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Habeas Corpus Practice in State and Federal Courts

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PANEL
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PROFESSOR GOTTLIEB: My name is David Gottlieb and I teach at the University of Kansas School of Law. To my right is Professor Randall Coyne, who teaches at the University of Oklahoma College of Law. My purpose today is to speak briefly about habeas corpus for state prisoners in non-death penalty cases. Professor Coyne will follow with some comments about death penalty cases. When he has concluded, I would like to describe a case that was decided on Monday,[1] which may have a significant impact on federal criminal litigation and therefore for post-conviction challenges for individuals convicted of federal crimes.

My first thought when I was asked to talk about habeas corpus for state prisoners was, "I didn't know you cared." In fact, in recent years the availability of the writ of habeas corpus for state prisoners under 28 U.S.C. § 2254 has been narrowed dramatically. Through complex pleading requirements involving exhaustion of remedies, through rules imposing procedural default, rules prohibiting successive petitions, rules applying latches, and through rules on retroactivity, the federal courts seem largely to have been taken out of the business of federal habeas corpus for cases not involving the death penalty.[2]

The shrinking role for habeas corpus is evinced in the relative decline in cases filed by state prisoners. While prison populations have tripled or quadrupled in the last twenty years, there has been no comparable increase in Section 2254 petitions. The number of cases decided in favor of prisoners has declined even more dramatically.

While the writ of habeas corpus under Section 2254 has retained a significant amount of vitality in death penalty cases, its importance in non-death penalty cases in the last twenty-five years has diminished. A generation ago, many commentators likened federal habeas corpus to a kind of federal appeal as of right. State prisoners with federal constitutional claims who wanted to have a federal forum hear their claim were thought to be presumptively entitled to a hearing in a federal court. And because the Supreme Court of the United States was obviously not in a position to deal with the petitions of all state prisoners who had federal constitutional issues, the theory was that the lower federal judiciary had been deputized to hear the cases.

Over the past twenty years, this expansive view of habeas corpus has been decisively rejected by the Supreme Court. Today, most state prisoners with constitutional claims are unable to get a hearing in a federal court. What the court has failed to do, however, is replace the former justification for habeas corpus with any satisfactory account of the role of habeas corpus for this generation. In

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1. Apprendi v. New Jersey, 530 U.S. 466 (2000).
2. *See id.* at 310.

Wainwright v. Sykes,[3] over twenty years ago, when the Supreme Court began its process of cutting back the writ of habeas corpus, the majority promised that habeas corpus would still have a place as a remedy for an individual whose custody is unconstitutional, at least when that error reflected upon the basic justice of the individual's incarceration.[4] But the cases in the last twenty years have not been faithful to that theoretical position. The pleading requirements that are now in place with respect to habeas corpus are pleading requirements that would be difficult to impossible for seasoned attorneys to observe. For prisoners who are in custodial institutions, the requirements are often impossible. While some prisoners are able to surmount these barriers, most cannot. Thus, even prior to 1996, habeas corpus had ceased to be a viable remedy for most prisoners unconstitutionally deprived of their liberty.

In the past couple of years, Congress has grafted yet another layer on top of the Supreme Court's already high procedural hurdles. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[5] seemingly imposes procedural hurdles even more onerous than the Supreme Court's current impositions in federal habeas corpus cases. I want to talk a little bit about the Act, discuss a couple of cases that interpret its provisions, and share some thoughts about where we might be now. My conclusion is that the Act, particularly as interpreted by the Supreme Court, does relatively little to change the balance already achieved by the Court over the past generation. Instead, it can be read primarily as a codification of much of the Court's work.

