Testimony of

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I appreciate this second opportunity to address the Committee on this important topic. In my earlier statement and testimony, I attempted to point out the most significant problems with the original bill. That version of S. 1088 sought to remove jurisdiction from the federal courts to adjudicate broad categories of constitutional claims and was a fundamental break with the longstanding statutory and constitutional history of habeas corpus. It was my view that before enacting such sweeping changes to the writ, Congress should first collect sufficient information to make sure that this bill would fix what may be broken, and leave in place what is working properly. I have by no means changed that view, and I again encourage the Committee to contact the Federal Judicial Center and the Administrative Office of U.S. Courts to obtain the necessary data and analyses.

Since my July testimony, I have met with member staff to discuss different approaches and have reviewed the current substitute amendment. While I would certainly support revisions to habeas that meet the expressed goals of S. 1088--to speed the review process where (and if) it continues to lag, without sacrificing the writ's ability to remedy egregious constitutional error or wrongful convictions or sentences--I believe that the current amendment remains seriously flawed and should not become law. This latest substitute continues to preclude review of broad categories of claims, including all sentencing claims that come to federal court unexhausted, defaulted, or not discovered until the amendment period closes--even if the petitioner was not at fault, and even if the basis of the claim was deliberately and unlawfully withheld by a state official.

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It might aid the Committee to better understand my views if I can place the changes this amendment seeks to make within the context of the historic role of habeas corpus as well as recent changes in the law. I am familiar with this history. I represented citizens in habeas corpus proceedings prior to my years at the Department of Justice. I represented the government in these cases while at DOJ. I was personally involved in the Department review of and support of the AEDPA. Since leaving government service, I have represented habeas petitioners before the Supreme Court in several recent cases.

Habeas corpus is a critical safeguard against wrongful imprisonment. As Justice Holmes' classic statement in dissent in the Leo Frank case articulates:

[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

Throughout the 20th century, the federal habeas corpus statute provided a federal forum to citizens who believed their convictions or sentences were brought about in violation of a Bill of Rights protection. Through habeas jurisdiction, the federal courts have stepped in and remedied egregious trespasses of these fundamental rights.

During these years and up through the mid-1980's, the remedy was designed to focus upon whether federal constitutional error deprived the petitioner of a reliable verdict. Habeas courts were free to conduct evidentiary hearings in instances where they believed a more complete factual record would enhance the quality of their ruling; they could hear defaulted claims unless the prisoner had withheld the claim from the state courts; they were charged with determining, de novo, whether the facts showed a violation of the Constitution; and they could entertain more than one petition from the same prisoner so long at the petitioner's conduct did not "abuse" the writ.

Beginning in the mid-1980s, the Supreme Court thoroughly overhauled its writ jurisprudence and significantly tightened procedures to provide for much greater finality of state-court judgments. The Court took this action largely in response to assertions that the review of capital cases took too long and lacked finality.

Procedural Default. With regard to claims not properly raised before the state courts, the Court abandoned the Fay deliberate by-pass rule and installed the "cause" and "prejudice" standard. This shifting of the burden of proof placed significant burdens upon the petitioner before a defaulted claim could be heard in federal habeas proceedings. For a defaulted claim to receive merits review, the petitioner needed to establish "cause"--usually that his trial counsel's performance was so inadequate as to constitute a violation of the Sixth Amendment right to counsel, or that state officials interfered with the timely assertion of the claim. To show "prejudice," the petitioner had to demonstrate that the error substantially affected the verdict. It is widely agreed that this standard is demanding and difficult to meet.

This "cause and prejudice" standard is now well understood, and in practice it bars a large number of claims defaulted in state court from merits review in habeas proceedings. Most government attorneys are satisfied that this doctrine strikes the proper balance between respecting valid state procedural rules and vindicating harmful constitutional error. Many defense attorneys contend that the standards overprotect finality and unfairly bar review of extremely meritorious claims. Many prisoners, including those on death row, have in fact permanently lost federal review of potentially meritorious constitutional claims due to procedural bars.

