

Testimony of  
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Statement of Kent E. Cattani  
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I am Chief Counsel of the Capital Litigation Section in the Arizona Attorney General's Office. I am not here to argue that the death penalty is essential to justice in America. My interest is in explaining why I believe that unwarranted delay in federal habeas cases involving the death penalty interferes with important state rights and undermines public confidence in the criminal justice system.

I do not consider myself to be a death penalty proponent. However, I obviously do not oppose its application, and I am comfortable that there are crimes for which the death penalty is warranted. I am also comfortable that the decision whether to have a death penalty may be rationally made at the state or national level.

Having chosen to have the death penalty, the people of Arizona expect that the punishment will be administered fairly and that it will in fact be carried out when it has been imposed. The reality has been a system bogged down by extraordinary delay, primarily in the federal courts. Some death penalty cases have languished in the federal district court and in the Ninth Circuit for more than 20 years. I would like to address that delay, and to discuss in particular Arizona's frustrating efforts to opt-in to the accelerated review provisions of the Antiterrorism and Effective Death Penalty Act of 1996.

One of the key components of the AEDPA is a provision--specific to capital cases--designed to accelerate the federal habeas process on the condition that states opt-in by enacting procedures to ensure effective representation of indigent defendants in state post-conviction relief (PCR) proceedings. Under the opt-in provisions, the federal habeas process would be reduced to approximately three years by virtue of accelerated briefing schedules and a requirement that the federal courts rule on the claims raised within specified periods of time. The rationale underlying the opt-in provisions is that when more experienced attorneys represent death row inmates throughout the state court process, there is less of a need for a lengthy federal review.

After the AEDPA was enacted, the Arizona Legislature and the Arizona Supreme Court amended Arizona's system for appointing and compensating PCR counsel to meet the opt-in requirements. Arizona previously provided PCR counsel to all indigent capital defendants, and under the amended system, that provision remains and requires the appointment of an attorney who did not represent the defendant at trial or sentencing. Arizona enacted mandatory competency standards for attorneys who apply to be placed on a list of available counsel for capital PCR proceedings. There is an objective measure relating to bar status, continuing legal education, and years of experience as a lawyer and in practicing in the area of criminal appeals or post-conviction proceedings. There is also a subjective requirement that the attorney have "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases."

In addition to provisions to ensure qualified counsel for PCR proceedings, Arizona already had in place a system to try to ensure qualified counsel at the trial stage. Since 1993, Arizona has required the appointment of two highly qualified attorneys in every case in which the State notices its intent to seek the death penalty. The requirements for lead trial counsel include practice in the area of state criminal litigation for 5 years immediately preceding the appointment, having been lead counsel in at least 9 felony jury trials that were tried to completion; and having been lead counsel or co-counsel in at least one capital murder jury trial. There are additional legal education requirements and the same subjective requirement mandated for PCR counsel--that counsel shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital case. Additionally, Arizona provides extensive funding for mitigation specialists and expert witnesses at both the trial and post-conviction stages. Multiple expert witnesses and intensive mitigation investigation are routinely utilized in capital cases throughout the state.

Notwithstanding these procedures to ensure that highly qualified criminal defense specialists represent a defendant during trial and post-conviction proceedings, Arizona has not been able to take advantage of the opt-in provisions of the AEDPA. After the new provisions for appointment of PCR counsel were in place, the Arizona defense bar temporarily boycotted the system; some attorneys did so based on their unwillingness to be involved in a process that might accelerate the death penalty process; others did so based on their concern that the newly enacted compensation provisions were inadequate. Subsequent clarification by the legislature made clear that there is no cap on attorneys' fees and provides for compensation at an hourly rate of up to \$100 for 200 hours regardless whether a PCR petition is filed. The statute provides for compensation for additional hours upon a showing of good cause, and also provides for reasonable expert fees, investigative fees and litigation costs.

Since 2002, Arizona has spent more than 1 million dollars for PCR representation in 21 cases. Many of those cases are in the early stages of the post-conviction process, and will result in significantly higher expenditures by the state and local government. (The state pays for half of the cost of representation of indigent defense in capital cases; the county where the case was tried pays the other half.) Of the cases that have completed the post-conviction process, the expenditures have ranged between \$25,000 and \$138,000 for each case, with the median figure of approximately \$64,000.

