) (1994 & Supp. 1997) for a description of these rules.

<sup>726</sup> See *supra* Part IV.

for post-conviction representation. It also costs money to train, employ, compensate, and reimburse these attorneys. As a result, states will require only what is necessary to opt in, and no more. This possibility is enhanced by the facts that many states allow appointment of counsel who do not qualify under their standards, but are "otherwise qualified."

Furthermore, *ex ante* competency standards are ultimately no true guarantee of attorney quality. Requiring attorneys to leap hurdles in terms of years of practice, numbers of cases, or hours of training reveals nothing about the meaningfulness of those experiences. Regrettably, some of the worst lawyers are the ones with the greatest caseloads and the largest docket, and stories of attorney incompetence, by attorneys who might arguably meet state standards for experience with capital cases, are legion.<sup>727</sup> This is a dilemma parallel to that faced by employers. While paper credentials offer insight and guidance into the suitability of a candidate, ultimately they are no real guarantor of a candidate's ability to do the job effectively within the constraints of the organization. For this reason, employers use other screening methods, such as interviews, to gain a better sense of a candidate's strengths and weaknesses. Furthermore, many employers hire on a probationary basis, with the ability to dismiss candidates whose credentials outstripped their ability or compatibility. Unfortunately, prisoners under death sentence lack the time, opportunity, or background to effectively screen counsel and must often settle for whichever counsel is appointed.

Another concern with competence standards is that there is no indication of how broadly standards will be interpreted. For example, does Nevada's requirement of "serving as counsel in two felony appeals" mean that counsel was appointed prior to the proceedings and represented the client through to judgment, or just that the counsel was involved and had client contact? Does a requirement that an attorney have experience in capital cases allow for plea bargains, or must counsel actually try the case to the jury? The opt-in provisions give no guidance as

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<sup>727</sup> See, e.g., TASK FORCE REPORT, *supra* note 56, at 49-76.

to how strictly the standards must be followed, and the greater the latitude permitted, the wider the range in post-conviction counsel competence.<sup>728</sup>

A last issue with competency standards was pointed out by the response from Delaware. Practically speaking, setting competency standards may be used as a weapon by death penalty opponents to prevent opt in, since these standards are likely to be set through a democratic process. These opponents can either set the standards so high that no attorney will qualify, or if the opponents are attorneys, they would simply refrain from getting the necessary qualifications. Either way, the state is left without competent counsel to appoint.

The final argument against a post-conviction counsel right is that states have already proven their ability to provide effective counsel at the trial and appellate levels. Despite a constitutionally enacted right to counsel and means for enforcing its effectiveness, however, the quality of attorneys for indigent defendants often suffers.<sup>729</sup> *Gideon v. Wainwright* has notably been compared to a promise—a promise that all defendants unable to afford counsel for serious crimes shall be appointed counsel. However, despite constitutional mandates, states are often unable to fulfill this promise. As one commentator writes:

It requires a fair amount of credulity to expect that states that have countenanced practices such as assigning capital work to the lowest bidder without considering any criterion other than cost and sanctioned convictions and sentences of death in the kinds of situations recounted earlier would now hasten to furnish attorneys adequate to the demands of the job.<sup>730</sup>

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<sup>728</sup> There is one additional argument raised by the idea that counsel standards might be interpreted broadly. Some states, such as Colorado or Nebraska, have very small populations of eligible attorneys. While both states have small death row populations as well, this raises the issue that a state may conceivably be faced with a dearth of qualified attorneys and may seek a broad interpretation of competency standards in order to increase the ranks of "qualified" practitioners.

<sup>729</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

<sup>730</sup> Berger, *supra* note 56, at 1690 (footnotes omitted).



The unfortunate parallel is that the opt-in provisions are also a promise, but without enforcement mechanisms or guarantees, these promises, too, are likely to be broken.<sup>731</sup>

c. Doctrinal Bases for Post-conviction Counsel

A basic question in providing a right to post-conviction counsel is locating such a right among existing constitutional guarantees. For example, the right to trial counsel is plainly stated in the 6th Amendment, but is only applied to the states through the 14th Amendment Due Process clause. There are possible doctrinal bases for the right to post-conviction counsel. The first conception, and the strongest, suggests the use of a *Mathews v. Eldridge* balancing test to find a procedural due process right to post-conviction counsel.<sup>732</sup> This test determines whether a particular procedure is due by balancing three factors: "the private interest at stake, the risk of violating that interest through government action . . . and the government's interest in the matter."<sup>733</sup>

