

Testimony of
John Pressley Todd, Esq.

Assistant Attorney General
Capitol Litigation Section
July 13, 2005

Statement of John Pressley Todd
Assistant Attorney General
Arizona Attorney General's Office
United States Senate
Committee on the Judiciary

"Habeas Corpus Proceedings and Issues of
Actual Innocence"
July 13, 2005

For over thirty years, I have served as a prosecutor with the Arizona Attorney General's Office. I have spent about fifteen years investigating and trying street, white collar, and organized crime cases. The last fifteen-years I have litigated cases in the second stage of the criminal justice system, the post-judgment litigation that in death penalty cases will often span decades. This litigation involves the direct appeal, petition for certiorari to the U.S. Supreme Court, the state post-conviction relief proceedings, and federal habeas.

The Streamlined Procedures Act only affects one small part of this second stage of the criminal justice system, the narrow federal habeas review of state-court convictions for constitutional error. The Act will clear out the procedural undergrowth that fosters delay, while enabling the federal courts to consider cases where there exists a legitimate claim of factual innocence.

Before discussing the practical realities of habeas practice today and how the Act will affect it, I would like to briefly discuss: (1) the role of delay in the criminal justice system, and (2) how the Act fits into the entire criminal justice system. In my view, it is vital the Committee understands and considers the "big picture." Delay only benefits one category of habeas petitioners. The guilty defendant convicted of murder and sentenced to death. Unlike the non-capital defendant who is serving his sentence during the habeas process and has every incentive to proceed as quickly as possible to have a federal court vindicate a constitutional claim that the state courts wrongly decided, the capital defendant is not serving his sentence-he is avoiding it. Every day of delay is another day in which the State is kept from enforcing its court judgment that is presumed valid. A judgment the state courts have determined conforms to the laws of that state and does not violate the United States Constitution.

Turning to the criminal justice system itself, we all agree that the primary purpose of the criminal justice system is to separate the innocent from the guilty. There are only two possible errors: (1) an innocent person is convicted, or (2) a guilty person goes free. Either error is an affront to society. At the stage of the system where the evidence is the most reliable, we balance the scales so that if there is an error, it is on the side of the guilty person going free.

Thus, we instruct jurors on the presumption of innocence and that the State must prove, beyond a reasonable doubt, each element of the crime charged. We provide counsel for those who cannot afford counsel.

The Supreme Court has called the trial the "main event." This normally occurs close in time to the crime, when memories are fresh. In Arizona, we studied our capital punishment cases from 1974 to 2000. The medium time between the time of the crime and imposition of sentence was 1.4 years. Nowhere else in the criminal justice system are events so fresh or the opportunity for uncovering evidence so great.

At the "main event," we ask our peers, jurors, to decide factual conflicts in the trial. In the entire criminal justice system, the trial is the only place where all the admissible evidence is considered and all the witnesses testify. It is there, only there, that credibility assessments of all the trial witnesses are made. It is there that jurors decide based on the admissible evidence the facts. Since 1215, English speaking people have relied on jurors to determine the facts.

An appellate court reviews the trial record to be sure that there is sufficient evidence from which jurors could find the defendant guilty beyond a reasonable doubt and that no legal or constitutional error occurred that would make the fact-finding process unreliable or unfair. Generally, if a defendant claims error, the state and federal courts require the defendant to have pointed out the alleged error to the trial judge, so that the judge has an opportunity to consider and to make any necessary correction. This is known as the Contemporaneous Objection Doctrine. The Doctrine required because the trial court is in the best position to determine the effect of the alleged error on the fact-finding by the jurors.

Only rarely will a state or federal appellate court consider an alleged error that was not brought to the attention of the trial judge. The Contemporaneous Objection Doctrine requires attorneys to place the trial judge on notice and not to hold back the alleged error in case there is a conviction as insurance against a conviction. Without the doctrine, there would be an incentive to hold back a claim of error, as an "Ace in the Hole" for another court. As the Arizona Supreme Court expressed without this long-standing doctrine the justice system simply would not work. This is a fundamental principle of jurisprudence and extremely important in understanding the role of federal habeas.

