Steamlined Procedures Act of 2005

The implications of the Streamlined Procedures Act of 2005, introduced in the U.S. Senate by Sen. Jon Kyl (R. AZ) on May 19, 2005, and in the U.S. House by Rep. Daniel Lungren (R. CA) on June 22, 2005, are so profound for restricting access to federal court by state prisoners, that the following two articles are being published to provide an overview of how extensive those effects will be.

The courts of many, if not most states, have maintained the appearance of providing a source of relief from an unjust conviction, while in practice they have effectively ceased to do so. In California, e.g., the reversal rate is about 1%. Consequently, federal courts can be a safety value for blatant miscarriages of justice. The SPA will alter that situation by severely limiting access to federal court for those defendants who are not now shut out by failing to meet a procedural requirement, such as missing a filing deadline. The current one-year rule is so overly restrictive that two of the stories in this issue of *Justice:Denied* involve defendants who missed that deadline — Nancy Smith and Joseph Allen, and Bruce Lisker.

The SPA was on the fast track to be voted on by both the House and Senate when it hit the speed bump of a firestorm of opposition from a broad coalition of concerned individuals and activist groups. Some of the SPA's opponents supported enactment of the Anti-Terrorism and Effective Death Penalty Act in 1996, but they recognize that while the AEDPA limited state prisoner access to federal court — the SPA is intended to all but close the door.

A striking feature of the SPA's provisions is not just that they are so one-sided in limiting the situations in which a federal judge will be able to review a state criminal conviction and/or sentence — but that they are so expertly written to accomplish that objective. It was obviously written by lawyers intimately familiar with how best to subvert state prisoner access to federal court review while preserving the appearance that that access is still available. In an effort to find out the genesis of the SPA and who wrote it, *Justice:Denied* contacted Senator Kyl's office in Washington D.C. The Senator's press spokesperson said the SPA was a collaborative effort, but he was unable to identify who any of the collaborators were. *Justice:Denied* then contacted Representative Lungren's office in Washington D.C. The Representatives press spokesperson was very adamant that Lungren was the sole author of the SPA, pointing out that he is the former Attorney General of California. That is true, but it is unreasonable to believe that Lungren single-handedly wrote the SPA — or even a single word or it — since the bill he introduced in the House was identical to the bill introduced *more than a month earlier* in the Senate. Additionally, being California's AG didn't provide Lungren with the precise knowledge of federal habeas law possessed by the SPA's author(s).

The U.S. Department of Justice is a much more likely source of the SPA, since it is written with the same precision and in the same manner as the Patriot Act and the Homeland Security Act - both of which were written by DOJ attorneys. Since the SPA has DOJ fingerprints all over it, *Justice:Denied* has filed a Freedom of Information Act request for all DOJ documents related to the participation of DOJ personnel in any capacity during any stage of the SPA's creation.

The SPA is on Justice:Denied's website at, http://justicedenied.org/streamlined.htm . It can be read, downloaded, or printed out.

Streamlining Injustice

By Vivian Berger

The deceptively titled Streamlined Procedures Act of 2005 (SPA), now pending in Congress (S. 1088, H.R. 3035), would codify the wish list of radical habeas haters-whose appetite for "reform" of the writ remains unslaked even after enactment of the draconian Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Neither streamlined nor truly procedural, the SPA threatens to make the dauntingly complicated area of post-conviction litigation more complex and dilatory, while depriving prisoners of the means to enforce their substantive constitutional rights.

Derailing it will take more courage than legislators typically display on criminal justice matters. Indeed, the Senate version, offered by Senator Arlen Specter, R-Pa., and awaiting markup by the Senate Judiciary Committee, is almost as noxious as the earlier version, which is before the House. (In any case, it may eventually lose to the House bill in conference.) Only continued strong lobbying by opponents-who have included many former judges and prosecutors-can succeed in thwarting its passage this fall.

