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NEW OPPORTUNITIES FOR DEFENSE ATTORNEYS: HOW RECORD PRESERVATION REQUIREMENTS AFTER THE NEW HABEAS BILL REQUIRE EXTENSIVE AND EXCITING TRIAL PREPARATION

ANDREA D. LYON*

INTRODUCTION

The writ of habeas corpus seems to most defense attorneys some arcane thing that "federal" attorneys do to fix an error at the state court level which resulted in the imprisonment or death sentence for their client. The writ seems far removed and relatively unimportant in the preparation of a case for trial. Trial lawyers, particularly defense attorneys, certainly understand how important it is to preserve the record, to object, and to state both the federal and state grounds for the objection. However, it is not immediately apparent how, working backwards, the Anti-Terrorism and Effective Death Penalty Act of 1996[1] (hereinafter "the new Act" or "AEDPA") has changed, altered and intensified not only the need to preserve the record, but also the manner in which such preservation must be done. In fact, the new Act can be seen as providing the support and justification for an expanded motions

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1. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (to be codified in scattered sections of 28 U.S.C.).

practice, evidentiary hearings and discovery.

Defense attorneys may see this new Act as just one more overwhelming aspect of defending criminal cases. In many ways, attorneys are not wrong to see it that way. After all, if a credible case can be made by the prosecution that defense counsel could have presented or preserved a fact or claim at the trial level and did not, that fact or claim is waived.[2] If a fact or claim could have been raised on direct appeal, and was not, it is waived.[3] If a fact or claim could have been raised in state post-conviction or habeas and was not, it is waived.[4] While none of this is new, since the rules on waiver have been getting tougher as death penalty jurisprudence has progressed, the new Act greatly increases the burden on defense counsel.

Until the new Act, there was sometimes a way around the problem of waiver.[5] If an imprisoned inmate or one sentenced to death could show that he had both cause for the failure to present the fact and the federal claim to which it was tied and he could show prejudice to him as a result, he could overcome the procedural roadblock and at least get to present his issue to the federal court.[6] This is no longer the case. Now the inmate must show not only cause, but innocence as well.[7]

Even worse, under the new Act, if the defense attorney succeeds in bringing a claim into federal court, the application for a writ of habeas corpus "shall not be granted"[8] unless one of two conditions is met. The first condition requires the state decision to have been "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[9] Alternatively, the second condition requires that the state decision involved "an unreasonable application of clearly established Federal law as established by the Supreme Court of the United States." [10]

The first Part of this Article briefly discusses the history of the writ of habeas corpus and procedural default. The second part examines the changes that the new Act imposes on the rules governing the writ of habeas corpus and procedural default. Lastly, this Article focuses on the support that this Act can be seen as providing for a generally expanded motions practice in preparing for trial.

2. § 104, 110 Stat. at 1219.
3. *Id.*
4. *Id.*
5. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).
6. *Id.*
7. § 104, 110 Stat. at 1219.
8. *Id.*
9. *Id.*
10. *Id.*

I. HISTORY OF HABEAS CORPUS AND PROCEDURAL DEFAULT[11]

The writ of habeas corpus has a long and detailed history; it is a history with its roots in the Roman Empire.[12] The "Great Writ" came to the United States by way of English common law,[13] and is explicitly recognized in the United States Constitution.[14] Originally, the writ of habeas corpus was available only to federal prisoners. However, in 1867, by an act of Congress[15] state court defendants were afforded the same protections allowed under the writ.[16] This extension permitted federal courts to oversee state court proceedings for the first time, thus helping to secure the preservation of constitutional rights for state court defendants.[17] The states have held much resentment as a result of this federal monitoring function. State prosecutorial agencies in particular see this observatory function as an unwarranted intrusion into the affairs of the state court system.[18]

During the 1960s, the Warren Court handed down a series of decisions which extended the protections of the Bill of Rights to

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11. *See* Marshall J. Hartman & Shelvin Singer, *Requiem For Habeas Corpus*, THE CHAMPION, Mar. 1994, at 12-20 (discussing the history and scope of the writ of habeas corpus). See also Andrea D. Lyon, *Unintended Consequences: The United States Supreme Court's Mission to Restrict Remedies for State Prisoners Backfires*, 30 CAL. W. L. REV. 265 (1994) for this author's previous article on the subject of habeas corpus.

12. Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 55-56 (1934). *See also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 187-211 (1980) (discussing the progression and evolution which the writ of habeas corpus underwent before becoming available to both federal and state prisoners); Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DE PAUL L. REV. 85, 91-98 (1988) (describing the extension of federal habeas corpus jurisdiction over state prisoners); Maureen A. Dowd, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315, 1319-25 (1984) (explaining the development of habeas corpus applicable to state prisoners).

13. Blackstone called it "the most celebrated writ in the English Law." 3 WILLIAM BLACKSTONE, COMMENTARIES 170.

14. U.S. CONST. art. I, § 9, cl. 2. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

15. 14 Stat. 385 (1867).

16. *See* DUKER, *supra* note 12, at 187-211 (discussing the availability of federal habeas corpus to state court defendants).

17. *See* SHELVIN SINGER & MARSHALL J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK §§ 1.1-1.3 (1986) (discussing the congressional intent behind incorporating the Bill of Rights as against the States through the Fourteenth Amendment).

18. *See* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U.L. REV. 991, 1010 (1985) (indicating that "state courts may resent federal, trial level courts accepting habeas petitions and thus undertaking to second guess judgments that may have been affirmed by the states' highest courts").

defendants in state court.[19] In the landmark year of 1963, the Supreme Court handed down three decisions dealing with federal habeas corpus, namely *Fay v. Noia*,[20] *Townsend v. Sain*, [21] and

19. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 471 (1966) (requiring the recitation of one's right to remain silent and to consult with an attorney while being questioned in state custody); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (requiring the appointment of counsel to the defendant accused of a felony crime in state court); Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (holding that the Exclusionary Rule of the Fourth Amendment applied to state court proceedings via the Fourteenth Amendment). Prior to these cases, the Supreme Court held that the protections guaranteed by the Bill of Rights applied only in federal court. Therefore, state court defendants did not receive the constitutional protections which the Fourth, Fifth and Sixth Amendments guarantee.

20. 372 U.S. 391 (1963), *overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992). In *Fay v. Noia*, the defendant faced a conviction for felony murder largely because of an admittedly coerced confession. *Id.* at 394. The district court denied Noia habeas relief because he filed his appeal late. *Id.* The court's denial had an independent state ground for the decision. As a result of this independent state ground, the court prohibited federal review under 28 U.S.C. § 2254 which provided in part that "'[a]n application for a writ of habeas corpus for a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . .'" *Fay*, 372 U.S. at 396 (*quoting* 28 U.S.C. § 2254). The Court of Appeals for the Second Circuit reversed the lower court's denial of relief, with one judge dissenting. In its holding, the court found that exceptional circumstances excused the statutory requirement. *Id.* at 397. On appeal, the Supreme Court, in an opinion by Justice Brennan, affirmed the Second Circuit's reversal after a thorough discussion of the history of the "Great Writ." *Id.* at 399-426. The Supreme Court held that a federal district court should not deny a petitioner of federal habeas relief based on evidence of a procedural failure unless the petitioner "deliberately bypassed" state procedures. *Id.* at 438. This was a good faith test that required consideration of the claim unless at the state court proceeding, the petitioner or his defense counsel deliberately failed to raise a claim which they had factual or legal knowledge. *Id.* at 439-40.

21. 372 U.S. 293 (1963), *overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992). In *Townsend v. Sain*, the Supreme Court applied the same "good faith" test in deciding when an evidentiary hearing on a petition from a state prisoner was mandatory. *Id.* at 312-18. *See also* Lyon, *supra* note 11, at 267-68. Thus, the Court allowed habeas petitioners entitlement to a complete evidentiary hearing on their constitutional claims in federal court unless the petitioners "deliberately bypassed" the procedure mandated by the state courts. *Id.*

The *Townsend* Court expressed two concerns. The first concern focused on whether there was a constitutionally fair review of the facts. *Id.* at 317. The second concern focused on the deprivation a petitioner would have of this fair review if there was evidence of minimal review which had occurred in state court. *Id.* In the aggregate, this case "cut through the procedural thicket of state and federal comity" thereby requiring federal courts to grant relief to criminal defendants when the state court acted in an unconstitutional manner. *See also* Hartman & Singer, *supra* note 11, at 13. This decision did not limit when a federal district court could hold a hearing *sua sponte*, only when the district judge must hold such a hearing. *Townsend*, 372 U.S. at 318.

