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STATEMENT BEFORE THE
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Fairness, Reliability and Federal Habeas Corpus Procedures

Honorable Members of the United States Senate Judiciary Committee:

I'm pleased to appear before this committee to discuss the importance of fair and reliable administration of criminal justice and the crucial role of federal habeas corpus in the American system. There has been a tremendous increase in the number of American citizens being sent to jail or prison in the last 30 years. In 1972, there were 200,000 people in jails and prisons; today there are over 2.1 million people incarcerated. During this same time period, thousands of people have been sentenced to death in America. Some three and a half thousand people currently face execution and close to a thousand prisoners have already been executed.
The large number of incarcerated people and criminal prosecutions threatening long-term confinement or death has overwhelmed many state criminal justice systems. Many states have been unable to fund adequate indigent defense systems or provide resources for sufficient oversight, training and management of cases to ensure fair, constitutional and reliable convictions and sentences. In my state of Alabama we have no public defender system. With the exception of a few counties, indigent defendants in Alabama receive appointed lawyers from the private bar. The total compensation a lawyer may receive is limited by statute to $1500 to $3500 per case. This includes serious cases where the accused faces life imprisonment. There have even been caps on compensation in death penalty cases. Of the 190 people currently on Alabama's death row, 72% percent were represented by appointed lawyers whose compensation for preparing the case was capped at $1000 by state statute.
There are hundreds of people on death row in Texas who were defended by attorneys who had investigative and expert expenses capped at $500. In some rural areas in Texas, lawyers have received no more than $800 to handle a capital case. A study in Virginia found that, after taking into account an attorney's overhead expenses, the effective hourly rate paid to counsel representing a capital defendant was $13. In non-capital cases, courts have upheld rates as low as $845 for representation of an accused facing life in prison and $318 for people facing less than 20 years in prison. Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.
In Pennsylvania there are death row prisoners who were sentenced to death in Philadelphia in the 1980's and 1990's when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1700 plus $400 for each day in court.
Underfunded indigent defense has predictably caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. Even in capital cases, indigent accused facing execution have been represented by sleeping attorneys, drunk attorneys, attorneys almost completely unfamiliar with trial advocacy, criminal defense generally, or the death penalty law and procedure in particular, and attorneys who otherwise cannot provide the assurance of reliability or fairness in their client's conviction and death sentence.
While small steps have been made to confront the problems of inadequate funding for indigent defense at trial, the reality is that there are thousands of people who have been wrongly convicted and sentenced as a result of unreliable and underfunded legal assistance. There are obviously other problems contributing to wrongful convictions but it is clear that it is only through postconviction proceedings and federal habeas corpus review in particular that we can protect many innocent people and others who have been illegally and unfairly convicted and sentenced.
State Postconviction is Not Reliable in Many States
Deficiencies in state systems result in wrongful convictions and unreliable verdicts and sentences that must be corrected and addressed in postconviction proceedings. However, state postconviction in many states is simply non-responsive to these problems and even less reliable than the state trial process. My state does nothing to provide death row prisoners, or any other incarcerated person, counsel for postconviction review. If a condemned prisoner can get a petition timely filed within the statute of limitations, the court has the discretion to appoint a lawyer but the lawyer's compensation is limited to $1000 for the entire case. Lawyers do not want, and generally will not accept, those appointments.
Despite the fact that Alabama now has the fastest-growing death row population in the United States, it has no postconviction public defender office. Alabama appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It furnishes no paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts outside the trial record. It maintains no central agency to monitor the progress of capital postconviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support. More than fifty death cases are currently pending in state postconviction proceedings in Alabama, but the State did not assist the inmates in any of these cases to obtain timely, effective assistance of counsel or any other kind of legal aid.
Alabama's failure to provide any legal assistance to death-row inmates forces those inmates who cannot find volunteer lawyers to file state postconviction petitions pro se. Inadequate legal assistance is especially problematic because the Alabama postconviction process, which is governed by Rule 32 of the Alabama Rules of Criminal Procedure, is marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly-skilled counsel. The Alabama Attorney General's Office routinely moves to dismiss claims in petitions filed by death-row prisoners on procedural grounds such as lack of specificity, lack of factual development and failure to comply with complex procedural rules that are not well understood. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing - let alone the legal skill to understand what form of allegations will make a pleading "sufficiently specific" to satisfy Rule 32.6(b) [requiring "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds"] - prisoners without skilled counsel are at risk of summary dismissal.
Moreover, death-row prisoners cannot typically obtain independent judicial factfinding or decisionmaking in State postconviction proceedings without the assiduous efforts of competent and dedicated counsel. Many prisoners executed by Alabama have had constitutional claims that were barred from federal review because they could not obtain adequate legal assistance in state postconviction proceedings.
Finding volunteer counsel for all death-row prisoners in Alabama has always been difficult. With the rapid growth of the death-row population and AEDPA's 1996 enactment of a 1-year statute of limitations for filing federal habeas corpus petitions (28 U.S.C. § 2244(d)(1)), it has become almost impossible.
S.B. 1088 Will Create More Unreliability and Delay and Should Be Rejected
Federal habeas corpus law has become an extremely complex and procedurally demanding area. While review of substantive constitutional issues can sometimes be challenging for state and federal judges to resolve, there is no question that practitioners, judges, law clerks and reviewing courts spend most of their time trying to untangle complex procedural issues, rules and concepts in habeas corpus litigation. Years of litigation are devoted to a variety of procedural questions that dominate case opinions and the litigation process. S.B. 1088, the "Streamlined Procedures Act" (SPA), will unnecessarily add to this complexity and

