HABEAS CORPUS AS A CRUCIAL PROTECTOR OF CONSTITUTIONAL RIGHTS: A TRIBUTE WHICH MAY ALSO BE A EULOGY†

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INTRODUCTION

On April 24, 1996, President Clinton signed into law a statute misleadingly entitled the Anti-Terrorism and Effective Death Penalty Act of 1996. A more accurate rephrasing of the title would have been the Anti-Terrorism and Anti-Habeas Corpus Act of 1996.

This law's full impact will not be known until the Supreme Court interprets its many ambiguous and possibly unconstitutional provisions. But one thing that *is* clear is that the law will make it more difficult for death row inmates whose convictions or death sentences were secured in serious violation of the United States Constitution or Bill of Rights to obtain relief through habeas corpus proceedings. What is as yet unknown is *how much* more difficult this will be.

Ironically, many of those who voted for this habeas curtailing legislation did not, and do not, understand crucial facts about habeas corpus: what it is, and what it is designed to do; the kinds of egregious circumstances under which death row inmates have secured habeas relief; why federal habeas corpus is more important than ever in light of state judicial elections featuring emotional, misleading attacks on judges for their death penalty decisions; how severely the Supreme Court has already curtailed habeas' availability; why eviscerating habeas corpus further will not save significant sums and will add (at least in the short run) to further delays; and the implications of completely defunding capital postconviction resource centers at the same time that this statute's statute of limitations and other, complex new provisions came into effect. The remainder of this Article discusses these important facts, in an ef-

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fort to lay to rest some of the common misconceptions about the habeas corpus system which Congress has now changed.

SOME BASIC INFORMATION ABOUT HABEAS CORPUS

What is habeas corpus for? What does it do? Basically, one can only get habeas corpus relief if one is a state prisoner and has been denied relief in the state courts on a meritorious claim under the United States Constitution or Bill of Rights that is not a Fourth Amendment claim and does not constitute a harmless error. Even if all those things are true, one very often could not get federal habeas corpus relief even prior to the April 1996 enactment of habeas-curtailing legislation, because of such things as negligent waivers of claims by trial lawyers and the nonretroactivity in habeas proceedings of purportedly "new" Supreme Court decisions.[1]

If the state judiciaries in this country could be relied on to enforce the Federal Constitution, federal habeas corpus relief would not be granted very often in capital punishment cases. It is not often granted in noncapital cases. However, a study done a few years ago and cited in James Liebman and Randy Hertz's treatise on habeas corpus indicates that relief has been granted in about forty-seven percent of the capital federal habeas cases between 1976 and 1991.[2]

THE SERIOUS CONSTITUTIONAL VIOLATIONS CORRECTED ONLY IN HABEAS

From the description above of what the federal habeas is and how one can get relief, it should be apparent that one cannot get habeas relief for a "technicality." The winning claims in habeas cases are not technicalities. They are serious violations of the United States Constitution or Bill of Rights that are not harmless error. Yet, when a death row inmate wins in habeas corpus, the press accounts usually say that he won on a technicality unless he was found completely innocent.

One example of a nontechnicality is *Amadeo v. Zant*.[3] Although the state courts refused to grant relief, the Supreme Court granted habeas relief because the local prosecutor, Joseph Briley, had surreptiously gotten the jury commissioners to discrimi-

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[1] *See infra* notes 24 and 42 and accompanying text.

[2] JAMES S. LIEBMAN AND RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 17 n.21 (2d ed. 1994) (citing Brief *Amici Curiae* for Respondents, at App. B, Wright v. West, 112 S. Ct. 2482 (1992)).

[3] 486 U.S. 214 (1988).

nate against African Americans in determining who would be eligible for jury service. The jury commissioners discriminated by slightly less than the percentage which would, under Eleventh Circuit precedents, be held unconstitutional. The Supreme Court held that the prosecution's scheme was itself unconstitutional. Subsequently, Mr. Amadeo has gotten a life sentence, and although still imprisoned, he recently graduated from college.

Another example is the case of Federico Martinez-Macias, who was on death row in Texas for a crime he did not commit. After he lost his direct appeal in state court, the American Bar Association ("ABA") Postconviction Death Penalty Representation Project persuaded a major law firm's Washington office to take on his case. At that point, neither the ABA nor the firm had any idea that Mr. Macias was innocent. So, the fact that an innocent man had the resources of a major law firm behind him was fortuitous.