Exhaustion. With regard to the exhaustion requirement, the Court disapproved the consideration of so-called "mixed" petitions--those that contain both exhausted and unexhausted claims. It established a firm rule that petitions containing both exhausted and unexhausted claims must be dismissed. This rule strengthened the core reason for the exhaustion doctrine--that state courts be given the first opportunity to adjudicate federal claims asserted by state prisoners.

State-Court Factfinding. Further, the Court significantly reduced the availability of evidentiary hearings in federal habeas proceedings. It abandoned the Townsend rule and held that if the prisoner had a fair opportunity to develop the facts in state court, no hearing could be held in federal court unless he could show "cause" and "prejudice." Again, most government attorneys believe this standard properly balances the competing interests, while defense counsel believe it is unduly harsh--particularly when applied against indigent petitioners who had no lawyer or plainly deficient legal assistance in the state court.

Retroactivity. Also in the 1980s, the Court significantly changed the rules concerning what constitutional case law would be available to habeas petitioners challenging their convictions and sentences. The Court reversed the previously-existing rule that most of its decisions would apply in habeas proceedings and held instead that nearly all rulings beneficial to prisoners that are announced after a petitioner's conviction becomes final will not be available to him in habeas proceedings. By contrast, new decisions that favor the State do apply in habeas proceedings. Needless to say, this change was widely welcomed by government attorneys and criticized by the defense bar.

Harmless Error. The Court also decided that the traditional harmless-error rule--which provides that once constitutional error is shown, the State has the burden to show it was not harmful beyond a reasonable doubt--would no longer apply in habeas proceedings. It held that relief would issue only if the habeas court determined that the error substantially influenced the jury verdict.

Successive Petitions. Further, the Court abandoned the approach that generally permitted the filing of a second or successor petition and ruled that no claim, regardless of its merits, could be reviewed in a second or successor petition unless the petitioner could show both "cause" and "prejudice," or a reasonable likelihood of innocence. And for successor petitions attacking a capital sentence, the Court ruled that only petitioners who could show, by clear and convincing evidence, that they were not eligible for the death penalty would be heard in such proceedings.

Collectively, these decisions transformed the writ. They left prisoners with essentially one shot at federal review. And prisoners faced substantial (but not insurmountable) burdens to secure merits review of claims or evidence not properly presented to the state courts. Relief was available only if the error played a significant role in the judgment. This was the body of law upon which the AEDPA amendments built.

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AEDPA sought to continue this reform, focusing upon four areas. First, it sought to accelerate the habeas process. Second, it strove to bring greater finality by limiting prisoners to a single petition. Third, it fortified the deference given to state-court factual and legal determinations. And finally, it sought to provide incentives to States to furnish competent, funded counsel in post-conviction proceedings by rewarding those that did with even tighter restrictions on federal review.

Acceleration. Two AEDPA provisions sought to accelerate the review process. First, for all petitions, AEDPA erected a one-year statute of limitations. No Congress had previously imposed

any such limitations rule upon habeas. And for capital cases, AEDPA contained a separate chapter--commonly known as the opt-in amendment--that provided that for States that voluntarily undertook to implement a credible system for appointing qualified counsel during post-conviction proceedings, the statute of limitations period would be reduced to six months, and the federal courts would have to complete review within designated time periods.

It is clear that the general statute of limitations has succeeded in accelerating the filing of federal petitions. It has also barred numerous prisoners, who failed to comply with this provision, from any federal review of the lawfulness of their incarceration. Courts have found cause to toll the limitations period only upon an extreme showing of extenuating circumstances. Death-row inmates whose lawyers missed the statute of limitations have been executed without any federal review of their convictions or sentences.

There is an insufficient record upon which to determine if the opt-in chapter can and will speed up the review of capital petitions. As I will explain in a moment, only a single State (Arizona) has opted-in, after initial, ill-prepared attempts to qualify failed nearly a decade ago. There is no reason to believe that the provision will not work as designed for States that do chose to qualify.

Finality. By limiting the cognizable claims in successor petitions to two narrow categories--those that rely upon new retroactive rules announced by the Supreme Court, and those supported by clear and convincing evidence of innocence--such petitions are brought far less often, and they succeed in only rare circumstances. AEDPA has all but ended second or successor petitions, allowing them only to vindicate fundamental fairness.