ironically create dozens of procedural questions that may delay cases for years just as many aspects of the AEDPA are now becoming clear after its passage in 1996.

More importantly, S.B. 1088 will result in less reliable, fair and accurate administration of criminal justice. This is especially true in death penalty cases where the legislation will unacceptably increase the risk of executing the wrongly convicted and innocent. An examination of various aspects of the Act make it clear that this bill will undermine fair and reliable administration of criminal justice and contribute to delay and time-consuming litigation.

Section 2 - Exhaustion

Under current law there are stringent and clear requirements for "exhaustion" of claims that require a petitioner to present all legal theories, material facts and arguments to state courts before seeking redress in federal court. When state court process is unavailable or otherwise denied a prisoner, exhaustion rules permit federal review. This is a crucial protection.

Anthony Ray Hinton is an innocent death row inmate who has spent 19 years on Alabama's death row for crimes he did not commit. His case has been pending at the state postconviction trial court for 15 years. He has had no federal habeas corpus review. At trial the State conceded that there is no connection between Mr. Hinton and the murders he is accused of other than a weapon match between recovered bullets and a gun belonging to Mr. Hinton's mother. The State has repeatedly acknowledged that without a weapon match, Mr. Hinton should be released.

At a state postconviction hearing in 2002, three of the country's best toolmark examiners and firearm identification experts testified that the recovered crime bullets from this case cannot be linked to the gun recovered from Mr. Hinton's mother. They further concluded that the Hinton weapon was mechanically incapable of producing some of the recovered crime bullets. This unrebutted new evidence exonerates Mr. Hinton and mandates his release. Yet, exhaustion rules require him to languish on death row.

We have begged state courts to rule in Mr. Hinton's case for the last three years and anticipate that federal habeas corpus review of his unexhausted claims may be required. This bill would preclude such review and extend the wrongful imprisonment and condemnation of Mr. Hinton.

Anthony Tyson is a death row prisoner in Alabama who like many death row prisoners in Alabama could not find a lawyer for state court litigation before his federal statute of limitations was about to expire. He filed a pro se petition in May of 2002 and asked the state court to appoint him an attorney. The state court judge did nothing for eleven months. Relying on language in the AEDPA that this bill would eliminate, Mr. Tyson then filed a federal habeas corpus petition claiming that his issues could not be exhausted because of the state court's refusal to appoint counsel and state inaction. It was only when a federal appeals court was prepared to review Mr. Tyson's case that state prosecutors forced the state court judge to take action and facilitate review of Mr. Tyson's case.