The law firm reinvestigated the entire case. After losing in the state courts despite introducing strong evidence of innocence, the team, headed by Douglas Robinson, secured relief from the federal district court. This was affirmed in the Fifth Circuit, on the issue of ineffective assistance of counsel.[4] Thereafter, when the State attempted to reindict Mr. Macias, the grand jury heard the evidence of his innocence that had been developed by the law firm. The grand jury refused to reindict him, and Mr. Macias was released from prison.[5]

Joseph Green Brown was within hours of being executed in Florida when the Eleventh Circuit granted a stay of execution and subsequently granted relief. The Florida state courts had denied all relief. The Eleventh Circuit ruled in Mr. Brown's favor because the State had deliberately withheld from the defense the fact that the chief prosecution witness had repeatedly failed polygraph examinations.[6] Subsequently, the local prosecutor did not recharge Mr. Brown, who was released from prison. He had a remarkable experience in 1993 at the ABA Annual Meeting in New York, when he met one of the Eleventh Circuit judges who had literally saved his life by granting him habeas relief.[7]

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[4] Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992).

[5] *See* Saundra Torry, *Juggling the Issue of Representing Death-Row Inmates*, WASH. POST, Feb. 5, 1996, at F7.

[6] Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986).

[7] Symposium, *Politics And The Death Penalty: Can Rational Discourse And Due Process Survive The Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 247 (1994) (comments of Shabaka Sundiata Waqlini).

In a case I argued, *Francis v. Franklin*,[8] the charge to the jury shifted to the defendant, by means of a rebuttable presumption, the burden of proof on the main contested issue in the case, intent to kill. That charge had been upheld by the state courts, but the Eleventh Circuit and the United States Supreme Court held it was unconstitutional and not harmless error, and Mr. Franklin got relief.[9]

That was not a technicality. None of the other decisions discussed above involved technicalities. In some of them, as I have indicated, they literally resulted in innocent people not being executed.[10]

WHY STATE COURTS OFTEN DO NOT UPHOLD THE CONSTITUTION IN CAPITAL CASES

Why is it that we cannot rely on state courts to uphold the Constitution in capital cases? One reason is illustrated by a study of Georgia's habeas postconviction cases, all of which went to a single judge in the Georgia Superior Court in Butts County. A study covering decisions from 1983 to 1987 showed that this judge issued twenty-six capital postconviction decisions, all of which denied relief. The federal habeas courts later found harmful constitutional error in at least fourteen of these cases.[11]

State court judges have no incentive to grant relief in postconviction cases. In most states, judges must run for reelection. Their reelection battles are now frequently fought over crime issues.[12]

At the same ABA program at which Mr. Brown met the Eleventh Circuit judge, the then-Chief Justice of North Carolina, James Exum, bemoaned the politicization of state judicial elections. He said that when he first ran for election, judicial elections were not particularly partisan, but that when he ran for reelection, he had to combat attacks that he was soft on crime. He did so by showing

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8 471 U.S. 307, 309 (1985).

9 *Id.* at 312-13.

10 Summaries of a more extensive list of examples of capital cases in which habeas corpus relief has been granted, none of which involved "technicalities," are set forth in Ronald J. Tabak, Commentary, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOYOLA CHI. L.J. 524, 526-29 (1996).

11 Ronald J. Tabak and J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 16-17 nn. 53-54 (1991).

12 *See generally*, Stephen B. Bright and Patrick J. Keenan, *Judges And The Politics Of Death: Deciding Between The Bill Of Rights And The Next Election In Capital Cases*, 75 B.U. L. REV. 759 (1995)(discussing the effect of judicial elections on death penalty jurisprudence).

how often he had voted to uphold death penalties.[13]

Typically, those who vote in judicial elections have no way of knowing the constitutional basis for the rulings in favor of criminal defendants for which the incumbent judges are attacked. Instead, judges are attacked, in campaign advertising, for having voted against upholding particular convictions or death sentences. Their opponents promise to ensure a greater number of executions. As Chief Justice Exum pointed out, the North Carolina Supreme Court has been subjected to unfair press coverage by editorial writers even when those rulings have been unanimous and in line with binding United States Supreme Court precedent, because of the editorialists' misunderstanding of the applicable constitutional law.[14]