Applying these three balancing factors to the issue of post-conviction counsel, the *Mathews* test finds that the "private interest at stake" is the prisoner's interest in being unconstitutionally or erroneously executed and therefore is very strong.<sup>734</sup> The "risk of violation through government action" is also high because statistics show that errors are found more often when prisoners are represented than when they petition pro se.<sup>735</sup> The above discussion of the limitations faced by pro se petitioners confirms this risk of error.<sup>736</sup> The test concluded that the

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<sup>731</sup> *Id.*

<sup>732</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976). See McDermott, *supra* note 708, at 1332-33 (1990); Zeithaml, *supra* note 716, at 1208. Another commentator has elaborated on the *Mathews v. Eldridge* approach by suggesting a right to post-conviction counsel from the fusion of procedural due process with the right of access to the courts exemplified by *Bounds v. Smith*, 430 U.S. 817 (1977). See Millemann, *supra* note 716. However, in light of the limitations on the right of access to the courts imposed by the more recent holding in *Lewis v. Casey*, 518 U.S. 343, 351 (1996), Millemann's approach may be obsolete.

<sup>733</sup> Zeithaml, *supra* note 716, at 1208.

<sup>734</sup> *Id.*

<sup>735</sup> *Id.* at 1208-09.

<sup>736</sup> McDermott, *supra* note 708, at 1333.

"government's interest," on net, is positive. Though states would incur the cost of maintaining the attorney system, they would reap the benefits of better petitions and a more efficient process.<sup>737</sup> While the balance on the last item might vary depending on the state and its commitment to a strong death penalty, the enthusiastic reaction of many states to the opt-in provisions indicates that states are seeing greater advantages in providing counsel than in denying it. As each factor weighs heavily toward requiring post-conviction counsel, the *Mathews* test indicates that post-conviction counsel would be considered part of procedural due process.

A second approach sees the right to post-conviction counsel as emanating not from procedural due process but from equal protection.<sup>738</sup> This approach, advocated by Brad Snyder, is based on the Supreme Court case of *M.L.B. v. S.L.J.*,<sup>739</sup> which held that an indigent woman was entitled to a free transcript to appeal the state's decision to take away custody of her children. In so holding, the Court found that parental termination proceedings were "quasi-criminal" and therefore the woman was entitled to the transcript under *Griffin v. Illinois*'s right of equal access under the Equal Protection Clause.<sup>740</sup> In doing so, Snyder argues, the Court opened the door to a fundamental rights exception to the requirement of discriminatory purpose for suspect classifications under *Washington v. Davis*.<sup>741</sup>

Snyder begins his argument by reviewing the history of wealth as a classification for equal protection purposes. In *Griffin v. Illinois*,<sup>742</sup> the Supreme Court struck down a requirement that defendants seeking to appeal their conviction must pay for transcripts. While the decision rested on both due process and equal protection grounds, the case came to stand for the proposition that a defendant's ability to defend himself would not be based on his wealth.<sup>743</sup> The Court, however, refused to expand

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<sup>737</sup> See Zeithaml, *supra* note 716, at 1209; McDermott, *supra* note 708, at 1333.

<sup>738</sup> See Snyder, *supra* note 716, at 2211-12.

<sup>739</sup> 519 U.S. 102 (1996).

<sup>740</sup> *Id.*

<sup>741</sup> *Id.* at 2229.

<sup>742</sup> 351 U.S. 12 (1956).

<sup>743</sup> Snyder, *supra* note 716, at 2215-17.

*Griffin* into full-blown equal protection for wealth by deciding in *San Antonio Independent School District v. Rodriguez* that wealth was not a suspect classification.<sup>744</sup> In addition, the Court held in *Washington v. Davis*<sup>745</sup> that a showing of discriminatory purpose, and not just disparate impact, was required for proving an equal protection violation.<sup>746</sup>