Ths SPA would trap many wrongly convicted and innocent people in state court litigation indefinitely with no mechanism for permitting federal court review of clear violations of constitutional rights. Moreover, by adding to the pleading requirements imposed on state court prisoners, section 2 of the SPA will cause more procedural defaults and unfairly bar prisoners without counsel or adequate representation from ever receiving review of their claims.

Section 603 and 605 - Amended Petitions and Tolling of the Statute of Limitations

The combination of inadequate counsel in state court proceedings and the AEDPA's one-year statute of limitations means that many federal habeas corpus petitions have to be filed by recently appointed counsel who have no time to review the record or investigate the case before a petition must be docketed. Statutes of limitation frequently require rushed filings to beat a deadline that is often created by the failure of individual states to provide lawyers to prisoners at the completion of direct appeal.

In the last seven years, ninety-five indigent Alabama death-row inmates have filed state postconviction appeals. In ninety-four of these cases, the State made no lawyer available to the condemned inmate before the filing deadline expired. In some cases volunteers are found by our private, non-profit organization or through an American Bar Association project set up to help the poor. However, many death row prisoners cannot obtain volunteer assistance and are forced to file pro se petitions.

Under 28 U.S.C. § 2244(d)(1) as enacted by the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas corpus petition must be filed within one year of the end of an inmate's direct-review proceedings. Since this one-year statute of limitations is tolled during the pendency of State postconviction proceedings - but only for the period between the filing of a State postconviction petition and its final disposition - the federal statute creates a de facto outside deadline of one year; and the federal statute also puts a condemned inmate at grave risk of losing any opportunity for federal habeas corpus review unless the State postconviction petition is filed long enough before the one-year deadline so that there will be time, if and after State postconviction relief is denied, for the inmate to learn about the denial, prepare a federal habeas corpus petition, and get it filed in federal court, still within one year. Wrongly convicted prisoners for whom volunteer counsel can be recruited only after a large part of their one-year federal statute-of-limitations period has elapsed are caught between the dangers of rushed filing of an inadequately developed State postconviction petition and the risks of leaving so little time remaining in their federal limitations period that a moment's inadvertence or absence on the part of counsel at the exact time of denial of State postconviction relief will literally kill the prisoner, with no chance of federal habeas corpus review.

Under current conditions in Alabama, because of the State's failure to provide condemned inmates with any sort of legal assistance in preparing State postconviction petitions, most such inmates are in fact forced to suffer both the harm of rushed drafting of their State postconviction petitions and the peril of losing federal habeas corpus review through any minor mishap after the conclusion of the State postconviction proceeding. Available data on the latest cohort of death-row inmates who filed State postconviction petitions prior to 2002 shows that in twenty-one cases the inmates have less than a week remaining before their federal limitations period expires, and ten of the inmates have less than two days.

Section 605 of the SPA contemplates shortening the statute of limitations for short time periods while the appeal of state court judgments is being prepared. This would contribute nothing to the postconviction process apart from more traps for unsuspecting lawyers and pro se litigants. It would also undermine state court review of issues by forcing prisoners to file pleadings that are not crafted to facilitate appropriate, timely state court review but instead are governed by federal rules that effectively alter state court procedures and timelines.

SPA's restrictions on amendments to federal habeas corpus petitions are similarly misguided. In the 1990's, I represented George Daniel, a man who led a hard-working, law-abiding life until a car accident caused brain damage that went untreated. He became psychotic and delusional. After a couple of weeks he abruptly left his family and boarded a bus to Alabama. He arrived in a strange town and after wandering the streets for a couple of days and engaging in bizarre behavior, he got into a scuffle with a police officer and shot the officer with the officer's gun. Mr. Daniel's lawyers told the court that he was "crazy," irrational, and not competent to stand trial. He could not recognize family members, was eating his own excrement in the jail and was completely incapable of assisting in his defense. He was nevertheless convicted of capital murder and sentenced to death. At his sentencing hearing, the state called an "expert" from the state mental hospital who purported to be a clinical psychologist. That man testified that Mr. Daniel was not mentally impaired, but rather, was merely malingering.