An example of a growing trend in judicial campaigning is the election in 1994 for the Texas Court of Criminal Appeals. Stephen W. Mansfield ran for that court even though he had virtually no criminal law experience and had been fined in Florida for practicing law without a license. He ran against a Court of Criminal Appeals judge, a former prosecutor, who had been on that court for twelve years. Mansfield's platform was greater use of the death penalty, greater use of the harmless error doctrine, and fines for lawyers filing "frivolous appeals."[15] Guess who won? Mr. Mansfield is now sitting on the Texas Court of Criminal Appeals.[16]

In 1994, a circuit judge in Alabama ran for reelection. His advertising said, "Some complain that *he's too tough on criminals*, AND HE IS. . . . We need him now more than ever." He was reelected.[17]

A few years ago, James Robertson, one of the most respected judges on the Mississippi Supreme Court, was defeated for reelection after a campaign in which he was attacked for having concluded that it is unconstitutional to impose the death penalty for rape when there has been no murder.[18] The United States Supreme Court had made that precise, binding holding in *Coker v.*

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13 *See Politics and the Death Penalty*, *supra* note 8, at 270-71 (comments of Hon. James G. Exum, Jr.).

14 *Id.* at 272-73.

15 Janet Elliott and Richard Connelly, *Mansfield: The Stealth Candidate: His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32.

16 *See* Bright and Keenan, *supra* note 12, at 762.

17 The advertisement appeared in the Birmingham News, Nov. 4, 1994, at 4C, and Nov. 6, 1994, at 21P. *See* Bright and Keenan, *supra* note 12, at 765.

18 *On March 10, Vote for Judge James L. Roberts, Jr. for The Mississippi Supreme Court*, NORTHEAST MISS. DAILY J., Mar. 7, 1992, at 6 (campaign supplement) (criticizing Judge Robertson's opinion in Leatherwood v. State, 548 So.2d 389, 403-06 (Miss. 1989)

Georgia almost twenty years earlier.[19] But Judge Robertson was nevertheless successfully discredited in the electoral arena, because the average citizen did not know that he was bound by precedent. Judge Robertson was also attacked for other opinions which were in accord with United States Supreme Court rulings. He was defeated.[20] That undoubtedly lowered the courage level of numerous other judges in Mississippi and elsewhere.

Supreme Court Justice John Paul Stevens cogently attacked the practice of electing most state court judges, in an address to the American Bar Association in August 1996. Justice Stevens summarized his views as follows:

Persons who undertake the task of administering justice impartially should not be required - indeed, they should not be permitted - to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to "be tough on crime," or to "enforce the death penalty," is evidence of bias that should disqualify a candidate from sitting in criminal cases. Moreover, making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be. My good friend Justice Ben Overton of the Florida Supreme Court is quoted as saying that it was "never contemplated that the individual who has to protect individual rights would have to consider what decision would produce the most votes."[21]

Justice Stevens went on to say that his opposition to electing state court judges had been "reinforced" by his "review of capital cases * * * because the emotional impact of those cases gives rise to a special risk of error."[22]

THE USE OF IMPROPER SELECTION CRITERIA FOR THE FEDERAL JUDICIARY

With emotional election tactics tainting the state courts, it is

(Robertson, J., concurring), as being "morally repugnant"); *see* Bright and Keenan, *supra* note 12, at 764.

19 433 U.S. 548, 600 (1977) (holding the death penalty unconstitutional in rape cases where death does not occur).

20 *See* Bright and Keenan, *supra* note 12, at 764.

21 Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting (Aug. 3, 1996, Orlando, Fla.), at 12 (quoting from Bright and Keenan, *supra* note 12, at 814).

22 *Id.* at 12-13.

even more important to have life-appointed federal judges available to rule on the federal constitutional claims in habeas cases. However, improper selection considerations are also beginning to come into play with respect to federal judicial appointments. When state judges are considered for the federal judiciary these days, the Senate Judiciary Committee may examine them on how often they have granted relief in capital cases. Judiciary Committee members did that to Florida Chief Justice Rosemary Barkett, who was confirmed to sit on the Eleventh Circuit in 1994.[23] If the current Senate Judiciary Committee, with its Republican majority, had been in power then, she might never have been confirmed, because her numerous votes to affirm capital convictions and death sentences would have been deemed insufficient proof of her "toughness" on crime.[24]

Unfortunately, federal judicial appointments became a political football in the 1996 presidential election, with the Dole and Clinton campaigns engaging "in a kind of 'your judges are softer on crime than our judges' tit for tat."[25] Such election tactics, in which Senate Judiciary Committee Chairman Orrin Hatch has joined, make it less likely that people who would take habeas corpus cases seriously will be nominated and confirmed as federal judges.[26] It may also deter sitting federal and state judges from granting meritorious claims for habeas corpus relief, because granting such relief could harm their prospects for future federal court appointments.