Snyder argues that, applying this background to M.L.B.'s case, M.L.B. should be unable to challenge the statute on equal protection grounds using strict scrutiny.<sup>747</sup> Such a challenge would require showing that a law involved a suspect classification or burdened a fundamental right.<sup>748</sup> Though Mississippi's statutory requirement of purchasing transcripts disparately impacted the poor (because only they would be denied appeals), any equal protection claim would be foreclosed by the fact that wealth is not a suspect classification under *Rodriguez*.<sup>749</sup> Though M.L.B. could argue that according to *Griffin v. Illinois*, she had a fundamental right to access the criminal justice system, this would not be sufficient because she could not prove that Mississippi had a required discriminatory purpose under *Davis*.<sup>750</sup> Moreover, parental termination proceedings were considered civil, and thus *Griffin* would not apply.<sup>751</sup>

However, in finding that M.L.B. did have a right to a free transcript for an appeal, the Supreme Court opened cracks in

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<sup>744</sup> 411 U.S. 1 (1973).

<sup>745</sup> 426 U.S. 229 (1976).

<sup>746</sup> Snyder, *supra* note 716, at 2217-18.

<sup>747</sup> *Id.* at 2214 (stating that wealth, the reason M.L.B. was unable to obtain a transcript, is not a suspect classification).

<sup>748</sup> *Id.*

<sup>749</sup> *Id.* at 2217.

<sup>750</sup> *Id.* at 2224. Snyder writes:

Sidestepping *Davis* was the key to the Court's decision in *M.L.B.* The respondents in *M.L.B.* contended that *Davis*'s discriminatory purpose requirement applied in this case. . . . In effect, Justice Ginsburg's majority opinion can be read as accepting Justice Marshall's view [from *City of Mobile v. Bolden*, 446 U.S. 55 (1980) that discriminatory purpose is not required for strict scrutiny where fundamental rights are at stake] and rejecting respondents' arguments.

<sup>751</sup> *Id.* at 2221 ("First, due process concerns for the indigent are limited in civil cases.") See also *id.* at 2220 (discussing how the M.L.B. court classified the Mississippi proceedings as "quasi-criminal" in order to take advantage of the holding in *Griffin*).

each of these doctrines.<sup>752</sup> By describing parental termination proceedings as “quasi-criminal” and applying the *Griffin* right, the Court has allowed considerations of wealth to return to equal protection analysis, since *Griffin* rests on the idea of indigency.<sup>753</sup> Moreover, in finding for M.L.B., the Court has identified circumstances where discriminatory purpose need not be proved to make out an equal protection violation.<sup>754</sup> Snyder argues that these chinks in the doctrines create the idea of wealth-based disparate impact, and clear the way for an exception to the requirement of discriminatory purpose for fundamental rights.<sup>755</sup>

Snyder then argues that this fundamental right of access to the criminal process arising from *Griffin* and immune to the requirement of discriminatory purpose can develop into a right to post-conviction counsel.<sup>756</sup> Essentially, the failure to provide post-conviction counsel would be an equal protection violation with disparate impact on indigent capital prisoners, since

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<sup>752</sup> See, e.g., *id.* at 2220 (describing how M.L.B. was found to be “quasi-criminal” and therefore under *Griffin*); *id.* at 2225-26 (describing how the M.L.B. holding created an exception to *Washington v. Davis*).

<sup>753</sup> *Id.* at 2215-16 (describing *Griffin*); *id.* at 2225-26 (finding a fundamental rights exception to *Davis* based on *Griffin*).

<sup>754</sup> *Id.* at 2225-26.

<sup>755</sup> *Id.* at 2226. As support for this idea of a fundamental rights exception, Snyder points to three additional factors. First, Justice Marshall, dissenting in *City of Mobile v. Bolden*, resisted the universal discriminatory purpose test and advocated a fundamental rights exception, even going so far as to list those rights he believed were fundamental. Among them were the *Griffin* right to access the criminal process. *Id.* at 2224. Second, Marshall’s argument has been echoed in *Plyler v. Doe* and the work of scholars, most notably Daniel Ortiz, who argues that discriminatory purpose has been more strongly applied in certain contexts, such as housing and employment. *Id.* at 2224 & n.103. Third, Snyder argues that the reliance in *M.L.B.* on *Williams v. Illinois* suggests such an exception. *Id.* at 2224-26 (discussing *Williams* and the M.L.B. Court’s analysis). Based largely on *Griffin*, *Williams* struck down on equal protection grounds an Illinois requirement that indigent prisoners serve additional time beyond their sentence to work off fees and court costs. *Id.* at 2225. Though *Williams* preceded *Davis* by six years, it remains good law and has been approvingly cited by the Court. Snyder draws the inference that the reason *Williams* has survived is because of the fundamental rights exception to *Davis*; otherwise, presumably, *Williams* would be overruled. *Id.* at 2225. Its sudden reemergence in *M.L.B.* implies that the Court was taking advantage of this fundamental rights exception. *Id.* at 2225-26.