Mr. Daniel exhausted his state court remedies with an attorney who could not investigate the case. He was scheduled for execution and received a stay after filing a federal habeas corpus petition. Months later it was discovered that the "expert" who testified against him was a fraud - a high school dropout with no college degree, training or credentials who had been masquerading as a clinical psychologist for years. Mr. Daniel's petition was amended months after it was filed and relief that would not be available if this bill became law was granted. So compelling was the claim that Judge Ed Carnes of the Eleventh Circuit Court of Appeals, who then headed the Alabama Attorney General's capital litigation division, chose not to appeal the court's grant of relief.

The ability to amend a petition is something that should be left to the sound discretion of federal judges and appealed by either party when that discretion is abused. It should not be abolished so that condemned prisoners like George Daniel can have their constitutional rights violated with no recourse for relief.

Section 604 - Procedurally Barred Claims

Perhaps no section of this bill would create greater confusion, unfairness and unintended outcomes than the section that would shield wrongful convictions and unconstitutional conduct by allowing state courts to simply assert that the claims are procedurally barred.

As a practical matter, in many states there is no independent review of constitutional claims. Rulings in state postconviction proceedings are prepared by the prosecutor and simply signed by the judge wholesale without any changes. In Alabama, the state with the highest number of death row prisoners per capita in the country and in Texas, which has the second largest death row population in the United States and by far the most executions in the modern era, state court rulings that are written by prosecutors is the norm.

Circuit judges routinely abdicate their responsibility to be fair, independent, and impartial factfinders by simply adopting wholesale the detailed factfindings and legal judgments of the Attorney General's Office.

The absence of any independent analysis or factfindings in state postconviction death penalty cases has become so widespread in Alabama that it is the exceptional case in which a condemned prisoner obtains any impartial or judicial determination of the issues and facts that govern whether he will live or die. While virtually every court that has addressed the issue has condemned this practice, tolerance of this ongoing problem has deprived most Alabama death row prisoners of meaningful review of important constitutional issues and factual questions.

In fact, a review of published decisions suggests that in nearly every case reviewed by the Alabama Court of Criminal Appeals in the last five years, the order dismissing or denying the petitioner's State postconviction petition was prepared by the State and adopted verbatim or almost verbatim by the trial court. Similarly, in Texas, in 180 (88%) of the 204 state habeas corpus proceedings in which the state and trial court findings of fact and the Court of Criminal Appeals order were available, the Court of Criminal Appeals adopted findings that were exactly or virtually identical to the proposed findings issued by the prosecutor. These orders typically are over eighty pages long and contain detailed findings of fact and conclusions of law. Many were adopted over the petitioner's specific objection. Most were adopted verbatim. In some cases, the trial judge did not even remove the word "Proposed" from the title of the order and instead simply signed the exact order submitted by the State.

The federal courts should not be forced to withdraw from the obligation to protect constitutional rights simply because the state asserts that a claim is procedurally barred. Many claims that are core to the integrity of the criminal justice system are frequently deemed procedurally barred. For example, claims of racial bias have frequently been deemed procedurally barred. In Alabama, we have won reversals in close to 25 death penalty cases after proving that prosecutors illegally excluded African Americans from jury service in violation of the Constitution. In many of these cases, the state courts had improperly asserted that claims of racial bias were procedurally barred.