Prior to the clarification regarding compensation, there were only 6 attorneys on the list of qualified PCR counsel and a backlog formed of about 15 capital defendants who were ready to pursue PCR proceedings and were awaiting appointment of qualified counsel. In those cases, it took between one to two years to appoint counsel. More attorneys eventually applied for the list, and there are currently 4 Arizona cases pending at the PCR stage where the attorney was appointed without delay.

The first case that went through the state post-conviction process with an attorney appointed under the opt-in provision requirements was that of Anthony Spears, who was sentenced to death in 1992. In *Spears v. Stewart*, the district court denied Arizona's request that the case be treated as an opt-in case, and certified the opt-in issue to the Ninth Circuit for an interlocutory appeal. The Ninth Circuit held that Arizona's mechanism for appointment of counsel for indigent capital defendants in post-conviction proceedings meets the requirements of the AEDPA and qualifies for opt-in status. 283 F.3d 992 (9th Cir. 2002). However, the court held that the opt-in procedures could not be invoked in *Spears* because there had been a 20-month delay before counsel had been appointed in the state post-conviction proceeding. *Id.*

We were pleased that the Ninth Circuit found that Arizona's appointment mechanism for PCR counsel satisfies the requirement to be an opt-in state, but we were disappointed that the ruling does not apply to *Spears* or to any other case in which there had been a delay in appointing post-conviction counsel. The delay in appointing counsel did not prejudice *Spears*. His post-conviction never argued or suggested in any way that the 20-month delay affected his ability to pursue the claims *Spears* raised in his post-conviction proceeding. In my view, *Spears* was given every advantage contemplated under the AEDPA opt-in provisions, but the

State has been denied the corresponding benefits to which it is entitled.

The holding in *Spears* places undue emphasis on what is essentially an arbitrary date. There is no set time line for any criminal case. Sometimes there is a delay between the date of the crime and the date of the arrest. Sometimes there is delay prior to trial, or delay during the trial or state appellate process. If, for example, there had been a delay in preparing transcripts for the appeal, or if the Arizona Supreme Court had taken additional time to resolve *Spears'* direct appeal, the PCR proceeding might have commenced on or about the same date even without delay in appointing counsel. Again, there was no suggestion that the delay in appointment of counsel prejudiced *Spears'* case. In my view, Arizona should have been deemed to have opted in to the accelerated provisions for capital cases.

That fact that Arizona has attempted to opt-in to the accelerated provisions of the AEDPA for capital cases does not signify an intent to foreclose a defendant's efforts to establish innocence. We have no interest in executing or even incarcerating an innocent person. We believe, however, that our state court system provides the necessary means to address claims of innocence, and that the federal habeas process does not measurably increase the likelihood that innocent persons will be vindicated.

The Arizona Rules of Criminal Procedure place no limitation on a defendant's ability to raise claims relating to newly discovered evidence or retroactive application of new substantive rules, and we permit DNA testing and retesting (as technology improves) at state expense any time there is evidence that may establish innocence. We have a specific rule of criminal procedure that exempts from the rules of preclusion any evidence that would establish that the defendant did not commit the crime or should not have been subjected to the death penalty. Thus, it is hard to fathom a claim of innocence for which an Arizona defendant would not be granted relief in state court, but which would entitle the defendant to federal habeas relief.

I believe that the best way to improve our criminal justice system is to ensure that quality representation and adequate resources are made available for the main event - the trial and sentencing proceedings. We are trying to do that in Arizona, and we have a system that provides defendants in capital cases with two highly qualified attorneys at trial, another highly qualified attorney to handle a direct appeal, and yet another highly qualified attorney to handle state post-conviction proceedings. The direct appeal process includes review by the Arizona Supreme Court (whose members are appointed through a merit selection process) and the United States Supreme Court, and the post-conviction process permits review not only by the original trial court, but again by the Arizona Supreme Court and the United States Supreme Court. That same type of review is also available for successive post-conviction relief proceedings, where a defendant seeks to raise claims of newly-discovered evidence, change in the law, or freestanding claims of innocence.