<sup>756</sup> *Id.* at 2237-38.

wealthier prisoners would have access to counsel.<sup>757</sup> Snyder further argues that post-conviction proceedings should be viewed as "quasi criminal" in the language of *M.L.B.*, and certainly as more criminal than parental termination proceedings.<sup>758</sup> Given the interests of the prisoner at stake, the risks involved, and the state's non-neutrality, a post-conviction case seems closer to *Griffin* than to *M.L.B.*<sup>759</sup> Thus, Snyder calls for the overrule of *Murray v. Giarratano*.<sup>760</sup>

Snyder's argument is a complex and convoluted one, resting on a case he admits is "ambiguous."<sup>761</sup> He is aware of the strong arguments against his proposal, and he tackles each in turn. First, he recognizes that *Ross v. Moffitt*, *Pennsylvania v. Finley*, and *Murray v. Giarratano* all suggest that the right to free transcripts is broader than the right to counsel.<sup>762</sup> As such, *M.L.B.* would stand for exactly its result, and for no more. Snyder responds that the history of the right to counsel before *Gideon*, such as *Griffin* and *Powell v. Alabama* (the Scottsboro Boys case), demonstrates that the Court saw capital cases as different and allowed appeals in these cases which would not be allowed in a non-capital case.<sup>763</sup> However, Snyder overlooks the key holding of *Giarratano*: after the death sentence, death is *not* different. While capital cases require special procedures at trial, no special procedures are required in post-conviction stages.

Second, Snyder confronts the idea that there is no due process right to post-conviction counsel.<sup>764</sup> He argues that equal protection, not due process, should underpin a right to this counsel.<sup>765</sup> While due process is based on traditional ideas of "fundamental fairness" which would militate against recognition

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<sup>757</sup> *Id.* at 2237 (arguing that a right to state post-conviction counsel should be analyzed under equal protection like *M.L.B.* and should qualify as a fundamental rights exception to *Davis*).

<sup>758</sup> *Id.* at 2240-41.

<sup>759</sup> *Id.* at 2239-41.

<sup>760</sup> *Id.* at 2237.

<sup>761</sup> *Id.* at 2226.

<sup>762</sup> *Id.* at 2241-42.

<sup>763</sup> *Id.* at 2242.

<sup>764</sup> *Id.* at 2242-43.

<sup>765</sup> *Id.*

of a brand-new right, equal protection is “counterhistorical” and reflects newer values.<sup>766</sup> While this is true, Snyder himself fails to adequately address the issue that *Griffin* was decided on both due process and equal protection grounds.<sup>767</sup> As such, while equal protection may spur the development of such a right, due process remains tied to traditional rights formulations and may prevent recognition.

Lastly, Snyder faces the issues of federalism that would block such a right.<sup>768</sup> He argues that post-conviction counsel would decrease federal intrusion into state court decisions because post-conviction claims would be presented effectively (with minimal repetition and invasion), that the federal government could pay for the state post-conviction counsel, and that recognition of such a right is appropriate given the Court’s historical involvement in death penalty issues.<sup>769</sup> In the end, while intriguing, Snyder’s argument is not entirely persuasive. His hypothesis is either too hasty in declaring a right to post-conviction counsel based on a single case, or it is too farfetched, premising a substantial constitutional correction on a shaky foundation of overlapping ideas.

#### d. Ensuring Effective Post-conviction Counsel

There are two ways to ensure effective assistance of counsel: (1) *ex ante* qualification-based systems, which require attorneys to meet certain requirements and assume that qualified attorneys are, by definition, effective, and (2) *ex post* mistake-based systems, such as *Strickland v. Washington*, which evaluate an attorney’s performance after the proceeding to determine if the attorneys committed any prejudicial errors. Both of these approaches have flaws which, if left untended, could undermine the meaningful provision of post-conviction counsel.

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<sup>766</sup> *Id.*

<sup>767</sup> *See id.* at 2215-16.