The Antiterrorism and Effective Death Penalty Act of 1996 was designed primarily to deal with habeas corpus petitions filed by death sentenced individuals rather than those serving terms of imprisonment. For example, the time limits and successive petition limitations are designed to deal with problems of capital litigation. It's obviously very important for a state that wishes to impose capital punishment that its execution not be postponed indefinitely. The impatience with delays allegedly caused by habeas corpus litigation in death penalty cases thus created political pressure to enact strict time limits for filing federal habeas corpus petitions. But concerns with delay should not be as important for states in non-capital litigation; if a prisoner is already serving his or her term of imprisonment, the state loses little if delay occurs. Similarly, the argument for limiting successive petitions was made with death penalty cases in mind. Congress did not want inmates filing petition after petition in efforts to forestall executions. In contrast, a successive petition by an inmate serving a term of imprisonment does not forestall the inmate's punishment. The petition, after all, is filed while the sentence is being served. Although the political concerns driving the bill were aimed at capital litigation, the imposition of a statute of limitations and an almost complete bar on successive petitions was imposed on capital and non-capital cases alike.

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3. 433 U.S. 72 (1977).
4. *See id.* at 90.
5. 28 U.S.C.A. § 2261-2266 (1996).

Thus, the new 28 U.S.C. § 2244 imposes a rigid bar on second or successive habeas corpus petitions.[6] A second petition is prohibited unless the applicant shows either that the claim relies on a new constitutional rule made retroactive or that the factual predicate could not have been found. In addition, the prisoner must demonstrate that the fact, if proven in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would find the applicant guilty.[7]

A fundamental question facing lower courts has been whether this bar on federal habeas corpus should be interpreted in light of prior habeas practices, or whether it should be seen as a vehicle allowing courts to throw out as many habeas petitions as possible. In *Slack v. McDaniel*,[8] decided on April twenty-sixth of this year [2000], the lower court had dismissed a successive petition—a second habeas petition that was filed after a first habeas petition had been dismissed—for failure to exhaust state remedies.[9] Prior to the AEDPA, there had been a century of jurisprudence emphasizing the obligation of petitioners to exhaust state remedies. There was long-standing precedent that the consequence of a failure to exhaust was dismissal in order for the prisoner to exhaust state remedies.[10] No court had ever suggested, prior to this Act, that once the petitioner had, in fact, exhausted remedies and then went back to federal court, he would be barred from filing a federal habeas corpus petition on the ground that the properly filed petition was successive.

Nevertheless, that was the resolution adopted by one lower court.[11] The court concluded that the literal prohibition on successive petitions in the AEDPA required dismissal. The Supreme Court reversed. The Court emphasized the necessity of examining the bar on successive petitions in light of existing federal habeas corpus practice. The Court opined that Congress never intended, when it codified the exhaustion remedy, to bar individuals who exhausted remedies after a dismissal and returned to the state from ever being able to be heard in federal court. The Supreme Court decided, therefore, that a lower court could not dismiss petitions as successive when the first petition was dismissed without prejudice for exhaustion of remedies.[12]

The second major requirement of 28 U.S.C. § 2244 imposed by the 1996 Act was a statute of limitations.[13] The Act mandates a one-year limitation in the filing of habeas corpus petitions, which begins to run from the conclusion of direct review, with the limitation period stayed if the inmate is pursuing state post-conviction litigation.[14]

The AEDPA became effective on the date of enactment, April twenty-seventh, 1996, and the federal courts were almost immediately confronted with the task of determining whether and how to phase in the limitation period. Some courts determined that the limitation period could apply immediately, and, in essence,

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6. *See* 28 U.S.C. § 2244(a)-(c).
7. 28 U.S.C. § 2244(b)(2)(A)-(B).
8. 529 U.S. 473 (2000).
9. *See id.* at 479.
10. Rose v. Lundy, 455 U.S. 509 (1982).
11. *Slack*, 529 U.S. at 479.
12. *See id.* at 487.
13. 28 U.S.C. § 2244(d)(1).
14. *See id.*

retroactively, to bar inmates filing after the effective date who might already have waited more than a year before exhausting state remedies. However, most courts rejected that position. Relying on the doctrine of equitable tolling,[15] which mandates that a litigant be given a reasonable period of time in which to file a cause of action when a newly-created limitation period would cut off an existing claim, virtually all the federal courts decided in relatively quick succession that some extension of the limitation period must be implied. Since the limitation was one year, the tolling given by most courts to the limitation period was the same: one year from enactment of the statute.

