Who Wrote The Streamlined Procedures Act of 2005?

The Streamlined Procedures Act of 2005 (SPA) is currently being reviewed in the U.S. Senate Judiciary Committee and the House Committee on the Judiciary. Senate and House committee hearings concerning the SPA were held in November 2005, but as of mid-December neither has voted on whether to send it for a vote by the full House and Senate. Efforts to quickly send the SPA out of those committee's so it could be voted on and promptly enacted were thwarted by intense opposition from politically influential people who normally support "law and order" proposals. The accompany article by Marcia Coyle outlines some of the opposition to the SPA.

Federal courts have been an important avenue for a state prisoner to get relief from a wrongful conviction after state courts refused to do so. (See e.g., $662,000 Awarded Man Imprisoned 5 Years For Phantom Rape of Woman "Sick Of Men", in this issue of *Justice:Denied*.) Because the SPA would more profoundly affect the accessibility of federal court to an innocent state prisoner than any legislation in U.S. history, its genesis and who wrote it is of interest to *Justice:Denied*.

The SPA was introduced in the Senate by Senator Jon Kyl (R. AZ) and in the House by Representative Daniel Lungren (R. CA). As reported in *Justice:Denied* Issue 29, the office of Senator Kyl's office in Washington D.C. was contacted in an effort to find out the authorship of the SPA he introduced. The Senator's press spokesperson told *Justice:Denied* the authorship of the SPA was a collaborative effort. However, when requested he was unable (or unwilling) to identify any of the collaborators. *Justice:Denied* then contacted Rep. Lungren's office in Washington D.C. The Representatives press spokesperson was very adamant that Lungren was the sole author of the SPA. 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.

The SPA was carefully written by a person or persons possessing not only an intimate knowledge of the federal habeas statutes, but with the skill to deviously close the door to federal court in the face of state prisoners while maintaining the appearance that the door is still open. There are attorneys within the U.S. Department of Justice that possess both the specialized knowledge and the writing skills that were necessary to write the SPA. Consequently, in August 2005 *Justice:Denied* filed a Freedom of Information Act request with the DOJ that requested in part:

> "... access to and copies of any and all information related to assistance provided by any employee of the Department of Justice in the research, development and or drafting of The Streamlined Procedures Act of 2005 ..."

In early December 2005 the DOJ responded to *Justice:Denied's* FOIA request by stating that no records could be found of any involvement by any DOJ employee in regards to the SPA. Of course, that only means that if DOJ employees were involved, they were smart enough not to leave an obvious paper or email trail.

U.S. Senators and Representatives are exempt from FOIA requests, so Senator Kyl and Rep. Lungren can stonewall written requests for information. So the mystery remains: Who wrote the SPA?

Justice:Denied is continuing its effort to obtain currently undisclosed information about the SPA that is of public interest.

More Fuel Added To Debate Over Federal Habeas Review

By Marcia Coyle

If the chief judges of state and federal appellate courts, the organized national bar and a host of others say that a bill that would strip the federal courts of nearly all authority to review state convictions and sentences is a mistake, you'd think the bill's proponents might back down.

Think again.

Only a week after a second cautionary letter from the Judicial Conference of the United States – the Senate Judiciary Committee was prepared to vote [in October] on S. 1088, the so-called Streamlined Procedures Act of 2005, making the most sweeping changes in federal habeas review in a decade.

But lack of a quorum and strong objections by some Democratic senators forced a delay in the chairman's call to vote out the bill and deal with its problems later.

The bill's sponsor, Sen. Jon Kyl, R-Ariz., and supporters are expected to try again. But this time, a substitute measure – offered by judiciary Chairman Arlen Specter, R-Pa. – will be on the table, and Democratic committee members have pressed successfully for a public hearing.

Specter's Substitute

Specter, who had sought unsuccessfully to get a vote on his substitute at the meeting in early October, said then that his version meets the concerns of the Judicial Conference. That's news to the policy-making body of the federal judiciary.

"Our people hadn't seen it by then," said Richard Carelli, a spokesman for the Administrative Office of the U.S. Courts. "I'm assuming we will have some reaction to it."

But the substitute amendment, by virtue of its very existence, fails to do the one thing that federal and state chief judges have urged the senators to do: conduct a study on whether there is any unwarranted delay in resolving habeas corpus petitions in the federal courts.