THE SUPREME COURT HAS ALREADY "LEGISLATED" AWAY MUCH OF HABEAS CORPUS

It used to be that if a death row inmate were able to get his habeas corpus case into federal court and had not deliberately waived his claims in state court, the federal court would rule on those claims. Increasingly, that has not been so, due to a variety of doctrines "legislated" by the Supreme Court in the last two decades.

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[23] *See* Henry J. Reske, *Liberal Detectors: Judicial Nominees Sized Up Based On Death-Penalty Stance*, ABA J., Jan. 1994, at 14 (discussing the focus on death penalty cases in the judicial confirmation proceedings).

[24] Joan Biskupic, *They're Clinton's Choice—Unless the GOP Objects*, WASH. POST, Feb. 20-26, 1995 (Nat'l Weekly Ed.) at 12.

[25] Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1, A10 (Nat'l Ed).

[26] Eric Schmitt, *Senator Renews Attack on Clinton's Judges*, N.Y. TIMES, Mar. 26, 1996, at B9.

One of the doctrines is that of procedural default. Two cases are illustrative of how procedural default works. I represented Aubrey Dennis Adams in the United States Supreme Court after having secured unanimous relief for him in the Eleventh Circuit.[27] At his trial, the trial judge told the jurors numerous times that they had absolutely no responsibility for the sentencing and that it was not on their conscience or their shoulders—whereas in reality, Florida law views the jury as the conscience of the community, and the jury's capital sentencing recommendation can be overridden only if no reasonable jury could have done what the actual jury did. Thus, the judge's repeated statements to Adams's jurors were totally improper. A very conservative panel of the Eleventh Circuit held that this was unconstitutional, and that it was not a harmless error because it might very well have changed the outcome of the sentencing proceeding.[28]

The United States Supreme Court reversed by a five to four vote even though it assumed that the Eleventh Circuit had correctly found harmful constitutional error. It reversed because Mr. Adams's trial lawyer had not objected when the judge had repeatedly misinstructed the jury.[29] The four dissenters said that, at the very least, this constituted a fundamental miscarriage of justice.[30] Here is what the United States Supreme Court said about that:

> Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of the death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in the fundamental miscarriage of justice, the "extraordinary case,". . . into an all too ordinary case.[31]

Accordingly, Mr. Adams, whose jury was totally misinformed about its role, in violation of the Constitution, was executed.[32]

Another man whose constitutional rights were violated but was executed solely because of the procedural default doctrine is John Eldon Smith. We know that because his common law wife, Rebecca Machetti, in whose case the same constitutional violation —

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27 *See* Adams v. Wainwright, 804 F.2d 1526, 1528 (11th Cir. 1986), *modified*, 816 F.2d 1493 (11th Cir. 1987) (per curiam), *rev'd sub nom* Dugger v. Adams, 489 U.S. 401, 411 (1989).

28 *Id.*

29 *See* Dugger v. Adams, 409 U.S. 401, 410-11 (1989).

30 *See id.* at 422 (Blackmun, J., dissenting).

31 *Id.* at 412 n.6 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)).

32 *Execution Update*, DEATH ROW, U.S.A., (NAACP Legal Defense and Educational Fund, Inc.), Winter 1995, at 6.

involving discrimination in selecting the jury pool—occurred, was granted relief by the Eleventh Circuit before Smith's case ever got there.[33] Unfortunately, Smith's lawyer failed to raise that meritorious claim as early in the court proceedings as did Machetti's lawyer. When Smith's case got to the Eleventh Circuit, that court knew, from its ruling in Machetti's case, that if it reached the merits Smith would be granted relief. But the Eleventh Circuit did not grant him relief. It held that he had procedurally defaulted the issue.[34] The failure to raise this claim was not a deliberate bypass of the state courts. It was negligence. Yet, thanks to the procedural default doctrine, it caused Smith's execution.[35] As Adams's and Smith's fates illustrate, under the jurisprudence which existed even before the new habeas curtailing law was enacted, your lawyer's negligence could get you executed.