As noted, the one-year period is tolled during the time the individuals are exhausting state remedies. Because of the requirement of exhaustion of state remedies and the time required for exhausting collateral appeals, many inmates in technical non-compliance with the statute of limitations due to the delay that had occurred prior to the effective date of the statute, even after the one-year extension, found themselves applying to federal court for relief. In April of 1997, after the one-year period was over, a number of lower courts began dismissing cases filed by inmates in this class for non-compliance with the limitation period.

In *Hoggro v. Boone*,[16] this circuit rejected dismissal in these circumstances. The court decided that a lower court must take into account the tolling provision in assessing the timeliness of the filing and that the time during which an individual is properly exhausting state court remedies can't apply against this one-year period.[17]

Perhaps the most important provision of the new habeas corpus act was its reformulation of 28 U.S.C. § 2254(d), the so called "standard of review." The provision, which is new to habeas corpus, requires that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits...unless the adjudication of the claim...(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...."[18]

In April of this year, in *Terry Williams v. Taylor*,[19] the Supreme Court attempted to define this language.[20] The review provision permits a habeas corpus petition to be granted in two cases. The first is if the state court decision is contrary to federal laws determined by the Supreme Court of the United States. This limitation, prohibiting a habeas grant where the existing law is not already established, was essentially already in place in habeas corpus as a result of the retroactivity doctrine of *Teague v. Lane*.[21] The second portion of the standard, dealing with mixed questions of fact and law, which prohibits grant of a habeas petition unless a state's

15. The doctrine of equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed. *See* Irwin v. Department of Veterans Affairs, 498 U.S. 89, 94-96 (1990).

16. 150 F.3d 1223 (10th Cir. 1998).

17. *See id.* at 1226.

18. 28 U.S.C. § 2254(d)(1).

19. 529 U.S. 362 (2000).

20. *Id.* at 379-90.

21. 489 U.S. 288 (1989).

application of federal law is "unreasonable," is new and potentially more significant.[22]

There were three contending views of what Congress meant by "unreasonable application." Justice Stevens, in dissent, argued that the term was designed to require that a habeas court give serious attention to the state court decision but was not designed to create a situation where a federal court would find a state court in violation of the Constitution yet refuse to order relief. Thus, Justice Stevens concluded that the term was not intended to mandate "substantive deference" to the state's adjudication.[23] The Fourth Circuit, in contrast, interpreted the limitation in a way that would have ended habeas corpus as an effective way of looking at constitutional violations. Its view of an unreasonable application of clearly established federal law is that if any reasonable federal judge could have found that the state court resolution was a proper application of federal law, the court's resolution could not be said to be unreasonable.[24] Since there is virtually no legal question on which one can't have more than one opinion, I think that circuit's view, if enacted, would have virtually eliminated Section 2254 for state prisoners.

Justice O'Connor, writing for the majority, took an intermediate position. She looked to the Court's jurisprudence with respect to ineffective assistance of counsel and *Brady*[25] violations,[26] and concluded that the appropriate standard should be whether the state court's application was "objectively unreasonable."[27] If so, federal courts have the power to and are obliged to overturn the state conviction.[28] Indeed, in *Terry Williams* the majority found objectively unreasonable a claim of ineffective assistance of counsel that many lower federal courts had previously found entirely unobjectionable: an attorney's failure in a death penalty case to produce and find findable evidence of mitigation.[29]

In my own view, Justice O'Connor's interpretation does not fundamentally change the legal landscape in non-death habeas corpus cases. Whatever the legal test, federal courts in the last ten years have not been granting habeas writs when they thought that state courts were engaging in "reasonable" but "incorrect" applications of federal constitutional principles. As a practical matter, non-egregious violations were tolerated in most federal courts, even before this new statute. To be sure, this new standard of review places a formal hurdle that did not previously exist in the path of habeas corpus litigants—it's not enough to show that the state court is wrong with respect to the constitutional adjudication, one must show that the opinion was "objectively unreasonable." As a practical matter, writs already were being granted only infrequently, and the degree of deference shown toward the state was already substantial. In sum, if you look at the substantive result in *Terry*

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22. *See* 28 U.S.C. § 2254(d)(1).
23. *Terry Williams*, 529 U.S. at 374.
24. *Id.* at 377.
25. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding suppression by prosecution of evidence favorable to defendant a violation of Due Process).
26. *Terry Williams*, 529 U.S. at 399-416 (O'Connor, J., opinion of the Court with respect to Part II, concurring in part).
27. *Id.* at 390-391.
28. *See id.* at 391.
29. *See id.* at 399.