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All Aboard For The Death Penalty Express

Bill In Congress Will All But Kill State Prisoner Appeals To Federal Court

By Jordan Smith

If a contingent of congressional Republicans have their way, federal law governing criminal appeals by state prisoners to federal court will be gutted – opening up an express lane to the Texas death chamber and making it inevitable that an innocent person will be executed. The proposed legislation, the Streamlined Procedures Act of 2005 (HR 3035 and S 1088), would eliminate federal court jurisdiction over the vast majority of habeas corpus appeals – through which state defendants challenge the constitutionality of their convictions in federal court, a process that is at the heart of the growing number of exonerations nationwide — leaving state courts of appeal as the final arbiters of justice.

Illustration by Doug Potter, The Austin Chronicle

In Texas, the proposed legislation would leave decisions of life or death in the hands of the Court of Criminal Appeals – a court whose death penalty rulings have come under attack not only by reformers and advocates but also by the U.S. Supreme Court. If the draconian legislation becomes law, "it would end federal habeas corpus in Texas," says Jim Marcus, executive director of the nonprofit Texas Defender Service.

At issue are congressional limits on criminal appeals to the federal courts – where, for example, questions of ineffective counsel and claims of prosecutorial misconduct are adjudicated, and, more often than not, lay the groundwork for claims of innocence, new evidence testing, or the granting of a new trial. The rules governing the process were last modified nearly a decade ago with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 – a notoriously complex scheme of statutory hoops through which inmates and their attorneys must jump in order to have their cases heard in federal court. The complexity of the process – which can toss a case back and forth between federal and state courts – is often lengthy, a circumstance that, ostensibly, prompted Sen. Jon Kyl, R-Arizona, to introduce the SPA in the Senate this spring. "Many federal habeas corpus cases require 10, 15, or even 20 years to complete,"

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he told colleagues on May 19. "These delays burden the courts and deny justice to defendants with meritorious claims. They are also deeply unfair to victims of serious, violent crime." Although the AEDPA (passed by a Republican-controlled Congress) itself curtailed federal judicial oversight in order to speed the process along, its restrictions are apparently not enough for Kyl, his co-sponsors (first among them Texas Sen. John Cornyn), and his House colleague Rep. Dan Lungren, R-Calif. [who introduced the SPA in the House in June], who have seemingly decided the remedy to this sort of delayed justice is to eliminate the judicial process altogether.

Under the SPA, the only criminal cases that would earn any federal habeas review are those in which a defendant can show three things: one, that there are "new facts" in the case that were never brought to light through the "due diligence" of attorneys; two, that those facts establish the defendant's innocence by "clear and convincing evidence"; and, three, that "but for a constitutional violation, the defendant wouldn't have been convicted," Marcus says. "You should really think of it as three bells that all have to be rung." The problem, say Marcus and others, is it is nearly impossible to ring all three bells without first successfully ringing an underlying chord – such as a claim that the reason the new information was unidentified was the result of a prosecutor hiding evidence from the defense (as was the case with Texas death row inmate Delma Banks, whose case was ultimately remanded to state district court), or because the defendant's attorney was ineffective. Under the SPA, those claims would need vetting in state court – in Texas that means the CCA, a court whose record on such issues is abominable. It was the CCA that infamously opined in Calvin Burdine's death case that Burdine's lawyer sleeping intermittently through his trial did not necessarily mean his counsel was ineffective. (During a Senate Judiciary Committee meeting late last month, Cornyn told members that he believes the law "provides for a lawyer who is awake and fully functioning," and said the fact that Burdine's case was reversed shows "that the system can and does work." But if those kinds of claims aren't raised during state appeals or in a direct appeal to federal courts, Cornyn argues, a defendant should not be able to raise a claim for the first time, years later, during federal habeas appeals.)