Deference. AEPDA installed significant deference rules with respect to both the state court's findings of fact and its conclusions of law. With regard to the former, it abandoned an earlier requirement that the state-court factfinding process be adequate, and declared that any fact finding is presumed correct and cannot be set aside unless it is shown to be erroneous by clear and convincing evidence. The statute now also prohibits federal courts from holding evidentiary hearings unless the petitioner can show (1) that he was prevented from developing the facts in state court, or (2) that, despite diligent efforts, (a) the facts were not available, and (b) by clear and convincing evidence, he is innocent. These provisions sharply constrain federal habeas courts, and allow factual development only in compelling circumstances.

With regard to state-court legal determinations, for the first time in history the amendments removed the traditional power of federal courts to review a legal determination de novo. They imposed the rule that no legal determination--even if incorrect--could be disturbed unless it was contrary to a directly controlling Supreme Court decision or amounted to an unreasonable application of such authority.

That innovation marked a landmark shift in habeas jurisprudence, and Supreme Court construction of this provision has made clear that state-court legal determinations cannot be disturbed even when they are clearly wrong. They may be disturbed only when they are unreasonably wrong.

With respect to the opt-in amendments, perhaps to the surprise of AEDPA sponsors, few States have elected to enhance their post-conviction review process sufficiently to formally opt-in to the

expedited procedures available in the Chapter 154 amendments. Many never attempted to do so and provide no counsel services; others made early half-hearted attempts with inadequate systems and never again sought certification. One State, Arizona, has met the standards.

Thus, AEDPA enacted sweeping changes designed to further protect state finality interests and speed up the review process. As a result of those changes, which augmented the Supreme Court's earlier comprehensive pruning of habeas, the remedy that exists today is vastly scaled back. It reaches only a subset of the cases in which egregious harmful constitutional error deprived the petitioner of a minimally fair trial.

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It is this Writ that the current S. 1088 seeks again significantly to shrink. In its initial version, that bill sought to strip away jurisdiction to review broad categories of constitutional claims. Respected voices from many points of view urged Members to reject this bill.

For the most part, the present amendment rejects that misguided approach. Yet, upon careful review, it achieves many of the very same results. For the reasons that follow, I believe the substitute should not become law.

Exhaustion. I begin with the proposed changes to the exhaustion rule in Section 2. Since its inception in the late 1880s, the exhaustion doctrine has operated as a sequencing rule. It instructed petitioners that they could not bring their federal claims to federal court without first presenting them before the state courts. When an unexhausted claim is presented in a federal habeas petition today, the claim must be dismissed for failure to exhaust state remedies. If state law no longer leaves remedies to exhaust, in most instances the claim is treated as defaulted and cannot receive merits consideration unless the petitioner meets the demanding "cause" and "prejudice" standard.

Section 2 of S. 1088 would fundamentally change the principle of exhaustion. When unexhausted claims are presented, this amendment directs not that the State be given the opportunity to adjudicate them; rather, it irrebuttably assumes that the state court would not entertain them--even if state remedies in fact remain open. The claim remains before the federal court and must be dismissed with prejudice unless the petitioner satisfies a standard never before required in this context--and one that would rarely if ever be satisfied. The petitioner must show not only "cause" for his failure to adequately exhaust, but also, unlike the familiar "prejudice" standard used in other contexts, he must also demonstrate that he is "innocent." What is more, he must not only show legal innocence of the crime of which he was convicted, which is a highly demanding standard, but he must also establish complete innocence--that he had no involvement whatsoever in the underlying crime.

The effect of this standard is certain. It would bar review of all previously- unexhausted sentencing claims, regardless of how egregious the violation, and practically all guilt-phase claims. I have seen no evidence whatsoever requiring such a draconian solution. This provision would prohibit a federal court from reviewing any claim that the petitioner was prevented from asserting before the state courts because of government interference, or the incompetence of his counsel, or even because he had no attorney, unless he establishes his complete innocence.

Congress should not create such a broad rule that would preclude review of even egregious prosecutorial misconduct that evades detection in state court. That is what this provision accomplishes.