<sup>768</sup> *Id.* at 2244 (“On the other hand, telling all thirty six capital punishment states they have to provide counsel at state post-conviction proceedings . . . is tantamount to acting like a super-legislature.”).

<sup>769</sup> *Id.* at 2244-45.

For example, the *Strickland* standard for an ex post mistake-based system has been widely criticized for failing to adequately ensure effective assistance of counsel.<sup>770</sup> By presuming attorney competence, deferring to attorney judgments, and requiring a strong showing that even clearly erroneous conduct would have actually changed the outcome of the proceedings, critics argue that *Strickland* has become the proverbial needle through which the camel must pass.<sup>771</sup> In light of this critique, it therefore seems dubious to rely on a *Strickland*-like standard in the post-conviction setting as well. Furthermore, defenders of the AEDPA argue that prior to the opt-in provisions, there was no guarantee of any kind of post-conviction counsel at all. Now, by requiring states to enact qualification standards and by stationing federal courts as monitors, prisoners have far more protection than they ever did. While this protection may not be perfect, given *Strickland*'s weaknesses, the AEDPA's ex ante qualifications-based system seems a more effective solution. Finally, an ex post mistake-based system is inherently procedurally intensive, requiring a second attorney and a second proceeding to evaluate the performance of the first. As above, it is easy to envision an unfolding array of multiple procedures as prisoner cycle through attorneys by mounting endless ineffective assistance of post-conviction counsel claims.

The problems with an ex post mistake-based system would seem to argue for enhanced and enforced ex ante qualifications standards. However, as discussed above, reliance on an ex ante qualification-based system also cannot fully protect prisoners against attorney errors in the course of a proceeding. Even a qualified attorney can make errors in judgment, miscalculate, lack concentration or focus, incorrectly interpret a new case, or simply perform below expectations. While ex ante qualification-based standards do ensure that prisoners are represented by arguably better and more skilled attorneys, by foreclosing ex post

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<sup>770</sup> See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 242 n.3 (1997) (citing articles critical of *Strickland*); *id.* at 278-85 (critiquing *Strickland*-style ex post facto review).

<sup>771</sup> See, e.g., TASK FORCE REPORT, *supra* note 56. The analogy to *Strickland* as the "eye of the needle" was made in *Sullivan v. Fairman*, 819 F.2d 1382, 1391 (7th Cir. 1987).

review, these attorneys are insulated and rendered immune to any challenge; there is no functional check on their performance, and hence, no reason for care.

The best way to ensure effective assistance of post-conviction counsel is to combine both approaches, while taking additional steps to minimize the weaknesses in both. Post-conviction attorneys should be required to meet *ex ante* qualification standards, and should also be exposed to *ex post* mistake-based inquiries into their performance.

The *ex ante* qualifications-based standards can be strengthened through Congressional action to either establish uniform standards or to provide greater guidance and direction to states in setting their own. This improved management would replace the piecemeal and completely open requirements presently in the opt-in provisions. These improved standards would include specific requirements for attorney experience, skills, knowledge, and training in post-conviction representation. Tougher qualification standards will ensure that post-conviction counsel is competent and effective from the outset. Moreover, these qualifications standards can be tied to increased resources for post-conviction counsel, including more opportunities for training, better funding and compensation, and establishment of death penalty resource centers to assist appointed counsel.<sup>772</sup>

In turn, Congress and the states should back these qualification standards up with an improved *ex post* mistake-based system. One possibility for reforming the *Strickland* standard to increase its effectiveness is simply to remove the burden of proving prejudice—if a defendant or a client can prove that the attorney's performance was ineffective in comparison to other attorneys, such a failure would be *per se* prejudicial.<sup>773</sup>

Another suggestion for improving the *Strickland* standard is to establish a checklist of actions and conduct expected of effective

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<sup>772</sup> Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1939 (1994).

<sup>773</sup> Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1276-81, 1285 (1986); Helen Gredd, Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1573 (1983).



tive counsel—failure of the attorney to adequately “check off” the items is by definition ineffective. A proposal for enacting such a procedure was put forth in a note by Martin C. Calhoun.<sup>774</sup> Calhoun recommends a two tiered “hybrid standard” in which the first tier is the checklist. Examples of items on the checklist include:

(1) Defense counsel must interview the defendant as soon as practicable to determine all relevant facts known to the defendant and must explain to him the attorney’s obligation of confidentiality and the importance of disclosing all relevant facts . . . .