Sanders v. United States.[22] Each of these cases made it possible for a state prisoner to obtain relief in federal courts even when the petitioner had made procedural errors, such as not filing an appeal on time as long as there was what amounted to a good reason for the default.

However, in 1977, the Supreme Court, with Warren Burger as Chief Justice, shifted its position and modified *Fay v. Noia*.[23] In *Wainwright v. Sykes*, the Court instituted the "cause and prejudice" test for courts to adhere to when confronted with questions of state procedural default.[24] Under the *Sykes* test, the petitioner would be barred from habeas corpus relief unless he could show "cause" as to why he had not properly raised the claim during the state proceeding and could demonstrate the "prejudice" resulting to him from the alleged constitutional violation.[25] After *Sykes*, courts stopped focusing on the merits of claims and moved into endless inquiries on what amounted to cause, what constituted prejudice, and what had been procedurally defaulted.[26]

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22. 373 U.S. 1 (1963). In *Sanders*, the Supreme Court announced that whether or not a second or successive petition constituted an abuse of the writ of habeas corpus, which would compel dismissal, would depend on whether the petitioner "deliberately abandon[ed]" the claim. *Id.* at 17-18. The *Sanders* Court applied this test to cases where the defense counsel lacked either factual or legal knowledge of a specific constitutional claim apparent when the petitioner filed the initial petition for habeas corpus relief. *Id.* at 16-18. As a result, a successor petition for writ of habeas corpus could be successful unless defense counsel not only had such knowledge, but deliberately failed to raise the claim. *Id.*

23. *Fay*, 372 U.S. at 438 (holding that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and . . . has forfeited his state court remedies").

24. 433 U.S. 72, 90-91 (1977).

25. *See id.* at 86-87 (stating that the Court's holding would "leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard"). *See also* Hartman & Singer, *supra* note 11, at 13 (stating that the Court viewed the *Sykes* standard as an attempt to promote "procedural uniformity").

26. These inquiries, largely the result of prosecution urged procedural defenses to litigation on the merits of a claim, became the subject of the public perception of "endless appeals." While there may have been reason to "fault" the defense for continuing to ask for relief, the fact that a large part of the delay was occasioned by the prosecution is one that simply has never been made in the media, resulting in a serious misperception of the need for "reform." *See generally*, Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493 (1996) (detailing the new habeas bill and the criticisms which the writ draws); James J. Sticha, Note, *To Be Or Not To Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 MINN. L. REV. 1615 (1996) (noting the increased costs of litigation and the effects on the actual innocence exception).

II. HOW AEDPA IMPACTS TRIAL PRACTICE FOR DEFENSE ATTORNEYS

It is beyond the scope of this Article to discuss the impact of the AEDPA on habeas practice in either the capital or non-capital context.[27] Instead, this Article seeks to articulate the duties the AEDPA places on the trial lawyer. This Article further seeks to articulate what opportunities these duties create for extensive, exciting and exacting motions practice.

One could certainly argue that, before the AEDPA, a conscientious defense attorney should file and litigate motions where, at a minimum, she had more than a suspicion or a hunch that such a motion was necessary. For instance, she would not file a motion to dismiss the charges based on allegations of prosecutorial misconduct unless she had evidence of that misconduct, and it was sufficiently egregious to warrant such a motion. Indeed, even if the misconduct was egregious enough, an attorney might decide not to file it for reasons of trial strategy or because she thought the motion unlikely to succeed. The defense counsel could do so, secure in the knowledge that should more evidence come to light later on, evidence the attorney could not have reasonably located through the exercise of due diligence, such a challenge could be mounted in a federal habeas corpus proceeding.[28] In light of the new law, this simply is no longer the case unless the prosecutorial misconduct is of such a nature that not only could one show prejudice to the court, a difficult enough endeavor, but innocence of the crime itself.[29] In other words, if the defense attorney has any reason to file such a motion she must do so. The price of failing to do so is that the issue can never be brought to the attention of the federal court unless it is accompanied by proof of innocence.[30]

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27. See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) for an excellent discussion on the AEDPA with respect to both capital and non-capital cases.

28. Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992) (holding that the state prisoner is "entitled to an evidentiary hearing in federal court if he can show cause for a failure to develop facts in state court and actual prejudice resulting from that failure").

29. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1219.