One of the justifications often given for curtailing habeas is that something must be done to shorten the length of time capital cases can take. For example, Senator Hatch has often regaled audiences with his version of why the *Andrews* case from Utah took so long. Wholly aside from the serious errors and omissions in the Senator's description of that case, his harping on it overlooks the facts that death row inmates and their counsel have not deliberately held back meritorious claims to be used in successor petitions, and that, even before Congress enacted habeas-curtailing legislation in April 1996, successor petitions were being given short shrift by the federal courts.

The leading case curtailing successor petitions is *McCleskey v. Zant*, decided in 1991.[36] That case involved the same Warren McCleskey on whose behalf Professor Baldus (the keynote speaker at this symposium) testified in the earlier *McCleskey v. Kemp*.[37] In what Justice Powell now says was the decision he most regrets writing,[38] the Court held 5-4 in *McCleskey v. Kemp* that no constitutional claim was presented by statistical proof of a pattern of racial discrimination in imposing the death penalty.[39]

In his second habeas proceeding, McCleskey attempted to

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[33] *See* Machetti v. Linahan, 679 F.2d 236, 241 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

[34] *See* Smith v. Kemp, 715 F.2d 1459, 1469 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983) (precluding consideration of the discrimination claim because the petitioner failed to adequately demonstrate "how the ends of justice would be served").

[35] *Execution Update*, *supra* note 28, at 4.

[36] 499 U.S. 467, 490-95 (1991).

[37] 481 U.S. 279, 286-87, 297 (1987).

[38] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994).

[39] McCleskey v. Kemp, 481 U.S. 279, 286-87, 297 (1987).

raise a *Massiah* claim. This concerned a jailhouse informant who, unbeknownst to McCleskey, had unconstitutionally been placed in the adjacent cell in order to extract an incriminating statement from him. This issue had not been raised in McCleskey's first *federal* habeas petition—although he had raised it in his first *state* post-conviction petition. The reason he did not raise it in his first federal habeas petition is that the State had flatly denied that it had injected such an informant, and McCleskey's counsel did not at that point have adequate evidence to support the claim. So, being responsible lawyers, and not wanting to incur Rule 11 sanctions, they did not raise the claim. They were not hiding something to bring up later; rather, they did not have facts to demonstrate that what they suspected had actually happened.[40]

After McCleskey lost on his original federal habeas petition, his lawyers received new evidence, including a statement by the informant showing what kind of deals had been made. Based on that evidence, McCleskey got relief in the federal district court.[41] But the Eleventh Circuit reversed,[42] and the United States Supreme Court then affirmed the Eleventh Circuit's holding. The Supreme Court held that the claim had been brought too late and constituted "abuse of the writ." The Court held that the claim should have been litigated in the first federal habeas proceeding, even though (1) at the time of that proceeding McCleskey had not yet secured evidence providing a factual basis for the claim and (2) the State, during the state postconviction proceeding, had asserted that the claim was baseless.[43] Because of this "abuse of the writ" holding, Mr. McCleskey was executed.[44]

Another door-closing doctrine is the retroactivity doctrine. Prior to 1989, the federal courts considered various factors in deciding whether constitutional rulings would be retroactively applicable in habeas cases.[45] However, starting with *Teague v. Lane*,[46] the retroactivity doctrine has been drastically changed.

An illustration of the *Teague* doctrine in action is *Butler v. McKellar*.[47] At the time of the trial in that case, defendant Butler

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40 McCleskey v. Zant, 499 U.S. 467, 526 (1991) (Marshall, J., dissenting).

41 *See* McCleskey v. Kemp, No. C87-1517A (N.D. Ga. Dec. 23, 1987).

42 890 F.2d 342 (11th Cir. 1989).

43 McCleskey v. Zant, 499 U.S. 467, 490-95 (1991).

44 *Execution Update*, *supra* note 28, at 6.

45 Linkletter v. Walker, 381 U.S. 618, 629 (1965).

46 489 U.S. 288, 294-96 (1989) (plurality opinion).