(3) Defense counsel must promptly investigate the circumstances of the case by pursuing all avenues that might lead either to facts or witnesses that could affect the merits of the case or the potential severity of the defense. If only one plausible line of defense is available, defense counsel must conduct a substantial *factual and legal* investigation into that defense; if more than one plausible line of defense is available, defense counsel must substantially investigate *all* of these defenses, unless, after partial investigation, time or monetary constraints force him to make the tactical choice of discontinuing the investigation of certain lines of defense . . . .

(6) Defense counsel must make:

- (a) an opening statement either before the prosecution has presented its case or before presenting the case for the defense;
- (b) timely objections that further the defense’s interests both at trial and in the event of an appeal; and
- (c) a closing argument that does not hurt the defendant’s case and points out any weaknesses in the government’s case.<sup>775</sup>

In order to prove ineffective assistance of counsel, a defendant must demonstrate that his counsel failed to “substantially satisfy” one or more of the checklist items.<sup>776</sup> Upon this showing, the defendant has established a presumption that his counsel was ineffective and would be entitled to judgment unless the

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<sup>774</sup> Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 436 (1988). See also Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to the Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

<sup>775</sup> Calhoun, *supra* note 774, at 438-39. While these checklist items are obviously aimed at trial, they could be easily adapted to expected tasks required of a post-conviction attorney, such as adequate review of the record, investigation into alternative claims, advocating all possible claims of the client, etc.

<sup>776</sup> *Id.* at 440.

government could prove that counsel's omission was "justified" or "insubstantial."<sup>777</sup> Calhoun deliberately avoids any requirement of proving prejudice.<sup>778</sup> If the government successfully rebuts the presumption of ineffectiveness, Calhoun suggests a second tier. Here the defendant could prove ineffective assistance of counsel by showing that, despite substantially satisfying the requirements of the checklist, the attorney's performance was ineffective under the particular circumstances of the case.<sup>779</sup> Calhoun argues that this second tier could be relatively cursory, requiring only a review of the record for any unusual or extraordinary behaviors by counsel in light of the facts of case.<sup>780</sup>

*Strickland* and the above proposals are alike in presuming that an attorney's performance is effective absent some showing by the defendant. An alternative possibility for enhancing the ex post mistake-based standard is to reverse this presumption of competence. Under this alternative approach, if the attorney is unsuccessful during the post-conviction proceeding, the presumption is that the attorney was ineffective. The attorney would then be forced to prove effectiveness, rather than disproving ineffectiveness, by reviewing and justifying the course of his involvement in the case, including discussions with the client, preparation, investigation, research, strategy, and tactics. As with Calhoun's proposal, this review could be expeditious, consisting of the attorney submitting a memorandum to the court, or a brief hearing in front of the judge in the post-conviction proceeding. This single hearing would obviate the need for repetitive, layered review and for multiple counsel appointments; it would not even need to be adversarial.

Reversing the presumption of competence can be justified in several ways. First, from an economic perspective, this approach is correct because unskilled and often illiterate prisoners are least able to judge whether their attorney performed competently. Such a rule would encourage disclosure because the attorney has the best information on his own performance;

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<sup>777</sup> *Id.*

<sup>778</sup> *Id.*

<sup>779</sup> *Id.* at 442.

<sup>780</sup> *Id.*

faced with possible penalties or at least a declaration of inadequate representation, an attorney has an incentive to share information with his client and the court.<sup>781</sup> Second, while flipping the presumption might be unworkable at the trial court level because of the large numbers of cases, it would be less burdensome in the context of post-conviction proceedings for capital prisoners—there are simply fewer prisoners at this procedural stage and the issues are more confined than at trial. Third, applying this new approach to capital post-conviction proceedings can also be justified as an extension of *McFarland v. Scott*,<sup>782</sup> which recognized that capital prisoners demanded special post-conviction procedures due to the nature of their sentences. Because *McFarland* finds that “death is different,” heightened procedural review for counsel in capital post-conviction proceedings makes sense.