If the state appellate court affirms the defendant's conviction and sentence, the defendant can petition the United States Supreme Court to review any constitutional claim of error.

The next step in the process is state post-conviction relief. This used to be a process only used if there were a real question of the trial attorney's effectiveness or truly newly discovered evidence. Since *Strickland v. Washington*, in a death case, new defense counsel routinely place the trial attorney in a state post-conviction proceeding on trial for alleged errors of omission and commission. Fortunately, this proceeding normally is before the judge who presided at trial, relatively close in time to the trial, when the attorneys and witnesses are still available for testimony. According to Arizona's death penalty study the medium period was about 2 ½ years after the time of trial. In a death penalty case, whether there is any merit to the claims is immaterial, because the proceeding creates delay and expands the record of the state-court proceeding. The state post-conviction proceedings also allows for inclusion in the record information that has not been found reliable, admissible or subject to confrontation.

If the trial judge denies the defendant's post-conviction relief petition, he can seek review to a state appellate court. If that court denies relief, the defendant can raise any constitutional issue in a petition for certiorari to the United States Supreme Court.

In Arizona, a defendant can bring a new state post-conviction relief proceeding for certain claims at any time, such claims include newly discovered evidence, a change in the law, and evidence of actual innocence.

The Death Penalty Information Center's list of purportedly exonerated defendants is frequently cited as a reason for greater federal review. The Arizona experience demonstrates federal habeas review has played no role in the Arizona cases. Additionally, there were two cases in which newly discovered DNA evidence actually exonerated the defendants. Neither person was on death row. Nevertheless, the state court procedures exonerated Larry Youngblood and Ray Krone. The reversals of the convictions for those individuals occurred at the state level, not in federal habeas. The claim that federal habeas review is necessary for defendants, who are actually innocent of their crimes, certainly is not supported by the Arizona experience.

The next routine step in the process for a capital defendant is federal habeas, for it guarantees significant delay regardless of the merits of any claim. The federal courts review is limited to being assured that the state court properly enforced the United States Constitution. Thus, the Supreme Court and Congress requires a state prisoner to have first presented his constitutional claim of error to the state court so that court has an opportunity to correct any Constitutional error, at a time much closer to the main event. Generally, the farther away from the main event, the trial, the less reliable is the available evidence. The chance of the error of letting a guilty person go free because the State no longer has the evidence with which to retry to the person, substantially increases. This is an affront on society in light of the jurors' verdict and certainly unjust for the victims.

Perhaps the only exception to the principle that evidence is less reliable overtime is an improvement in the forensic sciences, such as DNA. In Arizona, such evidence would be presented in state-court. No one wants a truly innocent person incarcerated or executed. Arizona and Streamlined Procedures Act, expressly allow for courts to consider this type of newly discovered reliable evidence.

Death cases languish in federal court for years. To some extent, this is understandable. By the time the cases reach a federal habeas, the record has increased multiple times and has become more complex, but often less reliable. Although it could and should be a relatively easy chore to determine what constitutional claims were presented in state court, under the existing law it is possible to parse theories and claims as well as add new claims so a simple task becomes difficult and time-consuming. In federal habeas, the district court judge then revisits the constitutional decisions made by all the preceding state-court judges. The district court judge's decision is appealed to the circuit court where additional years elapse, and certiorari is sought to the United States Supreme Court.

In a death case, one of the most popular areas of second-guessing is whether the defense attorney was constitutionally ineffective at sentencing for failure to do sufficient investigation into mitigation. It is a subjective decision. However, this defendant's sentence has nothing to do with the defendant's guilt or innocence. It is an issue easily influenced by a judge's view of the death penalty, notwithstanding the law of the state.

At any of these proceedings, the process can began anew if a new trial or sentencing is ordered.

The final step in the post-judgment litigation is the clemency review. That review is a matter of executive grace unencumbered with procedural issues. The executive branch is free to grant clemency out of doubt or mercy.

