

Testimony of
The Honorable Howard D. McKibben

Senior U.S. District Judge for the District of Nevada
Chairman of the Judicial Conference Committee on Federal-State Jurisdiction
November 16, 2005

STATEMENT OF JUDGE HOWARD D. MCKIBBEN
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ON
"HABEAS REFORM: THE STREAMLINED PROCEDURES ACT"
November 16, 2005

Mr. Chairman, Senator Leahy, and members of the Senate Judiciary Committee, I am Howard McKibben, a United States district court judge from the District of Nevada and Chair of the Judicial Conference Committee on Federal-State Jurisdiction. I am testifying today on behalf of the Judicial Conference of the United States, the policy-making body of the federal judiciary. I appreciate the opportunity to participate in today's hearing on the proposed Streamlined Procedures Act of 2005 and respectfully offer the views of the Judicial Conference on the latest version of S. 1088, the substitute amendment adopted by the Judiciary Committee on October 6, 2005 (hereinafter referred to as the "October Substitute").

The judiciary appreciates the concerns of the sponsors of the Streamlined Procedures Act who have called for procedural reform of habeas corpus in order to ensure greater finality in the criminal justice process and more prompt administration of justice. The judiciary shares the goal of eliminating any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts. At the same time, we would urge that before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there are any unwarranted delays occurring in the application of current law in resolving habeas corpus petitions filed in the federal courts by state prisoners and, if so, the causes for such delays.

The federal judiciary appreciates the efforts of the Chairman of the Committee and the sponsors of S. 1088 to address the issues identified by the Judicial Conference in its letters dated July 13, 2005, and September 26, 2005, to members of the Senate Judiciary Committee on earlier versions of the legislation. Although the Judiciary Committee has made changes intended to meet some of the objections previously expressed by the Conference, we continue to have concerns with the legislation as described below.

I. July 13, 2005, Letter of the Judicial Conference

In its letter of July 13, the Judicial Conference expressed opposition to certain provisions in sections 8, 9, and 11 of S. 1088, as introduced. Those provisions would: (1) require courts of appeals to hear and adjudicate appeals from district court decisions regarding habeas corpus petitions within certain time deadlines; (2) shift from the federal courts to the Attorney General

of the United States the responsibility for determining, in capital cases under chapter 154 of title 28, United States Code, whether a state has established a qualifying mechanism for providing competent counsel to indigent defendants in state post-conviction proceedings; (3) place judicial review of the Attorney General's decision solely in the U.S. Court of Appeals for the D.C.

Circuit, providing that

the certification decision would be conclusive "unless manifestly contrary to the law and an abuse of discretion"; and (4) amend 21 U.S.C. § 848(q)(9) to limit ex parte applications for expert services, give prosecutors the right to intervene in the defense funding application process, and require immediate public disclosure of payment information. These provisions, which are included in the October Substitute, for the most part remain unchanged from the bill as introduced, and therefore, the Conference continues to oppose these provisions.

II. September 26, 2005, Letter of the Judicial Conference

On September 26, 2005, the Judicial Conference provided a second letter to members of the Senate Judiciary Committee based on action taken by the Judicial Conference at its September 20, 2005, session. The positions of the Judicial Conference expressed in that letter addressed the substitute amendment approved by the Senate Judiciary Committee on July 28, 2005 (hereinafter referred to as the "July Substitute").

A. Provisions Related to Retroactivity and Ex Parte Funding Requests in the October Substitute

The October Substitute makes no changes to the July Substitute with respect to two of the positions adopted by the Conference in September. First, the Judicial Conference opposed provisions of the Streamlined Procedures Act contained in the July Substitute that would apply the new rules in that statute to pending federal habeas proceedings. Such retroactive application could complicate and protract, not curtail, the disposition of pending cases and may cause further litigation related to issues of fairness. The October Substitute continues to retroactively apply the Antiterrorism and Effective Death Penalty Act of 1996 to cases pending prior to its enactment and would apply certain provisions of the Streamlined Procedures Act to pending cases. Because these provisions in the October Substitute are identical to those in the July Substitute, the Conference reiterates its objections.

Second, the Conference opposed the provision in section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital conviction or sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding. This provision also remains unchanged in the October Substitute, and thus the Conference opposes this provision.