Providing this level of review at the state court level should decrease the number of meritorious claims that are presented in federal court (since federal habeas review permits only claims that have first been presented in state court). Nevertheless, during the past 10 years, we have seen an increase in the number of claims that are being raised in federal court and an increase in delay in federal court. That delay has prejudiced the state's and crime victims' interest in fairness and the finality of state court judgments, and has decreased public confidence in the criminal justice system.

Section 9 of Senate Bill 1088 proposes a revision of the opt-in requirements to shift the responsibility for determining whether a state has opted in from the courts to the United States Attorney General. Given the fact that a federal court ruling that a state has opted-in would subject the federal court to fast-track requirements that accelerate the pace of required work, there is a logical basis for this proposed change. Judicial oversight of the Attorney General's decision would still be available through the Court of Appeals for the District of Columbia Circuit.

Section 9 further proposes a relaxation of the fast track deadlines for consideration of claims in the district court from 180 days to 15 months. Although 180 days should be sufficient to address claims that have necessarily been raised previously in state court, the additional 9 months creates a more realistic time frame to address federal habeas claims in federal court. From the perspective of states who have unsuccessfully attempted to "opt-in," a 15-month review period is obviously a great improvement over the current essentially unlimited review period.

Several other aspects of Senate Bill 1088 would help to expedite capital and non-capital cases in federal court, while still providing protections for defendants attempting to raise claims of actual innocence. For example, Section 4 addresses procedural default. Under current law, federal courts may not consider a claim if it was not properly raised under state procedural rules. There is an exception if an applicant shows "cause" for the failure to raise the claim and "prejudice" from the asserted error. Alternatively, if an applicant produces evidence of "actual innocence," the federal court may consider the claim. The applicant may also avoid the procedural default rule if the federal court finds that the state court did not regularly apply the procedural rule or if the procedural rule actually required some consideration of the Constitutional merits of the claim.

Senate Bill 1088 would refine the procedural default doctrine by precluding federal courts from considering claims that were rejected by state courts as "procedurally barred" even if the state court separately denies the claim on the merits. Nor will the federal courts be able to consider the claim if it is raised in the context of ineffective assistance of counsel. Finally, the federal courts will not be able to review a claim denied on procedural grounds in state court even if the state court has exceptions for its procedural default rule based on the serious nature of the alleged error.

An Arizona capital case, *Smith v. Stewart*, 241 F.3d 1191 (2001), provides an example of why this type of change is needed. In *Smith*, the state courts rejected a claim of ineffective assistance of sentencing counsel (raised in *Smith's* third post-conviction proceeding) on the basis of a state procedural bar. The federal district court rejected the claim on the basis of procedural default, but the Ninth Circuit reversed, holding that the state procedural default ruling was intertwined with a merits ruling. The Ninth Circuit reasoned that, because a Comment to Arizona's procedural rules noted that for some issues of significant constitutional magnitude, the state must show a knowing, voluntary, and intelligent waiver by the defendant, Arizona's procedural default rule necessarily required a merits ruling on every defaulted claim. Arizona argued that the comment suggested only the need for an on-the-record waiver of certain types of claims, including the right to counsel or the right to a jury trial. The Ninth Circuit rejected the State's argument, as well as its request that the court certify a question to the Arizona Supreme Court to clarify whether a procedural default ruling necessarily encompassed a merits ruling. Arizona filed a certiorari petition in the United States Supreme Court, which reversed the Ninth Circuit's ruling.

Although the State ultimately prevailed in the United States Supreme Court, the victory simply returned the parties to where they were two years earlier. In the meantime, every other case involving a procedural bar imposed by an Arizona court was similarly delayed pending resolution of *Smith* in the United States Supreme Court.

*Smith's* federal habeas proceeding has been pending since 1994. The district court denied relief in 1996, and the case has been in the Ninth Circuit since then. Most recently, the Ninth Circuit ordered a stay to allow *Smith* to pursue a claim of mental retardation in state court, even though *Smith* had never raised a claim of mental retardation in state court or in the federal district court. Arizona has filed a certiorari petition in the United States Supreme Court challenging that ruling. In the meantime, the case, involving a 1982 conviction of first-degree murder, kidnapping, and sexual assault, remains in limbo.