The Judicial Conference recently sent the committee the results of a preliminary review of statistical data on the federal courts' handling of non-capital and capital habeas cases filed by state prisoners.

Based on that analysis, "The Conference does not believe that the data as a whole supports the need for a comprehensive overhaul of federal habeas jurisprudence," wrote Leonidas R. Mecham, conference secretary and director of the Administrative Office of the U.S. Courts, the management arm of the federal judiciary.

"We oppose the [Specter] substitute," said Kyle O'Dowd, the legislative affairs director for the National Association of Criminal Defense Lawyers. "We don't think it's a reasonable legislative proposal. Senator [Russell] Feingold [D-Wis.] said this is a solution in search of a problem. There needs to be some systematic study of the issue before we even talk about legislation."

But the Specter proposal is "a good and necessary" bill, said Kent Scheidegger of the Criminal Justice Legal Foundation. The Antiterrorism and Effective Death Penalty Act of 1996 "didn't accomplish what states wanted to see done," he insisted. "There's no confidence that is going to happen. The courts have had 10 years to implement AEDPA."

Fast-Track Reform

The debate has now boiled down essentially to two problems that Kyl believes justify a habeas overhaul: delay – both in handling state prisoners' habeas corpus petitions and in carrying out death sentences – and a broken bargain under the 1996 AEDPA, which itself imposed sweeping limits on federal habeas review.

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AEDPA promises that if the states establish procedures for the appointment, compensation and payment of reasonable litigation expenses of competent counsel for indigent death row inmates in post-conviction cases, the states can take advantage of AEDPA's expedited time frames for federal review of habeas petitions. The federal circuits decide whether a state qualifies for "opt-in" status. To date, only Arizona is an opt-in state.

On the delay issue, the Judicial Conference recently reported to the judiciary committee that it reviewed statistical data compiled for fiscal year 2004 and found the following:

District Courts: There were 18,432 non-capital habeas corpus petitions filed by state prisoners in U.S. district courts, and 6,774 in U.S. courts of appeals. The total number of terminations for 2004 showed that the federal courts are bringing to conclusion nearly as many non-capital habeas petitions from state prisoners as are filed annually.

The median time from filing to disposition for those cases in the district courts has remained relatively constant since 1998, and in 2004 was six months. In the courts of appeals, the median time also remained relatively stable between 1998 and 2004, ranging from 10 to 12 months.

"Thus, the statistics appear to indicate that the district and appellate courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously," said Mecham.

For capital habeas corpus petitions, the data showed that from 1998 to 2002, more cases were filed in district courts than were concluded. As a result, the number pending increased from 466 at the end of 1998 to 721 at the end of 2002. But in 2003 and 2004, the number terminated nearly equaled the number filed, so the growth in the pending caseload slowed and was 732 at the end of 2004.

The median time from filing to disposition of state capital habeas cases was 13 months in 1998; 24.5 months in 2001; 20 months in 2003; and 25.3 months in 2004.

Habeas scholar Ira Robbins of American University Washington College of Law said that he could only speculate on why the disposition time for state capital habeas nearly doubled in the district courts from 1998 to 2004.

"In that six-year period, habeas corpus has gotten increasingly difficult," he said. "While Congress may have intended to speed up the process, new statutes like AEDPA often tend to slow it down – especially when there is a long period of interpretative, or 'shake-out,' litigation, as there has been with AEDPA."

"This is one of the arguments against the pending habeas legislation: Now that the interpretative period of AEDPA has matured and judges know how to work with it, it would only slow down the process to add yet another layer of habeas complexity," he said.

Circuit Courts: In the courts of appeals, the Judicial Conference reported that the number of terminations of state capital habeas corpus appeals kept pace with the number of filings between 1998 and 2000.

But in 2001, the number filed was more than the number terminated, which increased the number of cases that are pending. From the end of 1998 to the end of 2004, pending state capital habeas cases rose from 185 to 284.

The median time from filing to disposition of capital habeas appeals ranged from 10 to 13 months between 1998 and 2002. The median time increased to 15.5 months in 2001; dropped to 13 months in 2003; and rose to 15 months in 2004. Those appeals pending three years or more increased from five (2.7 percent of all pending state capital habeas cases) at the end of 1998 to 36 (12.7 percent) at the end of 2004.