30. *Id.* Since the AEDPA seems to follow in large part some of the more restrictive decision of the United States Supreme Court, it seems likely that the shameful holding in *Herrera v. Collins*, 506 U.S. 390 (1993), created this dichotomy. In *Herrera*, the Court held that it was not unconstitutional to execute an innocent man. *Id.* at 404. *Schlup v. Delo*, 115 S. Ct. 851 (1995), to some degree overruled *Herrera* albeit *sub silentio*. In *Schlup*, the defendant was a prison inmate who was convicted and sentenced to die for the murder of another inmate. *Id.* at 856. The defendant produced a videotape that showed him in the prison dining room some 65 seconds before the guards received a

III. TRIAL PREPARATION OPPORTUNITIES FOR DEFENSE ATTORNEYS

So what does this mean for defense attorneys? More particularly, what does it mean to defense trial attorneys? Well, it certainly increases the burden on us. An attorney's failure to object, to file a motion or to elicit a fact from a witness may indeed prove fatal to the defendant's ability to even raise the issue in a federal court in subsequent proceedings.

Yet, the author maintains that the AEDPA is actually an opportunity. Because the new Act places such a heavy burden on the state courts, trial courts in particular, and because every fault except the most egregious will be laid at defense counsel's door, the much vaunted defense lawyer's paranoia actually serves her interest.

In other words, if a defense attorney can think of a legitimate good faith reason to file a motion, she should do so. In doing so, the attorney should cite the bipartisan sponsored AEDPA. For example, an attorney should consider whether to file a motion to recuse an unfair judge. This is different than a motion to recuse a judge for cause, and should require a lesser showing than an ordinary motion or at least it ought to be. The reason is that if there is to be this heightened deference to the trial judge's findings of fact as required under the AEDPA,[31] to the extent that those findings of fact cannot be overturned except in the most extraordinary of circumstances,[32] then defense counsel should make such a motion where there are grounds to make it.

In addition, the defense attorney should make broader requests for discovery in order to fully develop all of the pertinent facts for a constitutional claim. Under the AEDPA, failure to do so may prove fatal when raising the issue in federal court unless the defense attorney can meet the very stringent two prong test. The first prong requires a factual predicate that could not have been found out with the exercise of due diligence or, in the unlikely event that the United States Supreme Court hands down a new rule of law which applies retroactively to matters on collateral review. The second prong requires the defense attorney to show factual innocence.[33] Broader requests for discovery means asking for the predicates for conclusions that the police have drawn. For example, if an attorney has a police report that says "the suspect matched the description," then you

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distress call pertaining to the murder. *Id.* at 858. The petitioner's death sentence and conviction were reversed and remanded in light of this evidence of actual innocence. *Id.* at 869.

31. § 104, 110 Stat. at 1219 (setting forth the narrow circumstances in which a defendant may obtain habeas corpus relief).

32. *Id.* (stating the "determination of a factual issue made by a State court shall be presumed to be correct"). In addition, this provision allows a defendant to overcome this presumption by clear and convincing evidence. *Id.*

33. *Id.*

should ask in discovery how was it the police came to that conclusion, and how the police located your client's photograph in the first place. The constitutional reason for asking such a question is grounded in the Fourth Amendment,[34] and possibly in the Sixth Amendment,[35] since there is a possibility that the police relied on an informant whom the defendant may have a right to confront.[36] While the new Act will not guarantee that the court will grant such a discovery motion, in post-trial proceedings such a request may very well satisfy the exhaustive requirements, since the defense attorney would have already made every effort to have a hearing on the facts. All the motions discussed below will serve a similar purpose under the AEDPA even if they are denied.

There are other sorts of constitutional motions that should be made under the auspices of the same section of AEDPA.[37] Because of the need to adequately develop facts in state court, the defense attorney can, and should, ask for an evidentiary hearing on a plethora of issues relating to motions. If defense counsel has a good faith basis to suspect a *Brady* violation,[38] such as prosecutorial misconduct,[39] then the defense counsel should file a motion to discover the extent of these violations, including a request for appropriate sanctions. For example, if defense counsel has interviewed a witness, and that witness has stated something exculpatory which he asserts he has previously told the police or the prosecution, then the defense counsel has a reason to file a motion alleging the *Brady* violation. In raising this motion, defense counsel should ask for an evidentiary hearing on what precisely occurred during the witness interview and ask for disclosure of all contacts between the prosecutorial agency involved and any other witness in the case.