In *Cassett v. Stewart*, 2005 WL 1021273 (a non capital case), the Ninth Circuit recently added another impediment to resolution of procedurally defaulted claims. *Cassett* never raised the claim at issue in state court, and the district court found his federal habeas claim to be precluded. The Ninth Circuit reversed, however, ruling that because there has not been a ruling of preclusion by a state court, the case should not be dismissed and *Cassett* should be given an opportunity to return to state court to raise the claim. If the rule in *Cassett* is applied in capital cases, an already delayed process will be delayed even further to allow defendants to return to state court to try to litigate procedurally defaulted claims. As with the *Smith* case, Arizona is seeking further review of *Cassett* by the United States Supreme Court.

In addition to Smith, there are several other examples of capital cases that demonstrate extensive delay in the federal habeas process:

#### Joseph Lambright

Lambright was Smith's co-defendant, and was similarly convicted and sentenced to death in state court in 1982. In 2004, the Ninth Circuit ordered an evidentiary hearing on a procedurally defaulted claim that Lambright's counsel had failed to investigate as possible mitigation the possibility that Lambright suffered from post-traumatic stress disorder based on his combat experiences in Viet Nam. .

At the evidentiary hearing held last year in federal district court, the State established that Lambright was never in combat in Viet Nam; he was a mechanic who was never involved in a combat situation. The friend who Lambright claimed to have held in his arms after the friend was sawed in half by enemy fire, is in fact alive and well in Florida. The case remains pending in the Ninth Circuit; the only issue now before it is the propriety of the district court's ruling that Lambright did not establish that his counsel was ineffective for failing to assert post-traumatic stress disorder as a mitigating circumstance.

#### Michael Correll

Correll was convicted in 1984 of first degree murder in a triple homicide case. The trial court sentenced Correll to death after finding four aggravating factors beyond a reasonable doubt: that Correll committed the offense in expectation of pecuniary gain, that the murders were committed in an especially cruel, heinous or depraved manner and multiple homicides. Correll's federal habeas proceeding has been pending since 1987. The district court denied habeas relief in 1995. However, the Ninth Circuit ordered an evidentiary hearing regarding whether counsel was ineffective at sentencing.

At the evidentiary hearing held in 2003, Correll called fourteen witnesses during the hearing including the original trial attorney; a mitigation specialist; a neuropsychologist; a psychiatrist; and addictionologist; a toxicologist; and several of Correll's family members and friends. The State responded that if Correll had provided this alleged mitigation evidence to the trial court, it would have opened the door for the State to present powerful rebuttal evidence, including evidence of Correll's rape of a female psychiatric patient while he was undergoing treatment for his antisocial personality disorder; Correll's repeated sexual assaults against his sister while living at home; Correll's numerous escape attempts from mental health facilities; and Correll's participation in a number of armed robberies with this thirteen year old brother and fifteen year old girlfriend.

In March 2003, the district court denied Correll his requested relief, finding that Correll did not suffer any prejudice as a result of his counsel's deficient performance. The district court held that, "after all of the evidence that [trial counsel] could have obtained and presented has been reviewed, it is clear that the rebuttal and non-mitigating aspects of such evidence overwhelms any slight mitigation evidence."

Correll immediately appealed that ruling to the Ninth Circuit, and the case has remained pending in that court since then. Thus, the case has been pending in federal court for 18 years.

#### Jasper McMurtrey

The federal district court ordered an evidentiary hearing regarding whether the state trial court should have conducted a competency evaluation of capital defendant McMurtrey. The state court held an evidentiary hearing in 1994, after which the trial judge, who had presided over McMurtrey's trial, found that McMurtrey had been competent during trial. The district court nevertheless granted federal habeas relief, finding that there was not enough evidence from which the trial judge could reach the conclusion that McMurtrey was competent during trial, even though the evidence included the trial judge's own recollection of what happened. Arizona is seeking further review of that ruling.

The common thread in these cases is not only one of excessive delay in federal court, but of an absence of any allegation of factual innocence. The federal habeas process is not accomplishing its intended purpose in these and many other cases and is in fact undermining public respect for the criminal justice system.