Williams, the direction given to the Fourth Circuit was, "It's not dead yet. It's not over until we say it's over, and it's not over yet."

In the companion case of *Williams v. Taylor*,[30] the Court made a similar judgment with respect to evidentiary hearings. The AEDPA standard with respect to evidentiary hearings prohibits grant of a hearing if the applicant has failed to develop the factual basis of a claim in state court proceedings.[31] The Fourth Circuit interpreted that as saying, "If you didn't develop it we don't really care *why* you failed to develop it."[32] This standard eliminated virtually any opportunity for a prisoner to be granted an evidentiary hearing because, by definition, if the state court has not held an evidentiary hearing, the petitioner has failed to develop the facts. Relying on its prior decision of *Keeney v. Tamayo-Reyes*,[33] the Supreme Court rejected this overly rigid interpretation. The Court concluded that a prisoner's "failure" to develop facts must be taken to imply some degree of fault on behalf of the prisoner.[34] In *Williams v. Taylor*, the reason the evidence hadn't been developed was because the state had failed to disclose it. Accordingly, the Supreme Court reversed the Fourth Circuit again. It left habeas corpus in approximately the same position it was in before congressional intervention.

In sum, while habeas corpus has been diminished significantly, it has not been eliminated. The restrictions imposed by the AEDPA may complete the work of the Supreme Court in limiting habeas corpus for state prisoners, but it does not set up an entirely new regime. Habeas corpus still exists, albeit in shrunken form, as a remedy for state prisoners whose convictions occurred as a result of constitutional violations.

STEVE KESSLER:[35] Which case was decided on Monday?

GOTTLIEB: It's a case called *Apprendi v. New Jersey*.[36] It is not in my materials, because it was just decided Monday and it's a case that may or may not be incredibly important, depending on whether some of the concurring opinions state what the law is going to become. It involved a hate crime enhancement to a New Jersey statute. The court held there was a violation of the defendant's jury trial right when the court imposed the enhancement at sentencing and increased the sentence beyond the legislatively-mandated maximum for the underlying offense.[37] If this case means only that a judge may not add to a statutory maximum at sentencing, then, it seems to me, it is going to be a difficult case in some federal drug sentences and it's going to involve a lot of litigation.[38] But its effects will be manageable. Justice Thomas, however, thought the case stood for a broader rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment...

30. 529 U.S. 420 (2000).
31. 28 U.S.C. § 2254(e)(2) (DATE).
32. *See Williams*, 529 U.S. at 428.
33. 504 U.S. 1 (1992).
34. *See Williams*, 529 U.S. at 433.
35. Attorney at Law, Lawrence, Kansas.
36. 530 U.S. 466 (2000).
37. *See id.* at 490.
38. *See id.* at 470.

the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petty larceny."[39]

According to Justice O'Connor, if Justice Thomas's position, in fact, becomes accepted, any fact that has an effect in real terms of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proven beyond a reasonable doubt.[40] She states, "Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines."[41] And, "As I have explained, the Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not."[42] Justice O'Connor concludes, "[T]he Court's decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today."[43]

There are almost half a million cases that have been decided under the Federal Sentencing Guidelines.[44] Many of them, including quite a number of former clients of mine in Leavenworth,[45] will be very interested very soon in the results of this decision. One of the remarkable things about the decision in this case is that the Justices who made up the majority didn't make much of an effort in footnotes to discourage the filing of litigation based on the broader reading of the case. So it's potentially an extremely important case in terms of where the law is going to go.