If the concern is that petitioners will attempt to exploit the total exhaustion rule by deliberately inserting unexhausted claims so the federal petition will stall, the Supreme Court has recently addressed that very issue and solved the problem. In Rhines v. Weber, 125 S. Ct. 1528 (2005), the Court fashioned a sensible rule that, for good cause, empowers the district court to hold the petition for a short time to permit exhaustion if the claim is likely meritorious. If the petitioner does not promptly return to state court to exhaust, the federal court is to proceed with the exhausted claims only.

Finally, in this section and in others as well, the habeas courts are directed to consider legal claims that were not adjudicated on their merits in state court as if they were. The bill does so by requiring that if the court reviews the merits of an unexhausted or defaulted claim that did not receive merits review in the state court, it must apply section 2254(d). That provision charges the federal courts not to disturb a state-court ruling unless it is contrary to, or is an unreasonable application of, clearly established Supreme Court law. But in the case of an unexhausted or defaulted claim, there is no state-court determination to which a federal court may defer. In such circumstances presently, the courts conduct de novo review--mindful that under Teague v. Lane they may rely only upon controlling law that existed at the time the conviction became final.

Amendment. The purpose of Section 3 of S. 1088 remains unclear to me, though I have continued concerns about its potential effects. As now drafted, that section would limit amendments to habeas petitions to those filed either before the statute of limitations runs or the State answers, whichever comes first. I would imagine that the purpose behind this provision is to ensure that petitioners do not constantly amend their pleadings, thus dragging out the process, running afoul of the statute of limitations, and burdening prosecutorial resources.

But it seems to me that the Supreme Court more than adequately addressed such concerns just last term in Mayle v. Felix, 125 S. Ct. 2562 (2005), ruling that only those amendments that "relate back" to the claims already included in a timely petition will be allowed. The S. 1088 provisions that go beyond Mayle threaten to do far more harm than good; indeed, I cannot see what genuinely useful purpose they would serve. For one thing, the State could cut off the petitioner's ability to present timely, meritorious claims simply by answering quickly. And if a petitioner gains access to exculpatory evidence through discovery in federal court that was denied him in state court--as happened recently in Banks v. Dretke, 540 U.S. 668 (2004)--and a claim of concealed Brady evidence arises, how is he to be able to present it? The ability to amend is already seriously restricted: it is not clear how this provision would advance a sensible goal while protecting a prisoner's right to present meritorious claims in a circumscribed manner.

Procedural Default. I am disappointed to say that this provision, one of the most troubling in the bill, is little changed in effect from earlier versions. Section 4 of S. 1088 would still strip federal jurisdiction over any claim that had been found by a state court to have been procedurally barred. This means that a default that was imposed despite the petitioner's essential compliance, as in Lee v. Kemna, 534 U.S. 362 (2002), or a bar that was announced after the prisoner allegedly failed to comply with it, as in Ford v. Georgia, 498 U.S. 411 (1991)--or even a default that was

caused by the State's own misconduct, like Amadeo v. Zant, 486 U.S. 214 (1988), where the prosecutor rigged the jury pools to underrepresent women and African-Americans and covered his tracks-- would be insulated from federal review.

I cannot understand why such a result would be desired. Federal law is already highly deferential to States' assertions of procedural irregularities. If a state court finds that a prisoner did not follow an established, legitimate procedural rule, and there is no excuse beyond his control for that failure, there already is no federal review--period. The Supreme Court made that clear in Coleman v. Thompson, 501 U.S. 722 (1991), where the inmate's postconviction counsel filed his brief a few days late. That one negligent act deprived Mr. Coleman of all federal habeas review because the state rule was well established and there was no way around it. Mr. Coleman was executed without any recourse to habeas corpus due to that default.

But this amendment, as I noted in my earlier testimony, would insulate any invocation of default from any federal review. I spoke in July about Banks v. Dretke, where the petitioner failed to allege that state prosecutors had coached their key guilt-phase witness about what to say, because the State successfully resisted discovery and by the time Banks learned of the misconduct, it was too late to raise the claim in state court. The Supreme Court held that it could not reward the prosecution from hiding this impeachment evidence so assiduously. Instead, applying a stringent "cause" and "prejudice" doctrine, it excused Mr. Banks from not having raised the claim at the point at which the State was continuing to conceal the truth and found that that concealment might very well have affected the verdict. Had S. 1088 then been in effect, the prosecutors would have benefited from their concealment and the State would have executed Mr. Banks on the basis of false evidence.