'We Don't Really Care'

Neither Marcus nor fellow TDS attorney Greg Wiercioch can recall a single case won on the basis of "actual innocence" during a habeas appeal that was not predicated upon one of those apparently lesser claims. "If the state system is shoddy," says Wiercioch, under the SPA "you're never going to get an opportunity in federal court to get better counsel, or to investigate what may be a claim of actual innocence. Unless you can meet the really high standard ... They're screwed." The legislation's message, say the TDS attorneys, "is that if [the defendant is not 100%] innocent, we don't really care," Wiercioch said. Even defendants who have been exonerated by DNA would likely not get a federal review. Take the case of an inmate convicted before the advent of modern DNA technology. Although the defendant may be able to pass through the SPA's first two hurdles – new evidence, clear and convincing evidence of innocence – any attorney would be hard-pressed to find a constitutional claim that hinges on the right to access modern technology. As such, the defendant would likely be barred from proving "actual innocence" in court.

According to Cornyn, all the hype over the possibility of denying justice to criminal defendants is, apparently, just hysteria. "What we are talking about here is not denying people access to reasonable review of their case, but we're talking about abuse of the habeas process in federal court," he told the committee on July 28. The "fact is" that habeas review "has become rife with gamesmanship" and is used to delay the imposition of a fair sentence. "In my state, from the time ... the most hardened criminals are convicted of the most heinous crimes ... their case is reviewed by not only a jury of 12 of their peers but up to 23 different judges ... perhaps even more."

Just because a number of people have reviewed the case, however, doesn't mean it has been justly resolved, points out SPA opponent John Whitehead, president of the conservative civil liberties organization the Rutherford Institute. "State court judges – who are often elected – are susceptible to pressures that life-tenure federal judges may find less compelling," he wrote in a July 27 memo to the committee. The SPA is "radical legislation" that would "likely result in the execution of citizens who have been wrongly convicted and sentenced to death." Whitehead isn't the only conservative critic of the legislation. The ranks of opposition are swollen with critics of all political stripes – including former Rep. Bob Barr, R-Georgia, the National Association of Criminal Defense Lawyers, former FBI director William Sessions, and the American Bar Association. This widespread criticism has apparently halted the SPA's progress. Sen. Arlen Specter, R-Penn., chair of the judiciary committee, recently tabled the measure until some time next month. If it passes, the measure will likely be challenged in court – at least in part on questions of whether Congress actually has the power to encroach on the jurisdiction of the judicial branch. "It is a constitutional issue, taking so much power away from the courts," Wiercioch says.

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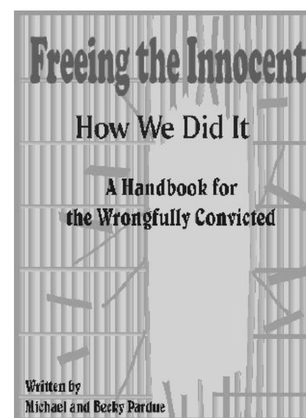
into state law in the dark of night a provision that says - even if you have a pardon - you have to have a letter from the district attorney saying you are actually innocent," Ellis said. "It's ridiculous. This is a fundamental change to the law that makes it harder far people to get what is owed to them. I want to see it changed."

Harris County (Houston) District Attorney Chuck Rosenthal said he will not send the necessary letter, "If I knew be was innocent, I would. But I don't know that now." Rosenthal discounted the pardon received by Sutton in May 2004, "If you give me some good reason to believe [the victim] was mistaken, I will probably send the letter."

"Even if he secures all the paperwork, which is unlikely, it might be 18 months before [Sutton] gets the money," said David Dow whose network continues to represent Sutton.

Ellis said he plans to introduce amendments to the compensation law in the 2005 legislative session. He wants the law changed to eliminate the "actual. innocence" letter requirement. He also wants to increase the amount of money exonerated people can receive to $40,000 per year of imprisonment. He said, "It takes $40,000 a year to incarcerate someone. We should be giving them at least that."

Source: *The Houston Chronicle*



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