The proposal before you will lessen the delay in the federal stage of the criminal justice system without precluding a truly innocent defendant from federal review.

Overall, the basic proposition of the Streamlined Procedures Act appears to be that if reliable evidence demonstrates actual innocence, no federal court will be barred from reviewing the constitutional claim. Let me explain.

§ 2: Mixed Petitions.

This section clarifies the defendant's obligation to fairly present his federal claims by specifically arguing the basis for the claim. As the United States Supreme Court has stated, if a habeas petitioner wishes to claim a violation of federal law "he must say so, not only in federal court, but in state court." *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365.

Despite this decade-old decision, some federal courts believe "drive-by citations" to the Constitution in state-court briefs are fair presentation of a federal claim. Section 2 would require a defendant to identify where the right in the federal constitution is found and argue why it applies to his case, thus giving the State court an opportunity to correct a constitutional error shortly after the trial, not years later. Anything less is not fair to the state courts. Moreover, this is simply a form of the Contemporaneous Objection Doctrine that is essential to the operation of our justice system.

The section also clarifies that the state prisoner must tell the federal habeas court where in the state-court record he fairly presented his federal claim. This would eliminate the need for the State or the Court from searching the state court record to determine if the claim was in fact presented. Currently, in Arizona the federal court requires this sensible time-saving procedure.

The section provides an exception to the general rule for cases involving actual innocence. If a state prisoner meets the actual innocence test, then there is no need to have presented the constitutional claim in state court.

The section also states that claims that have not been presented to the state courts must be dismissed with prejudice. One tactic of delay, is to file a habeas petition, then ask the court to hold the petition in abeyance while the state prisoner returns to state court to present additional federal claims to the State court. Normally, most of the state prisoner's constitutional claims will have been presented in his direct appeal. The AEDPA one-year statute of limitations does not start to run until after the direct appeal becomes final. The statute of limitation is tolled while the prisoner is presenting his constitutional claims in his state post-conviction proceeding. The law should encourage litigants to bring all their claims at one time and not to hold back claims.

§ 3: Amendments to Petitions

This section makes the current AEDPA statute of limitations enforceable by eliminating the civil procedure rule concerning the "relate-back" doctrine. Because of concerns for the AEDPA statute of limitations, the Supreme Court in June restricted the "relate-back" doctrine somewhat in *Mayle v. Felix*, once again overruling the Ninth Circuit. The Court acknowledged the vast difference between a normal civil case and a habeas case. However, in rendering its decision, the Court did not create a "clear-cut" rule, rather left factual issues to be resolved in each case. The effect is to create more litigation and more delay. This amendment would resolve that problem.

The AEDPA's statute of limitations provides adequate time to permit a diligent state prisoner to fairly present his constitutional claims to the state courts. The state prisoner should not be misled into thinking that a federal judge might allow an amendment. This clear-cut rule provides clear notice and avoids the litigation the Supreme Court left to be settled in each individual case after *Felix*.

In an Arizona death case, the habeas court had proceeded to the point of a decision on the merits, when a new judge decided that new defense counsel should be allowed to go back and find additional claims. Years later, counsel finally filed an amended petition of legally meritless claims, most of which were unexhausted claims. The next briefing schedule could focus on whether there is cause and prejudice to allow consideration of the unexhausted claims. The courts resources are wasted, and the case is delayed.

There is an exception, again grounded in a showing of actual innocence or a change in the law.

§ 4: Procedurally Defaulted Claims

This Section removes the question of "cause and prejudice" and, except in cases of actually innocent defendants, retains the requirement that the state prisoner present his federal claims to the state courts.