47 494 U.S. 407, 415-16 (1990).

raised a claim based on *Edwards v. Arizona*.[48] He asserted that when being questioned by the police he had asked for a lawyer, but that the police had nevertheless proceeded to question him—not about the same case they had originally arrested him for, but about a different case. The Supreme Court had already held in *Edwards* that the Constitution is violated if, after a defendant who is being questioned says he wants a lawyer, the police keep questioning him about *that same case*.[49] Mr. Butler asserted at trial and consistently thereafter that this same principle applies where the police question the prisoner about *a different case* after he asks for a lawyer. This assertion turned out to be correct.

Before Mr. Butler completed his federal habeas proceedings but after his direct appeal, the United States Supreme Court held in *Arizona v. Roberson*[50] that the *Edwards* principle does, indeed, apply in the context of questioning about a different case. So, when Mr. Butler's habeas case reached the Supreme Court, everyone knew that he had raised, and had never waived, a winning constitutional argument. But he still lost. Why? The Supreme Court held that *Roberson* could not be applied in Butler's habeas case because *Roberson* created a "new" rule that had not existed when Butler's case had been on direct appeal in state court. *Roberson*'s holding was characterized as "new" because the question of whether *Edwards* applies in the context of questioning about a different crime had been, prior to *Roberson*, susceptible to debate among reasonable minds. Therefore, Butler was denied relief.[51]

In 1993, the Supreme Court changed the way that the harmless error doctrine applies in habeas cases, and thereby made it more difficult for a habeas petitioner to secure relief. Formerly, after a habeas petitioner proved that the Constitution was violated in his case, the State had to show harmlessness beyond a reasonable doubt.[52] But under *Brecht v. Abrahamson*,[53] the standard in habeas cases was changed—to whether the constitutional violation lacked substantial injurious effect.[54]

Another change "legislated" by the Supreme Court curtailed a habeas petitioner's right to a federal evidentiary hearing. A habeas petitioner used to have the absolute right to a federal evidentiary

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48 451 U.S. 477 (1981)
49 *Id.* at 484.
50 486 U.S. 675 (1988).
51 *See* Butler v. McKellar, 494 U.S. 407, 416 (1990).
52 Yates v. Evatt, 500 U.S. 391, 403 (1991).
53 113 S. Ct. 1710, 1712-13 (1993).
54 *Id.* at 1718, 1722.

hearing when there were significant factual questions which the state courts did not decide.[55] But in *Keeney v. Tamayo-Reyes* in 1992,[56] the Supreme Court limited the mandatory right to a federal evidentiary hearing to situations where the facts were not subject to a full and fair hearing in the state courts for reasons beyond the control of the petitioner or his attorney.[57] So, if the reason the facts were not developed in state court was ignorance or mistake—which could easily have occurred, particularly where the petitioner had no lawyer in the state postconviction proceeding—the petitioner no longer had a mandatory right to a federal evidentiary hearing. (The federal judge still had the *discretionary* power to order a hearing in such circumstances. The newly enacted habeas curtailing law will, if construed literally, make even *discretionary* federal evidentiary hearings more difficult to secure, by establishing a prerequisite that the petitioner tie his claim to factual innocence.[58]

Much of what the Supreme Court has done in restricting habeas availability has elevated form over substance. For example, procedurally barring meritorious claims when it is obvious that defense counsel's waiver was not intentional elevates form over substance. A fatal example of this is *Coleman v. Thompson*,[59] in which Roger Coleman was denied relief because a law firm representing him *pro bono* was three days late in filing a notice of appeal in the state appeals court.[60] Mr. Coleman was executed[61] without regard to the possible validity of his constitutional claims.

People should not be sent to their deaths because their lawyers bungle in failing to meet a deadline like that. This is the kind of elevation of form over substance that we are seeing over and over again. When I discuss this with people who favor the death penalty, very few disagree with the principle that you should get one real chance to get your issues before the federal courts and have them decide them, and not have these various boobytraps de-

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55 Townsend v. Sain, 372 U.S. 293, 312 (1963) (setting forth the district court's power to conduct evidentiary hearings).

56 504 U.S. 1 (1992).

57 *See id.* at 11-12.

58 *See* S. 735, 104th Cong., 1st Sess. § 604(4) (amending 28 U.S.C. § 2254 (e)(2)). As Professor Larry Yackle has stated, such a literal reading "has to be unconstitutional in application" in circumstances in which it would require a federal court "to rule on the merits of a federal constitutional claim in ignorance of the material facts, simply because those facts weren't developed in state court." Larry Yackle in Panel Discussion: *Is There Any Habeas Left in This Corpus?*, 27 LOY. CHI. L.J. 523, 566 (1996).

