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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> "To be considered truthful Mr. Fonseca's overall score would have to equal or exceed 6 points. His score for the test was 13. It is my professional opinion that Mr. Fonseca was telling the truth when he stated that he did not shoot Arthur Mayer."

Dr. Rovner, who has a Ph.D in Psychology, claims that when a polygraph examination is conducted properly by a highly trained and skilled examiner using state of the art computerized instruments, the results are accurate 96% of the time. He thinks that with today's sophisticated equipment, virtually no one can "beat" a test.

Fonseca is considering his options in light of the new evidence of Dr. Rovner's finding. Fonseca was assisted in arranging Dr. Rovner's exam by INNOCENT!, a Michigan-based non-profit organization that works with families and friends of the wrongly convicted. Meanwhile, Fonseca remains behind bars. Contact INNOCENT! at,

INNOCENT!
20 W. Muskegon Avenue
Muskegon, MI 49440
Or email, thedouger@chartermi.net

Dr. Rovner's email address is: rovner@polygraph-west.com. His website is, http://polygraph-west.com

JD Note: Contrary to popular mythology fueled by television programs and movies, there is not a blanket exclusion of polygraph results as evidence in state and federal courts. The U.S. Supreme Court has never directly ruled on the admissibility of polygraph test results, and their admissibility in federal circuits varies. Many states allow the introduction of polygraph examination results under different circumstances. In California, where Timothy Fonseca is located, polygraph results are admissible in a pretrial, trial or post-conviction proceeding if both parties stipulate to its admissibility. Cal. Evidence Code § 351.1. (a) states:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and *post conviction motions and hearings*, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court*, unless all parties stipulate to the admission of such results*.

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Almost a decade ago, AEDPA severely cut back on habeas protections that decisions by the Supreme Court over the previous 20 years had already trimmed substantially. Among other things, AEDPA imposed a novel statute of limitations (ordinarily, one year from final judgment); abolished "same-claim" successive petitions; greatly restricted successors containing claims omitted from an earlier application (usually requiring that the underlying facts strongly demonstrate actual innocence); and barred relief for any claim adjudicated on the merits in state court unless such adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court ... or ... was based on an unreasonable determination of the facts." Moreover, chapter 154 of AEDPA gave the benefit of even more favorable provisions in capital habeas cases to states that opted to put in place mechanisms for appointing and paying competent counsel to represent death-sentenced defendants in state post-conviction proceedings.

Impossible standards for review

The SPA goes even further toward rendering illusory federal protection of defendants' rights. Overruling a long line of Supreme Court precedent, it removes jurisdiction from habeas courts to consider claims that a state court refused to hear on the ground of some procedural error committed by the prisoner or his lawyer-even if the lawyer's inadequate assistance caused the default or the state court's action was unreasonable. To overcome this global barrier to review, a petitioner would generally have to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and ... the facts underlying the claim ... would be sufficient to establish ... that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." The proverbial camel could have navigated the needle's eye more easily than a prisoner will be able to satisfy this provision.

Other sections direct dismissal with prejudice of claims not exhausted in state court, where many defendants lack the aid of counsel in collaterally attacking their judgments, and severely restrict the right to amend habeas petitions. Again, the only escape hatch is the "mission impossible" innocence exception. Additional provisions would alter current tolling provisions, so as to trap unwary litigants into breaching the one-year statute of limitations, and impose rigid timetables on the processing of habeas appeals.

Finally, the House bill zeroes in on capital cases in further jurisdiction-stripping sections. It bars federal courts from hearing almost all claims of sentencing error that a state court has found to be harmless, and-subject to the innocence "out"-all claims by death row inmates, if the U.S. attorney general certifies that a state's system for furnishing counsel in post-conviction proceedings fulfills statutory standards. Significantly, existing law leaves the certification decision to the judiciary, not to a potentially biased executive official, and does not wholly deny the applicant a hearing in "opt-in" states.

Fueled by baseless hostility toward prisoners and federal judges, the SPA threatens to put habeas courts out of the business of safeguarding constitutional rights. It would reverse the results of decisions granting relief for such violations as ineffective assistance of counsel and racial bias in jury selection and place innocent lives at risk. Ironically, too, it would not lessen delays: The courts will have to interpret and review challenges to its provisions. The bill deserves capital punishment and quick burial.

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Vivian Berger is a professor emerita at Columbia Law School.

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receive compensation. The law provides that people who were wrongly convicted can collect $25,000 per year of incarceration up to a maximum of $500,000 if they: (a) Served all or part. of their sentence; (b) Received a pardon based on their innocence or relief from a court based on their innocence; and (c) Can document the amount of time served. Under the law Sutton is eligible for over $100,000.

However, when Sutton applied for compensation, his claim was denied. Unbeknown to the law's original author, State Senator Rodney Ellis (D-Houston), someone changed the law he introduced prior to its enactment by the legislator in 2003. The added provision requires that people claiming compensation for wrongful imprisonment must first obtain a letter from the district attorney whose office prosecuted them. The letter must certify the claimant's "actual innocence."

Ellis said he was never consulted about the change to the law. "Someone has slipped

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