The October Substitute does significantly change the July Substitute with respect to the treatment of unexhausted claims, amendments to petitions, procedurally defaulted claims, and the tolling of the limitation period. In many instances, however, those changes do not resolve the concerns of the Judicial Conference, as explained below. The October Substitute also raises concerns with respect to the rules for reviewing procedurally problematic claims in the context of capital cases under chapter 154 of title 28, United States Code.

B. Treatment of Unexhausted and Procedurally Defaulted Claims

In September 2005, the Judicial Conference opposed the provisions related to unexhausted claims, procedurally defaulted claims, and the tolling of the limitation period included in the July Substitute. Those provisions had the potential to

(1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an

orderly review of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation.

With respect to unexhausted claims, the Judicial Conference opposed the provisions of the July Substitute. Those provisions would have amended current law to delete provisions that permit federal courts to forgive the failure to exhaust where the state provides no corrective process or where such process would not provide an effective remedy, see 28 U.S.C. § 2254(b)(1)(B)(I)-(ii), and would have limited federal court review of unexhausted claims except for those meeting the standards of 28 U.S.C.

§ 2254(e)(2). Those provisions also would have required dismissal with prejudice of unexhausted claims not qualifying under section 2254(e)(2) instead of providing for a stay of the proceeding pending exhaustion of potentially meritorious claims. In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Supreme Court ruled that a district court may stay proceedings on a mixed petition if the applicant can show good cause for the failure to exhaust, that the claim is potentially meritorious, and that the applicant has not engaged in dilatory litigation tactics.

The Judicial Conference also opposed provisions that would have limited federal court review of procedurally defaulted claims, except for those claims meeting the requirements of 28 U.S.C. § 2254(e)(2).

Although the October Substitute would replace the section 2254(e)(2) requirements with different prerequisites for federal court review of unexhausted or procedurally defaulted claims, those new prerequisites also raise concerns for the judiciary. The October Substitute recasts the "cause-and-prejudice" standard defined and developed by the Supreme Court, and it modifies the current "actual innocence" standard. These revised standards, never before applied in this manner, create complexity and could further delay, not expedite, the resolution of federal claims. Moreover, complying with such standards may be even more problematic in cases where the applicant did not have counsel in state post-conviction proceedings.

The October Substitute would continue to require dismissal of unexhausted claims with prejudice and would also delete the provisions in current law that permit a federal court to forgive a failure to exhaust if the state provides no corrective process. Although it would not require an unexhausted claim to qualify for consideration under section 2254(e)(2), a federal habeas court would be permitted to reach the merits of such a claim only if the applicant can show "cause" for the failure to exhaust and a "reasonable probability" that but for the alleged error, the fact finder would not have found that the applicant "participated in the underlying offense," or if the applicant can show that but for the alleged error it is "more likely than not" that no reasonable fact finder would have found that the applicant participated in the underlying offense. These are new standards that have never before been applied to the exhaustion doctrine. In either circumstance, the federal court would also have to conclude that denial of relief would be contrary to or involve an unreasonable application of clearly established federal law, as determined by the Supreme Court, or would entail an unreasonable determination of a factual matter. These same standards would also govern federal court review of procedurally defaulted claims.

By these provisions, the October Substitute would modify the law that governs relief from procedural defaults under the "cause-and-prejudice" standard articulated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Leading cases define cause as an external impediment to the applicant's

ability to raise the claim. See *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The prejudice inquiry focuses on the likely impact of an error on the fairness of the trial; courts will ask if errors at trial "worked to [the applicant's] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." See *United States v. Frady*, 456 U.S. 152, 170 (1982).

The October Substitute seeks to make a problematic change to the well-established cause-and-prejudice standard. It redefines prejudice as a "reasonable probability that, but for the alleged error, the fact finder would not have found that the applicant participated in the underlying offense." The reference to the underlying offense changes the traditional focus of habeas relief from an inquiry into whether a constitutional error has tainted the trial process, to an inquiry into whether the error would cast doubt on the claimant's participation in the underlying offense. Constitutional errors that occur during sentencing might not be reviewable under such a standard, because such errors may have no bearing on whether the applicant "participated in the underlying offense." For example, an applicant's challenge in a capital proceeding to the aggravating factors that justified imposition of the death penalty would not necessarily disprove "participation" in the offense. Other constitutional errors might infect the guilt phase of the trial within the meaning of *Frady* but similarly fail to establish non-participation in the underlying offense.