Without further information, the conference, said, "The judiciary is unable to draw a definitive conclusion" as to the causes for these increases or whether the time frames are unreasonable.

Broken Bargain

The debate over whether circuit courts have refused unfairly to certify states as "opt-in" states under AEDPA is mostly an anecdotal one. There appear to be no studies supporting either view.

Thomas Dolgenos, chief of the Federal Litigation Unit of the Philadelphia District Attorney's Office, said: "A fair number of states have tried but none has been able to meet the requirements to the satisfaction of the courts. The feeling around prosecutors I've spoken to about it is the system is sort of rigged. We're not sure if we're ever going to get compliance. A lot of states thought they should now be in compliance. They've taken steps but can't convince the circuits of that."

But long-time capital litigator George Kendall, senior counsel to Holland & Knight, called the opt-in reason a "red herring."

"Most states tried to opt-in right after AEDPA in cases pending," he said. "They wanted certification and hadn't crossed their 't's and dotted their 'i's.

"In most other cases, the states don't care to opt in. They don't have to provide lawyers and don't have to spend any money, because the general amendments to habeas in the 1996 act really cut it back. It's not like states have been going back and back and courts are irresponsibly saying, 'No, we're not going to certify.'"

American University's Robbins, who tracks habeas corpus decisions for his habeas textbook, agreed, saying, "I think it is generally accepted wisdom that states have stopped trying to opt-in because AEDPA's general habeas corpus reform provisions are already enormously state-favoring. As far as I know, there has been no major litigation on the opt-in question in a long time – at least not at the circuit court level."

Substitute Habeas

The Specter substitute reduces the amount of jurisdiction-stripping in the original Kyl bill, said opponents and supporters, but is still not acceptable to most of the original opponents.

On the opt-in issue, Specter adopts the Kyl approach that would give the U.S. attorney general the authority, and not the circuit courts, to determine whether a state qualifies as an opt-in state for the benefit of expedited review procedures in capital cases.

But Specter would not, as Kyl would, eliminate all federal habeas review once a state has qualified.

Both approaches would make the proposed review changes applicable to all cases pending at the time of enactment of the legislation but Specter eases the new time limits if they would have started for some cases on a date before enactment.

For procedurally defaulted claims, both senators would require the habeas petitioner to show cause why the claim was not raised in state court and add a requirement that the petitioner show he or she was innocent of the underlying crime.

Specter would provide some narrow protection for the attorney-client relationship when an indigent petitioner asks the court for funds to hire experts or investigators. He, like Kyl, still would prohibit *ex parte* communications with the judge on that request and require notice to the government and an opportunity to respond.

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and could have originated in the coat or any wool garment of a gray/purple color."

- This coat also had a small stain on the inside of a pocket too small to type or test. The prosecution's forensic examiner identified this stain as blood, but acknowledged that it was "consistent" with someone cutting a finger and putting his hand in the coat. Even this testimony was overstated. In the lab report, the witness expressed doubt about whether this stain was even blood: "The coat was treated with luminol reagent, resulting in a positive presumptive reaction for blood. Subsequent analysis using Takiyama, a confirmation test for blood, indicated no detectable blood present." Thus, this witness's testimony failed to link Tony's coat to the crime at all.
- Finally, even if the jury saw the physical evidence as connecting Tony's coat to the crime, there was an explanation for that that was consistent with Tony's account of what happened: Tony loaned the coat to Victor shortly before the crime, so that Victor could conceal his gun under the coat.

To show how the Murillo's could have mistakenly identified Tony, defense counsel introduced the booking photograph of Victor from December 19, 1991. Victor had been arrested at his parents' house, along with his brother Van, in the early morning hours of December 19, 1991. Van was charged with the crimes that occurred at the Murillo's house, Victor was arrested for assaulting the officers who were attempting to arrest Van, and their father was arrested for hindering the arrest of Van. The defense also introduced the booking sheets for Tony and for Victor. The sheets showed that as of December 19, 1991, both young men were 5'-8" tall. Victor weighed 156 pounds, while Tony weighed 150 pounds. Tony was 18 years, 6 months old; Victor was 17 years, 8 months old – only 10 months younger than Tony. As the photographs of Victor and Tony show, they also looked very similar. An eyewitness or victim could have mistakenly identified Victor Belton as Tony Ford.