59 501 U.S. 722 (1991).

60 *See id.* at 727.

61 *Execution Update, supra* note 28, at 7.

termine whether you ever get a decision. But the Supreme Court continues to utilize such boobytraps, because the courts have come under great criticism for not speeding up executions.

Accordingly, what Congress should have done in 1996 was to put some life back into habeas corpus. Instead, the legislation it enacted will weaken what little was still left of habeas corpus.

EVISCERATING HABEAS FURTHER WILL NOT SAVE SIGNIFICANT SUMS AND WILL ADD TO DELAYS

The principal reason why habeas "reform" legislation has been enacted is that Congress and much of the public assume that habeas claims are almost always frivolous, and they want death row inmates to get executed quickly. However, as discussed above, in a very significant percentage of cases—well over forty percent—habeas claims of death row inmates are not only not frivolous; they concern serious, nonharmless violations of the Constitution. Indeed, if the Supreme Court had not erected the various boobytraps discussed above, the past rate of success for death row inmates in habeas cases would have been even higher.

Sadly, an inevitable effect of the habeas-curtailing law enacted in April 1996 will be to increase the number of executed people whose rights under the Constitution have been violated through harmful errors.[62] Moreover, these "reforms" will not materially save on costs and will add to, not diminish, delays.

With regard to costs, it is important to recognize that by far the greatest reason why the death penalty system is more costly than the alternative is greater trial and pretrial costs. These include the costs in the high percentage of cases (the percentage is particularly high in New Jersey) where the State unsuccessfully seeks the death penalty but incurs all of the costs of seeking it. Cases in which the death penalty is sought are far more likely to go to trial than cases in which the death penalty is not sought. So, even if there were *no* state postconviction or federal habeas corpus proceedings, the death penalty system would still be far more expensive than the alternative.[63]

The cost of the death penalty system might be significantly reduced by adopting this proposal by Judge Alex Kozinski of the

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[62] *See* Marcia Coyle, *Law: Innocent Dead Men Walking? New Law Would Have Sealed Fate of Some Inmates Later Found Not Guilty*, Nat'l L.J. May 20, 1996 at 1, A20-A21.

[63] *See* Philip J. Cook and Donna B. Slawson, *The Cost of Processing Murder Cases in North Carolina*, Terry Sanford Institute of Public Policy, Duke Univ. (May 1993), at 1; *see also* Ronald J. Tabak and J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 133-36 (1989).

Ninth Circuit (a conservative Reagan appointee): severely narrow the categories of homicides which are eligible for the death penalty, so that the only crimes eligible are the Ted Bundy types of cases.[64] Those are the cases which are used as the "loss leaders" in trying to persuade the public to have the death penalty. But instead of following Judge Kozinski's advice and narrowing the scope of the death penalty, Congress and state legislatures have continued to expand its scope. Accordingly, even if the recently enacted curtailments of habeas corpus do eventually save a small sum of money, any such sum will pale in comparison to the new costs from making the death penalty applicable to additional crimes.

The recently enacted statute adds great complexity and will make habeas corpus proceedings more protracted, at least for the next few years, because it will take several years before we learn from the Supreme Court all that Congress has done in enacting the legislation.

Not until April 1996, we had been litigating under an established statute that had existed, substantially unchanged, since 1948. But this new law changes the statutory language in a variety of ways. Numerous issues about what it means must be, and are being, litigated. But only when the Supreme Court resolves each of these issues will we know the real impact of the new law.

PROBLEMS ARISING FROM THE LACK OF ADEQUATE COUNSEL IN STATE POSTCONVICTION PROCEEDINGS AND THE DEFUNDING OF RESOURCE CENTERS

The enactment of the habeas-curtailing law comes at a particularly bad time for death row inmates, because the same Congress which enacted that law has also eliminated all federal funding for capital resource centers. These resource centers had, for the past several years, performed the vital function of ameliorating the situation which had arisen from there being a woefully inadequate number of capable counsel available to handle state postconviction and federal habeas corpus proceedings for indigent death row inmates.