The October Substitute also contains a provision that appears to track the "actual innocence" exception of current law. See *Murray v. Carrier*, 477 U.S. at 496 (permitting review of a procedurally defaulted claim where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"). Like the prejudice inquiry, this modified actual-innocence inquiry is framed in terms of participation; relief may be granted only if the applicant shows that "it is more likely than not that no reasonable fact finder would have found that the applicant participated in the underlying offense." As with the revised cause-and-prejudice standard, this provision could foreclose review of sentencing errors, and thus is inconsistent with the position of the Judicial Conference. Furthermore, shifting the focus from "actual innocence" to "non-participation in the underlying offense" would introduce uncertainty and complexity in the law and would create new problems for both the state and federal courts.

It is also worth noting that sections 2 and 4 of the October Substitute include language that would provide that the state is not required to answer any unexhausted or procedurally defaulted claim unless the court first determines that the claim qualifies for consideration under either the revised cause-and-prejudice standard or the modified "actual innocence" standard. The intent and effect of these provisions are unclear. If intended to eliminate the state's need to file any response at all in such cases, these provisions could impose a new and substantial burden on the district courts.

C. Tolling of Limitation Period

The July Substitute would have amended 28 U.S.C. § 2244(d)(2) to delete the words "judgment or" from the statute, permitting tolling only as to those federal claims that were actually included in the state post-conviction petition. The habeas applicant would have been required to submit all federal claims to the state post-conviction court, even where those claims had been previously raised in state court on direct review and exhausted for purposes of federal habeas review. When the Conference opposed this provision, it was noted that the provision could have burdened state post-conviction proceedings and resulted in the forfeiture of claims that were presented on direct review but omitted from the state post-conviction proceeding.

The October Substitute partially addresses this problem by allowing the federal habeas limitation period to be tolled if the application for state post-conviction relief includes at least one federal

constitutional claim. It would enable (as under current law) a state prisoner to submit one or more federal claims in the state post-conviction process (such as an ineffective-assistance-of-counsel claim that was not subject to exhaustion on direct review) and thereby toll the federal habeas limitations period during the exhaustion of such federal claims. Following the completion of the state process, the state prisoner would be able to combine all federal claims (including those that were exhausted on direct and collateral review) into a single, timely federal habeas petition.

It should be noted, however, that the October Substitute could produce a situation in which an applicant is required to file a federal habeas challenge to a state court conviction while state post-conviction proceedings remain pending. Such overlapping state and federal collateral litigation might occur if the applicant exhausted all of his or her federal claims on direct review and had no federal claims to present in state post-conviction proceedings. Under the October Substitute, the state post-conviction proceeding would not toll the federal limitation period, and the applicant could not wait until the state process ended. Such overlapping litigation seems inconsistent with the policy of federal respect for state court proceedings that underlies the exhaustion rule, and the notion of preserving federal judicial resources for the review of convictions that the state courts have upheld against all challenges based upon state and federal law.

The October Substitute, like the July Substitute, could be read to deny tolling credit for periods when no actual proceeding is pending before the state court. Such an approach could produce tolling results inconsistent with the Supreme Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), which permits the one-year limitation period to be tolled from the initiation of the state post-conviction proceeding at the trial level to the completion of the proceeding at the appellate level, provided that the applicant has met all relevant state-court deadlines. The October Substitute also would continue to preclude federal courts from equitably tolling the one-year time period. For the same reasons that it opposed these provisions in the July Substitute, the Conference continues to oppose these provisions in section 5 in the current version.

D. Capital Cases under Chapter 154

In its September 2005 letter, the Judicial Conference did not discuss section 8(a) of S. 1088 related to the scope of federal-court review of capital cases under chapter 154. The July Substitute would have provided that capital cases arising under chapter 154 follow the standards of chapter 153 in several aspects. The Conference did, of course, comment on proposed amendments to chapter 153 that would have limited federal court review of unexhausted or procedurally defaulted claims to only those claims meeting the standards of section 2254(e)(2). The October Substitute makes further changes in section 8(a).