PROFESSOR COYNE: My name is Randall Coyne and I'm a professor of law at the University of Oklahoma Law School. What I'd like to do in the brief time that I have with you this afternoon is to first take you through the highlights of the handout I distributed in order to give you a sense of what death row looks like here in the Tenth Circuit.

All six states[46] within the Tenth Judicial Circuit have the death penalty as a sanction. Some we see imposing it more vigorously than others. There's been, of course, a dramatic increase in the number of prisoners found on death row throughout the country. Since executions resumed with Gary Gilmore's execution in Utah in 1977, there's been a rapid increase in the number of inmates on death row. Around the time of Gilmore's execution, there were some 500 or so inmates on death row. We're now topping 3500. The *ABA Journal* a month or so ago had this cover story you're probably familiar with.

It shows a picture of the electric chair and asks, "Death Knell for Death Row?"[47] Perhaps a more appropriate headline would have been, "Is Habeas Corpus Dying?" It seems to me the death penalty remains very vigorous. Having said that, it's important to note that three of the four most recent decisions of the Supreme Court

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39. *Id.* at 501 (Thomas, J., concurring).
40. Id. at 525.
41. *Id.* at 544.
42. *Id.* at 550-551.
43. *Id.* at 551.
44. *See id.*
45. United States Federal Penitentiary, Leavenworth, Kansas.
46. Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
47. Mark Hansen, *Death Knell for Death Row?*, 86 A.B.A. J. 40 (June 2000).

on habeas have come out in favor of the petitioner.[48] So there is some good news for defense attorneys in those opinions as well as for prosecutors.

Last year we had a total of ninety-eight executions throughout the country. This year, as of June twenty-third, we're already at fifty. We're in a position to pass what was an all-time historic high since the resumption of executions in 1977. Of course, Texas leads all states in the number of folks on death row and in the number of people they execute. Texas, as of June twenty-third of this year, executed 222 people. Not too far down the list though, is the state of Oklahoma, the state from which I hail, which as of that date put to death 28 people. In fact, in one four-week period in Oklahoma, we had an execution every week. Wyoming has put to death one inmate since the resumption of executions. Utah has punished by death and executed six people.

Pending executions are largely in the state of Texas. Of those that are expected to be executed in the next three or four months, I'd say ninety percent are from Texas, but there are a couple of things worth noting. One, of course, is that there is an Oklahoma execution set for July and many more to soon follow if what the experts tell me is true, and I imagine it is. But also, New Mexico may get back into the business of executing people. There is a person here in New Mexico named Terry Clark who has at least a "soft" date, meaning it's not absolutely certain he will be executed on July third.[49]

Also, of more national significance, the federal death chamber, which was built a few years ago in Terre Haute, Indiana, is expected to put to death the first federal prisoner this summer on August fifth. Juan Raul Garza is set to be put to death by the federal government.[50] That would be the first federal execution in over thirty years, I believe. The federal death row is very, very small compared to some, but there are a number of people interested in the federal death penalty as well.

Colorado currently has six inmates on death row, at least as of April first. The statistics are a bit old. All six are men, two blacks, two whites, and two persons described as "other." Kansas, which in the past few years reinstated the death penalty, has four white men on death row. Neither of those jurisdictions has women on death row. In New Mexico, five males are on death row; four of those are white. Oklahoma looks to me to be the only state within the Tenth Circuit that has any women on death row. And there's a very real possibility, if not a strong probability, that later this year Oklahoma will become the first state in the Tenth Circuit to put to death a woman since the resumption of executions in 1977.[51] Other states have

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48. *See* Michael Williams v. Taylor, 529 U.S. 420 (2000) (holding that petitioner preserved his claims of juror bias and prosecutorial misconduct through diligent effort to develop facts supporting his claim); Terry Williams v. Taylor, 529 U.S. 362 (2000) (holding that petitioner's constitutional right to effective assistance of counsel was violated); Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that defendant received ineffective assistance of counsel).

49. Terry Clark was sentenced to die after he was convicted of kidnapping and killing a young girl in 1986. He was scheduled to die December 1, 2000, but received a third delay. *See Child-Killer's Execution Postponed Until Next Year*, ALBUQUERQUE J., August 30, 2000, at A1.