Amended S. 1088 would allow a claim such as this to be heard only if the petitioner not only could prove cause (as Mr. Banks was indeed able to do), but also his complete innocence. This is the same standard used to excuse the failure to exhaust or amend under this bill, and I would like to address it here.

Cause and prejudice--the current standard for obtaining merits review in the face of a legitimate procedural bar--is rarely satisfied. As to the prejudice requirement, the reviewing court must ask if it can truly have confidence in a verdict obtained without the missing evidence. Thus in Strickler v. Greene, 527 U.S. 263 (1999)--where the State insisted that it had provided all exculpatory evidence yet did not acknowledge that its star eyewitness had given several statements contradicting her trial testimony--the Supreme Court found cause in the State's suppression, but not prejudice, because it could not say that the suppressed evidence would have made a difference in the outcome of Strickler's trial or sentencing. The case powerfully reinforces the reality that just because a petitioner can prove he was entirely free from fault for having failed to obtain the facts establishing a constitutional violation does not mean that he obtains relief on his claim; he must also satisfy the extremely demanding "prejudice" prong.

I do not understand why it is necessary to make that already-strict and rarely-met standard essentially unattainable. Requiring a showing of complete innocence on top of "cause" will do just that. Many prisoners come to federal court without ever having had adequate tools to prove their claims, much less their innocence. It is often only after discovery is granted, or a procedurally defaulted claim is heard, that evidence of innocence emerges. The Supreme Court

found in Kyles v. Whitley, 514 U.S. 419 (1995), for example, that the State of Louisiana violated the Constitution when it withheld Brady evidence about its main witness. After the Court granted relief, and evidence emerged pointing to that witness as the killer, the State was unable to obtain a verdict of guilt (much less a death sentence) in three subsequent trials, and Kyles was freed. Ronald Williamson from Oklahoma won a new trial in federal court on an improperly defaulted competency claim and was later exonerated by DNA evidence. You may remember the notorious case of Anthony Porter in Illinois, who received a stay of execution on a mental-retardation claim just days prior to his scheduled execution. While that stay was in effect, a group of students investigated and identified the real killer. Porter, still alive, was released. Evidence of innocence is very often not immediately available. Nor is it always tied to the constitutional error that leads to the new trial, which is an additional requirement that amended S. 1088 would impose.

The "Great Writ" has never before been treated as a tool for divining who is innocent. Yet the "exceptions" to most of the new provisions in this bill are premised on just that: complete innocence and the ability to prove it. Thus an inmate whose incompetent state lawyer did not press the claim that he was not even eligible for the death penalty would not be able to turn to federal court because, under this legislation, defaulted sentencing claims could never be reviewed, even if they were barred improperly. The writ would be unavailable to Ledell Lee, whose Arkansas lawyer was drunk during postconviction proceedings. Or to Zachary Wilson, whose trial prosecutor instructed other district attorneys on how, when, and why to strike African-American jurors, and did so in his case. Prohibiting federal courts from entertaining these cases would be a terrible sea change in the way the writ of habeas corpus has been understood in our country.

There are still other significant problems with this section. Contrary to notions of federalism, the bill would require federal courts to default some claims that state courts did address on the merits, and to comb the state record where their rulings were ambiguous. And it offers an illusory exception: where the Supreme Court has already held that a state procedural rule is infirm, jurisdiction is permitted--thus allowing review only for those Missouri petitioners situated exactly like Mr. Lee or those in Georgia facing the precise default addressed in the Ford case.

Tolling. Section 5 of amended S. 1088 fortunately ameliorates some of its predecessor's problems in the tolling section. Statutory tolling would occur by petition and not by claim, and in most jurisdictions all of the time spent pursuing state-court remedies would be tolled against the federal statute.