With regard to the standard of review to be applied to the merits of habeas petitions under chapter 154, the October Substitute follows the basic approach of the July Substitute. Section 8(d) specifically incorporates the chapter 153 standard of review that governs review for claims that the applicant has properly exhausted and preserved for federal habeas review. That standard allows relief only where the state court reaches a conclusion that is contrary to or involves an unreasonable application of Supreme Court law or is based on an unreasonable determination of a factual matter.

The October Substitute, therefore, creates two different standards for procedurally problematic claims (i.e., claims not exhausted, procedurally defaulted claims, or claims not originally included in the federal habeas petition). Under chapter 153, as described earlier, the October Substitute applies either a revised cause-and-prejudice standard or a

modified actual-innocence standard to determine whether a federal court may reach the merits of a procedurally problematic claim. Under chapter 154, the October Substitute would permit a federal court to consider similar procedurally problematic claims in the capital context only where the applicant meets the demanding requirements set forth in current section 2254(e)(2). That provision would permit a court to award relief only in cases where the claim relies upon a new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court or on a factual predicate that could not have been previously discovered, and where the facts would establish by clear and convincing evidence that the applicant was not guilty of the underlying offense.

Requiring procedurally problematic claims in capital cases under chapter 154 to meet the requirements of section 2254(e)(2) raises concerns similar to those expressed in the Conference opposition to similar claims under chapter 153 as potentially imposing too great a restriction on the adjudication of constitutional claims.

E. Amendments to Habeas Petitions

In its September 2005 letter, the Judicial Conference also opposed section 3 of the July Substitute, which would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law. The July Substitute would have limited the amendment of existing claims or the presentation of additional claims in habeas petitions, unless those amendments met the requirements applicable to claims in second or successive petitions that were not previously presented. See 28 U.S.C. § 2244(b). While not identical, these requirements closely mirror the requirements of section 2254(e)(2).

In opposing section 3, the judiciary noted that the Supreme Court recently narrowed the scope of amendments to petitions that will qualify for relation-back treatment under current law, permitting amendments to existing claims or new claims to be presented only if such claims arise from the same discrete set of factual occurrences that underlie the petition's original claims. Only where the new claim rests upon facts of the same "time and type" will it relate back to the original petition. See *Mayle v. Felix*, 125 S. Ct. 2562 (2005).

The October Substitute changes the circumstances in which an applicant could modify existing claims or add new claims by requiring such claims to meet the revised cause-and-prejudice standard or the modified actual-innocence standard that would be applicable to federal-court review of unexhausted or procedurally defaulted claims. All claims modified or amended after the one-year limitation period has run (or after the state has filed its answer) that could not meet either of the revised standards would be regarded as time-barred.

In opposing the similarly restrictive approach in the July Substitute, the Conference observed that the provision could prevent the refinement of existing claims during the course of habeas litigation and foreclose meritorious claims that might qualify for relation-back treatment under *Mayle*. As claims are refined through the adversarial process, the courts may permit amendments where that is the appropriate means of focusing the arguments on relevant issues. Accordingly, because the Judicial Conference opposes legislation that would add procedural requirements that may impede the courts' ability to resolve cases on the merits, the judiciary opposes these provisions in the October Substitute.

III. Conclusion

The Judicial Conference appreciates the Judiciary Committee's efforts to take into account the concerns raised in our letters of July 13 and September 26, 2005. As I noted earlier, the Conference supports the elimination of unwarranted delay in the fair resolution of habeas corpus

petitions. As noted in the attachment to the September 2005 letter, a preliminary analysis of the statistical data indicates that no significant delays appear to exist with respect to non-capital habeas corpus petitions. As noted in that same attachment, the data regarding capital cases are inconclusive and suggest the need for further analysis. The Conference is committed to working with the Congress to identify the causes of any unwarranted delays. At the same time, the Conference wishes to express concerns about legislation that could preclude the federal courts from reviewing meritorious constitutional claims and, with the creation of new procedural hurdles, could protract rather than streamline consideration of habeas petitions in the federal courts. Thank you for your consideration of these views.

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