Similarly, if there is physical evidence which has been, or is going to be, sent to a crime laboratory for testing, then defense counsel should move the court to order the evidence split in half so inde-

34. U.S. CONST. amend. IV.

35. U.S. CONST. amend. VI.

36. *See, e.g.*, Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (stating that the identity of an informant may be disclosed at trial when the identity or informant's communications are "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause"). *But see* McCray v. Illinois, 386 U.S. 300, 312-13 (1967) (declining to recognize an absolute rule that would allow an accused the right to confront an informant at a preliminary hearing).

37. *See generally* § 104, 110 Stat. at 1219.

38. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that prosecutorial suppression of evidence favorable to the accused is a violation of due process "where the evidence is material either to guilt or to punishment").

39. Prosecutorial misconduct includes situations where someone from the police or other law enforcement agency unduly influences witnesses or where there has been interference with the defendant's access to evidence via subpoena or other court order, such as an order directing the prosecution to "make available" the physical evidence.

pendent testing can be done. Furthermore, the defense counsel should ask for an evidentiary hearing to determine the methods by which the police or investigator collected and preserved the physical evidence in order to determine if there has been any contamination of the evidence. Defense counsel must ask the court for an evidentiary hearing on each claim, and request that the trial judge give it in order to fully develop the facts as the AEDPA now requires defense counsel to do.

Because section 2254(d) of the AEDPA heightens the burden on the defense to prevail in federal court, saying that a writ "shall not issue" unless the state decision is contrary to, or an unreasonable application of federal law as interpreted by the United States Supreme Court, or an unreasonable determination of the facts by the trial judge, the defense counsel must ask either orally or in writing, for the court's reasoning in ruling on motions and objections. One must remember that the federal courts have been told to defer to the trial court, and it is not fair to require the defendant to live with those determinations when those determinations become virtually unreviewable without the reasons for rulings on the record. Each defense counsel should make this request for a written or oral ruling at the beginning of the litigation, and renew and refer to that request as the litigation proceeds.

In the event that the defense loses its case, section 2244(d)(1) of the AEDPA imposes a one year federal filing deadline from "finality."[40] In addition, most states have very short filing deadlines of their own for filing any state post-conviction or habeas.[41] For these two reasons, the defense counsel should ask for a new lawyer to be appointed to look at what was done and not done. In addition, since this litigation is by its nature so fact intensive, defense counsel should also ask that a new investigator and possibly a new expert or experts be appointed so that new counsel can adequately develop the facts as required. It is important to keep in mind that ineffective assistance of counsel at the collateral stage is not a grounds for relief under AEDPA;[42] therefore, a defense attorney cannot rely on someone being able to correct prior mistakes during the collateral stage.[43]

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40. § 101, 110 Stat. at 1219.

41. *See, e.g.*, ARIZ. REV. STAT. § 13-4234 (Supp. 1995) (providing a 120-day filing deadline for capital cases); IDAHO CODE § 19-2719 (providing a 42-day filing deadline for capital cases); 725 ILCS 5/122-1 (West 1994) (providing a 45-day filing deadline for capital cases); NEV. REV. STAT. ANN. § 34.575 (Michie 1996) (providing a 30-day deadline for capital cases); N.C. GEN. STAT. § 15A-1415 (Supp. 1996) (providing a 120-day filing deadline for capital cases); OKLA. STAT. ANN. tit. 22, § 1089 (Supp. 1997) (providing a 90-day filing deadline for capital cases).

42. § 104, 110 Stat. at 1219-20.

43. While section 2244(d)(1)(B) of the AEDPA says that an exception to the filing deadline will be made when "impediment to filing created by State action" exists, it is not at all clear what exactly such an impediment might be.

CONCLUSION

All of this may sound overwhelming to defense counsel, but remember, the burden falls not only on the defense, it falls equally on the prosecution which, in most circumstances, must oppose such motions. Furthermore, the burden falls upon judges who are acutely aware of the burdens placed on already crowded dockets of this requisite "extra" litigation. Most importantly, the burden falls on the public who will see added costs both in time and money in trial litigation. While the intent of Congress was certainly to "move things along," the actual effect of this legislation may very well be the opposite in that it should further complicate the pre-trial and trial stages of these cases by giving the defense attorney the opportunity to truly investigate her case at a level she has been unable to do before. This opportunity creates a more complex trial, an even more complex record, and an expansion rather than a diminution in the scope of litigation.