Of course, the procedures required to enact a meaningful and effective post-conviction counsel system are more demanding and expensive than the simple qualification-based standards which presently exist. Creating such a complex system involving higher qualifications standards, increasing funding, and additional post-conviction proceedings smacks of a return to the height of the Warren Court, where repetitive procedure was valued more than finality. The argument against such a complex system to ensure effective assistance is simply that it tips the balance too far in favor of procedure and prisoners whose guilt has already been adjudicated. Unfortunately, there is no good response to this final argument—it represents the paradox of habeas corpus and post-conviction proceedings in general. On one hand, procedural rights of prisoners must be upheld and protected, for fair and just outcomes can only emerge from fair

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<sup>781</sup> As an additional possibility, evidence of attorney ineffectiveness in post-conviction settings could be divorced from considerations of professional responsibility. The fact that attorney ineffectiveness or incompetence is relevant to charges of ethical malfeasance may be one reason why ineffectiveness is so difficult to prove: courts and other attorneys may be reluctant to penalize trial or appellate attorneys operating under often difficult circumstances in this manner. However, in such circumstances, the clients bear the brunt of the attorney's errors. By divorcing attorney effectiveness from ethics, there may be less of a stigma to finding ineffectiveness and clients may be better protected.

<sup>782</sup> 512 U.S. 849 (1994).

and just procedures. On the other, a system must be able to reach a final determination or it will be paralyzed under the accumulated weight of unresolved matters. While this paper clearly illustrates the need for meaningful and effective post-conviction counsel and advocates the reforms necessary to ensure it, this is not a uniform, or even a majority, view.

## VI. CONCLUSION

This paper has attempted an exhaustive review of the opt-in provisions under Chapter 154 of the Antiterrorism and Effective Death Penalty Act. Part II reviewed the origin of the provisions, born out of the tension in habeas corpus between guaranteeing constitutional rights of prisoners and preventing endless repetitive litigation of procedural minutiae. This Part showed how the Powell Committee proposal containing the opt-in provisions became Congress' choice, over arguably better designed and fairer proposals.

Part III reviewed the litigation history of the opt-in provisions, with a focus on those states forced to confront the issue through affirmative prisoner suits. As a result of this litigation, inmates have been foreclosed from testing or ensuring that a state's system of providing post-conviction counsel meets set standards. Such claims are simply non-justiciable to federal courts.

Part IV inquired into the policies and intentions of those states with the death penalty toward the opt-in provisions. While the majority of death penalty states are seeking or believe themselves to have opted in, some states remain undecided or hostile to Chapter 154. One notable trend among many of the states—optimistic, pessimistic, or undecided—was the perception that federal courts are opposed to allowing opt in and will not, or will reluctantly, find states to qualify under Chapter 154.

Part V synthesized the previous parts to critique the opt-in provisions. This Part concluded that in fostering tensions within the federal system, the opt-in provisions have created more trouble than they have prevented. In addition, because prisoners cannot effectively challenge the competency of their representation, the opt-in provisions' guarantee is effectively

empty. This Part recommends reforming the system by abolishing the quid pro quo mechanism in favor of the AEDPA's present timelines and by recognizing a right to effective post-conviction counsel; alternatively, this Part recommends adoption of the ABA Task Force proposal as an effective means of reforming habeas corpus overall. This Part concludes by reviewing arguments for a right to such counsel and concluding that such a right should be recognized through the Constitution and through statutory amendment to the AEDPA.

In the end, proposals for reform of the opt-in provisions return one back to where this paper started: the debate over habeas corpus. Those in favor of expedited review and limited ability to litigate would seem to favor the opt-in provisions, as they give states freedom of choice, freedom from intrusion and freedom from delay. In contrast, those who favor habeas corpus as a means of defending constitutional rights of prisoners are inclined to see the opt-in provisions as a faster road to "slaughterhouse justice."<sup>783</sup> The workings of the opt-in provisions and this paper's proposed reforms show that neither of these positions is entirely correct. While the opt-in provisions would theoretically increase the speed of capital post-conviction review, it would only do so through federal critique of a state's chosen system. Rather than make states freer, opt-in provisions station federal courts as monitors against states providing incompetent counsel. In turn, the proposed reforms of abolishing the quid pro quo and guaranteeing right to post-conviction counsel would meet many of the demand of those who favor prisoners' rights, but such reforms would have to come in the context of limited review and the remaining timelines in the AEDPA. The debate over habeas corpus has been tense and polarized since the early days of the Warren Court; only through considered compromise and balance among the competing interests can a meaningful and effective position be found.

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<sup>783</sup> Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603 (1998).