Tony's lawyers also tried to present additional evidence about the unreliability and inaccuracy of the Murillo sisters' identifications. Before trial, they asked the court for funds to hire Dr. Roy Malpass, a highly regarded El Paso expert in eyewitness identification. The trial judge denied their request. Relying on the daughter's questionable identification of Tony, the jury convicted him on July 9, 1993. He was subsequently sentenced to death.

An Eyewitness Identification Expert's Post-Trial Examination

After exhausting his state court appeals, Tony filed a federal habeas corpus petition. In response to Tony's request, the court provided the funds for Tony's lawyers to consult with Malpass so that they could show what Tony's trial attorneys could have presented to the jury had their request for Malpass's assistance at trial been granted.

Working with Tony's federal court lawyers, Malpass conducted two empirical studies, based on well-established scientific principles, to determine whether the process by which the Murillo sisters identified Tony – by looking at an array of six photographs of different people, one of whom was Tony – was likely to produce a mistaken identification.

The first study compared the similarity of facial features and appearance of Tony, the other five people included in the photo array, and Victor. The results showed that Tony and Victor were, by far, the most similar looking. Thus, someone who had seen Victor actually commit the crime and who was shown the photo array with Tony's picture in it would have been drawn to Tony's picture.

This is exactly what happened in the second study Malpass conducted. The second study was designed to determine whether the photo array from which the Murillo sisters picked out Tony was "suggestive" – that is, was composed of photographs of people different enough in appearance from Tony that he stood out and was more likely be picked out by persons given a verbal description of Tony's facial features. Based on this study, Malpass concluded that the photo array was substantially biased to lead to the identification of Mr. Ford's photograph: His photo was four times more likely to be picked out by research participants. A fair and non-suggestive photo array would have lead research participants to pick out each photo with approximately the same frequency.

The importance of this, as established by the first study, is that Victor looked remarkably like Tony. Thus, if the person the Murillo sisters saw shoot their brother was Victor they would have been highly likely to pick Tony out of the photo array they were shown – even though they had never seen him before.

Had the trial court provided the funding for Malpass's assistance, he also could have provided additional critical information to the jury in their effort to determine whether the Murillo sisters' identifications were reliable:

- Because the Murillo's were Latino and the suspects were black, Malpass would have explained that the risk of a mistaken identification was higher. In a study based in El Paso, involving the cross-racial identification of a black suspect by Latino eyewitnesses, the results revealed that *67% of the time*, when the Latino witness identified a black suspect, the witness was mistaken. By contrast, when Latino witnesses identified Latino suspects, they were mistaken only *29% of the time*. Numerous other studies of this phenomenon have confirmed this extraordinarily high likelihood of mistake in cross-racial identifications.
- Malpass would also have explained that the presence of a weapon that is used in a threatening manner, as it was in the Murillo's home, reduces the probability that an identification is accurate.
- Malpass would have explained that the Murillo sisters' unwavering certainty that their identifications were accurate (each testifying, "I will never forget his face") did not mean that they were accurate. Research has established that eyewitness certainty is not correlated with the accuracy of the identification. Among subjects who are highly certain of their identifications, the error rate of 50% is very high. This was especially important information for the jury to have had, because in post-trial interviews, members of Tony's jury revealed that one of the jurors had once been the victim of a crime and this juror told the other jurors that she, like the Murillo sisters, would never forget what the assailant looked like.
- Finally, Malpass would have addressed another factor that increased the likelihood that the identification of Tony was unreliable. The exposure of an eyewitness to a photograph of the suspect before he or she views the suspect's photograph as part of a photo spread increases the likelihood that the eyewitness will identify the

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Stephen Saltzburg of George Washington University Law School, who has been working on alternative proposals on behalf of the American Bar Association and the Constitution Project, said there should not be much federal review when a petitioner has gone through state procedures and the state courts did it right.

"I understand the goals [Kyl and supporters] have," he said. "But that doesn't mean you have to basically cut off federal habeas completely. The problem is Arizona has a pretty good system, but a lot of other states don't. In some jurisdictions, it's a necessary protection."

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