Yet the amendment remains problematic. For one thing, the time spent preparing appeals and the like in state postconviction proceedings still will not be tolled in "original writ" jurisdictions. Presumably the drafters are taking aim at systems like California's, where an original writ can be filed at each stage of the proceedings, and time limitations may not be clearly delineated. But as the provision does not specify what is meant by "original writ," I continue to have concern that some petitioners could unwittingly run afoul of the federal statute of limitations simply by properly pursing their state-court remedies--a result that would go against the very notions of federalism this bill presumably is meant to advance.

Similarly, the statute is tolled for state-court proceedings only when they assert a federal constitutional claim. Here as elsewhere, the proposed amendments may serve to reward or even encourage bad behavior on the part of law enforcement. If a state petitioner does not assert a claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963), or Napue v. Illinois, 360 U.S. 264 (1959), or Giglio v. United States, 405 U.S. 150 (1972), because such information was not made available to him, and then in federal court through discovery or even happenstance he learns that the State withheld exculpatory information in violation of the Fifth, Sixth, Eighth or Fourteenth Amendments, he would not be able to assert such a claim because he will already have missed the federal statute of limitations although he diligently pursued the claims available to him in the state forum. Prisoners should not be encouraged to advance claims without the facts to support them.

Again, it is unclear what this provision hopes to accomplish. Certainly petitioners should be exhorted to raise each and every claim the facts support; indeed, current law penalizes them severely for not doing so. And the exhaustion doctrine as it now stands restricts a prisoner's ability to raise any new claims in a federal forum. This new provision cuts off federal review for the most deserving of petitioners without any real gain on the other side of the scale.

As has previously been pointed out, S. 1088 would eliminate any authority whatsoever for the courts to grant equitable tolling. Again, it is not clear why such a draconian result--one not found in other areas of the law where limitations periods are imposed, is necessary here. A look at the very few cases in which equitable tolling has been permitted demonstrates that it is not in any way being abused.

Capital Cases. As I noted earlier, AEDPA established an expedited review process to reward States that established systems to provide competent defense services during their post-conviction process. Only one State has opted in. It would be interesting to gather information about why most have elected not to do so, but I believe it is simply the fact that the goals of the AEDPA have otherwise been satisfied: habeas cases are moving through the federal-court system adequately, and fewer prisoners are prevailing.

Under the circumstances, the most sensible course is to leave the Chapter 154 amendments alone. If more States establish systems to provide competent counsel in their post-conviction proceedings but are thwarted from receiving opt-in certification, it would then be appropriate to reopen this issue. But not today. Indeed, I find the latest amendment troubling--particularly removing judicial review of the qualification decision and placing it into the hands of the Attorney General. That determination is one that should be made by an impartial adjudicator, not a prosecutor. Whoever may occupy the position of the Attorney General of the United States, the position is not one of adjudication. We operate under an adversarial system of criminal justice in this country, and the Attorney General is by definition a prosecutor. The Justice Department often joins the States as an amicus curiae in state habeas cases before the Supreme Court, but I cannot recall any instance in which the Department did so on behalf of a prisoner. In the complete absence of any demonstration that the current Chapter 154 system does not work--and does not work because Article III judges cannot adequately perform the adjudicative function--I think it would be most unwise to transfer that function to the Attorney General.

Other Provisions. S. 1088 seeks also to make unwise changes to procedures that indigent petitioners must follow to secure necessary investigative and expert witness funds. Under current law, such requests are reviewed by the judge hearing the habeas case, and the proceeding is appropriately ex parte, as an application demonstrating substantial need is required, and that application inevitably (or at least usually) contains privileged information about trial preparation. The proposed amendment would condition application for such resources upon providing a copy of the application to the State--requiring an indigent petitioner to choose between securing the funds his counsel believes are necessary and foregoing such funds in order to preserve the confidentiality our adversary system requires. Especially since I am unaware of any evidence that the present system is not working properly, I cannot support this proposal.

Second, the amendment requires that any funds authorized must be disclosed to the public immediately. I perceive no need for such disclosure, which in practice could deter a judge from granting necessary funds. If there were merit to this proposal, the amendment should require disclosure of public funds authorized and spent by both sides.

Given the importance of this legislation, I welcome the opportunity to continue to work with Committee members and their staff to ensure that any changes to the habeas statute work to enhance the quality of review.

Thank you.