When I was a young attorney at the Southern Center for Human Rights, our office represented Tony Amadeo in the United States Supreme Court. Mr. Amadeo's conviction and death sentence had been obtained after a Georgia prosecutor had prepared a memo detailing for the clerk how to exclude black people from jury service. The prosecutor instructed the clerk how to underrepresent racial minorities and shield this bigotry from legal challenge through manipulation of the data. When this was discovered by Mr. Amadeo's attorney after the trial, the claim was presented to state courts but the issue was deemed procedurally barred. In federal habeas corpus litigation, a unanimous United States Supreme Court reversed Mr. Amadeo's conviction. The Rehnquist Court concluded that the effort by county officials to conceal the prosecutor's rigging of the jury lists constituted "cause" for the procedural default and thus required federal review of the claim. Mr. Amadeo's conviction was reversed and he was retried by a properly selected jury and received a life sentence. S.B. 1088 would shield this kind of racially discriminatory conduct from review.

James Cochran was convicted of capital murder and spent over 17 years on death row after a Birmingham prosecutor illegally excluded African Americans from jury service. Mr. Cochran's claim of racial bias was deemed procedurally barred by Alabama state courts even though Mr. Cochran had objected to the state's conduct. In federal habeas corpus litigation, the Eleventh Circuit ruled that Alabama's invocation of a procedural default rule was unfounded and a new trial was ordered. Mr. Cochran was tried by a fairly selected jury and found not guilty. His exoneration simply would not have been possible under this proposed bill and intolerable racial bias along with a wrongful execution would have resulted.

Section 606 - Harmless error in sentencing

Current habeas law requires federal courts to defer to state court findings of fact and legal conclusions, including findings of harmless error. Under current law, a federal court may not grant relief simply because the state-court's application of federal law was incorrect; rather, that application must also be "unreasonable." 28 U.S.C. § 2254(d)(1); see also Williams v. Taylor, 529 U.S. 362, 411-12 (2000).

SPA's section 6 would take away federal court jurisdiction to review constitutional errors in sentencing that the state court has deemed "harmless." Under this provision, federal courts would have no jurisdiction to review wrongful sentences. For example, federal courts could not review egregious prosecutorial misconduct if the misconduct affected a prisoner's sentence, rather than his conviction. For example, federal courts could not have reviewed the death sentence of Delma Banks who challenged his death sentence after learning that the prosecutor hid evidence that its central sentencing phase witness was paid for his role in setting Banks up.

Federal courts would have no jurisdiction to review the death sentence of prisoners whose counsel were grossly ineffective. Given the serious deficiencies that characterize legal assistance for many capital defendants, this would be grossly unfair. Federal courts would have no jurisdiction to review Terry Williams' death sentence. Mr. Williams' appointed counsel failed to prepare for sentencing until a week beforehand and failed to uncover extensive records documenting Mr. Williams' "nightmarish" childhood and mental impairments. The United States Supreme Court found that the Virginia Supreme Court's decision affirming Mr. Williams' death sentence was unreasonable because it relied on inapplicable Supreme Court precedent instead of the governing legal standards of Strickland v. Washington, 466 U.S. 668 (1984). This critical federal oversight is essential if our system is going to be reliable, fair, and just.

Conclusion

There are other aspects of this bill that would undermine the reliability and fairness of criminal justice administration in this country that I don't address in these remarks but that present serious problems I hope this Committee will recognize.

Section 9 of the SPA intimates that courts can't objectively evaluate whether states meet the "opt-in" provisions detailed in the AEDPA because their dockets are implicated in the timelines created by opt-in status. The legislation attempts to resolve this by empowering the chief prosecutor in the United States, the Attorney General, to make these decisions. Giving federal prosecutors control over even part of the federal judiciary's docket and decisionmaking authority would have serious implications for the separation of powers necessary for fair administration of criminal justice. Abolishing federal habeas corpus review for all constitutional issues except narrowly defined innocence claims would also pose very serious constitutional problems.

There is an understandable desire to have finality in all criminal cases. That finality should not come at the cost of fairness. We all have an interest in making sure that our system does not convict the innocent or wrongly punish the poor. Federal habeas corpus plays an import role in making sure that tragic errors in criminal cases are not insulated from correction required by the United States Constitution. That role should not be altered without care and a great deal of thought about the implications of restricting access to justice for some of our society's least protected.

I appreciate this Committee's time and attention to these very important matters.