It also resolves an important legal issue. Earlier I explained the importance of the long-standing and basic legal principle that an attorney must first give the trial judge an opportunity to correct a legal decision or forfeit the right to have a higher court review it. Most jurisdictions, including the federal courts, have developed a procedure as an exception to the Contemporaneous Objection Doctrine where in rare circumstances that are extraordinary the courts will consider a legal issue not presented in the trial court. Courts refer to this as "fundamental error" or "plain error" review. As a society, we want the first level appellate courts to do such review, because if a major error occurred without objection, it can be corrected close-in-time to the main event. The same policy considerations support another part of this section concerning properly filed applications. If a state court makes an exception in a unique case because of the special circumstances in order to do justice, that should not change state law for purposes of habeas review.

Fearing that fundamental error review would open the flood-gates to federal review of state convictions, the Arizona legislature changed the law so courts are no longer required to engage in such review. The section clarifies that such review does not exhaust a constitutional claim, unless the state prisoner is actually innocent. Of course, had the state court found the claim meritorious, there would be no need for federal review, the case would have been sent back. If the state court found the claim wanting, in most cases one would expect the federal court to agree.

The Section also overturns decisions out of the Ninth Circuit concerning what is an "ambiguous" state order. Although from the state-court record it was clear what federal claims had been presented in the direct appeal and what claims had not been, the Ninth Circuit claimed the state court order was ambiguous. The state court had used stock language that the claims were precluded because they had either been previously presented or could have been, the Ninth Circuit treated all the constitutional claims as if the state court had had an opportunity to address them.

Enactment of this section would clear out much of the procedural underbrush and focus the federal courts on those constitutional claims that the state courts had a fair opportunity to address and on actual innocence.

§5: Tolling of Limitation Period

This section clarifies that the only exceptions to the statute of limitations are those that Congress authorizes. It only permits tolling when a state prisoner is presenting a federal claim to the state courts. It would also overrule the Supreme Court's *Carey v. Scaffold* decision by excluding from tolling the time a post-conviction relief petition is between courts.

§6: Harmless Error in Sentencing

This section provides a very significant change because it essentially removes from the federal habeas courts constitutional claims related to sentencing. This section has nothing to do with the question of guilt or innocence. The policy question is whether federal habeas courts should be involved in state subjective discretionary sentencing decisions. With the exception of death penalty cases, virtually all would agree that those types of decisions do not require federal

oversight.

This does not mean a defendant cannot have constitutional review of his sentence. The recent Sixth Amendment decisions concerning jurors deciding elements that made a defendant eligible for a certain sentence all arose from direct review, not habeas. E.g. *Apprendi v. New Jersey*, *Ring v. Arizona*. The cases concerning the constitutionality of the death penalty were also direct review cases. E.g. *Furman v. Georgia*, *Proffitt v. Florida*. The same is true for capital jury instruction cases. E.g. *California v. Ramos*. And for ineffective assistance of counsel. E.g. *Strickland v. Washington*. Thus, this section does not affect the federal courts' ability to uniformly interpret the constitution in matters that could influence sentencing; it only restricts that ability to the Supreme Court. That restriction is appropriate, because that is the only federal court superior to the states' highest courts.

With death penalty cases, it is too easy for a federal court not to accord proper deference to a state's decision to have a death penalty. The strong policy reasons of comity and finality support Congress removing this issue from the habeas courts.

§§ 7 & 14: Unified Review Standard

Although almost a decade has elapsed since Congress enacted the AEDPA, I still have several pre-AEDPA cases pending in federal court. At this point in time, all habeas petitioners should be reviewed under the same procedures.

§8: Appeals

This Section would speed the appellate decision process with reasonable time periods. If a person is in custody in violation of the Constitution, his rights should be vindicated as quickly as possible.

§9: Capital Cases

This section would make it easier for states to take advantage of the AEDPA's opt-in provisions.

§10: Clemency and Pardon Decision

This section clarifies that a federal habeas court has no role to play in a state executive clemency proceeding. In death cases, such proceeding are often used to trigger a last round of appeals having nothing to do with the guilt or innocence of the state prisoner.

§ 11: Ex Parte Funding Requests

This provision allows the public to know the amount of funds being expended at this narrow review stage of the criminal justice system while protecting the attorney-client privilege.

The remaining sections do not appear to be in controversy.