In most states, there is no system for appointing lawyers who will properly represent indigent death row inmates in state postconviction proceedings. This situation continues to exist because in *Murray v. Giarratano*,[65] the Supreme Court declined to hold that

64 Stuart Taylor, Jr., *For the Record*, AMER. LAW., Oct. 1995, at 69, 72.
65 492 U.S. 1 (1989).

there is a constitutional requirement for counsel in state postconviction proceedings.[66] But there is a statutory right to counsel in federal habeas proceedings in capital cases,[67] so if meritorious claims under the Constitution have not been waived, there is a chance to secure relief in federal court.

Often, it does a death row inmate no good for effective counsel to get involved in the case when it reaches federal habeas, because the best claims have been waived earlier.[68] Fortunately, the federally funded capital resource centers sometimes acted to prevent such waivers, by persuading good counsel to handle state postconviction cases as volunteers and then to continue on with the federal habeas proceedings (with compensation possible in the latter). But Congress has defunded these resource centers, so most of them have, or will be, shutting their doors.[69]

The nation is likely to face a crisis in the representation of death row inmates, particularly in state postconviction proceedings. If that crisis arises, the constitutional issue raised but not decided in *Murray v. Giarratano* will come back to the Supreme Court. Perhaps this time, the Court will hold that the Constitution does entitle indigent death row inmates to decent lawyers in state postconviction proceedings.

The recently enacted habeas-curtailing law contains provisions which, on the surface, appear to be intended to help with the counsel problem. But on closer examination, it is apparent that these provisions will, if they are ever held to be applicable in a particular state, aggravate the counsel problem, by imposing ludicrously short time constraints affecting counsel and the federal courts. Thus, the new law provides that if a State has a mechanism for providing "competent" postconviction lawyers in capital cases—and it does not define the word "competent"—then the State will get various benefits, including a six-month statute of limitations on filing a federal habeas petition, a 180-day limit on the time the case can be in the federal district court and a ninety day limit for the federal circuit court to decide the case following briefing (*i.e.*, the ninety day clock would start running even before the oral argument). These lower federal courts could, under the new law, be subject to writs of mandamus if they do not meet the extremely

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66 *See id.* at 14 (Kennedy, J., concurring).

67 21 U.S.C. § 848(q)(4)(B).

68 *See supra* note 23 and accompanying text for a discussion of the procedural default doctrine.

69 *See* Tabak, *supra* Note 10, at 587.

short deadlines.[70] The assumption underlying these deadlines appears to be that the record will have been fully developed and the legal issues will have been effectively briefed in the state postconviction proceeding, so that all the federal courts have to do is to conduct oral arguments (if they so choose) and decide the cases. That is a completely unsubstantiated and dubious assumption, and will be even further off the mark than at present if—as has recently begun to occur in several states—state legislatures impose new time limits on the state postconviction proceedings.

Moreover, the new law will further aggravate the counsel problem in states which do not have a mechanism for providing "competent" postconviction lawyers. In those states, the new law's one-year time limit for investigating and filing habeas petitions will make it considerably harder than before to find capable lawyers who are willing to handle these complex proceedings on behalf of death row inmates. Other aspects of the new statute will aggravate this problem even further, because they change the prior statute in many as yet unclear ways.

CONCLUSION

Before the Supreme Court curtailed its availability, habeas corpus was reasonably effective in protecting the Constitutional rights of death row inmates. Through a variety of decisions in the past two decades, the Supreme Court turned habeas corpus into only a shadow of its former self. Then, in April 1996, Congress enacted legislation which will, in as yet not completely clear ways, curtail habeas corpus further.

This has all occurred despite ever increasing evidence that fatal Constitutional and factual error can be, and are frequently, made in death penalty cases and are all too often not corrected by the state courts. So, habeas is being further constricted at a time when the need to strengthen it should be more evident than ever.

While this "should be more evident than ever," it is not at all evident to the average citizen, or perhaps even the average law student or the average lawyer. The assault and battery perpetuated on the writ of habeas corpus have gone almost unnoticed by mainstream society; and when they have been noticed, they have often been applauded. Hopefully, this Article will lead readers to mobilize to resuscitate habeas corpus, so that it will once again be a meaningful protector of the Constitutional and Bill of Rights.

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[70] S. 735, 104th Cong., 1st Sess. § 607 (creating 28 U.S.C. §§ 2261(b), 2263(a), 2266(b)(1)(A), 2266(b)(1)(C), 2266 (c)(1)(A).