50. President Clinton delayed Garza'a execution until June 2001 because of concerns about possible racial disparities in the application of capital punishment. *See* Neil A. Lewis and David Johnson, *By the Book: Justice, Justice Shalt Thou Pursue*, N.Y. TIMES, Jan. 14, 2001, § 4, at 1.

51. Wanda Jean Allen was executed in Oklahoma on January 11, 2001.

done it, Florida, I believe, Arkansas, and Texas. Oklahoma will join those ranks by executing a female who resides on our death row.

We have—again these statistics are very old—three or more women on death row and probably upwards of 150 folks on death row in Oklahoma. Utah has a death row of eleven persons, two blacks, six whites, two Hispanics, one identified as "other," and all are male. In Wyoming, there are two white males on death row.

There's a great passion for the death penalty in Texas and it seems to have spread to Oklahoma in a way that's of great concern to folks who work in this area, both in prosecution and on the defense side. I also wanted to draw your attention to, in just a moment, a study you've perhaps heard about. It's been widely publicized. It was a study of capital cases conducted by a group of Columbia University law researchers. It's called the *Liebman Study*[52] and it's available on the Internet. Essentially, it's a study examining twenty-three years of cases on appeal for rates of error. The findings of the *Liebman Study* seemed to suggest the importance of careful court review and dedicated lawyering, particularly in capital cases. And not just the importance of careful review, but the results from the kind of attention we spend on capital cases, or should be spending.

There was an overall rate of prejudicial error noted in the study of the American capital system of sixty-eight percent.[53] In other words, serious reversible error was found in nearly seven out of ten capital cases of the thousands of cases that the *Liebman* researchers undertook to review. How those parsed out as between the state and federal courts is interesting to note. State courts threw out about forty-one percent of death sentences.[54] Of the smaller group of cases that sailed through state review without any error being detected, federal courts later found serious error sufficient to undermine the reliability of those cases in forty percent of those sentences.[55] So it's not a system that, at least from an objective standpoint of statistical analysis, inspires a lot of confidence in the results, at least concerning the results of that original jury determination on whether a given defendant should be put to death or whether his life should be spared.

What were the most common errors identified by the *Liebman Study*? First, I suppose, was attorney incompetence, in large part defense attorneys who should have found evidence, who should have discovered information, and who should have presented it to the finder of fact, but failed to do so.[56] The second most important reason for the number of errors was prosecutorial misconduct,[57] prosecutors who found that type of information, who located evidence that should have been turned over to the defense and should have been presented to the jury, but was not. It is a system run by human beings and error obviously is going to be inevitable.

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52. James Liebman, Jeffrey Fagan, and Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*. June 12, 2000. Available at http://justice.policy.net/jpreport/index.html.

53. *Id.* at 5.

54. *Id.* at 4.

55. *Id.*

56. *Id.* at 5.

57. *Id.*

It's worth your time to get on the website. I guess I feel comforted by being part of the habeas panel today because that's perhaps the one environment you can be in and actually talk about statistics in such a way that it doesn't bore people, compared to some of the doctrines we're going to talk about and that Professor Gottlieb has talked about. They don't sound so bland after all.

There are report cards given based upon these error rates. There is one for the Tenth Circuit, and each state is given its own report card in respect to reversal rates and rates of error. I won't take up your time or opportunity to question by going over those. But they are also available on that website.

Professor Gottlieb mentioned just how difficult this area of law is from a prosecutor's standpoint, and from that of the Attorney General's office, judges, and magistrates, and certainly from defense counsel's standpoint. There was an interesting quote of Justice Breyer talking about the complexity of Supreme Court habeas jurisprudence. He said that area of Supreme Court law has "a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure."[58] He also said that habeas corpus has an attractive power, only for those who like difficult puzzles.[59]

Well, I sit before you as someone who hates difficult puzzles. I'm not very good at difficult puzzles. What makes the habeas puzzle so difficult is, of course, the series of procedural landmines, or hurdles, or barriers to actually having the court turn its attention to the merits of a particular claim. Procedural default has been mentioned by Professor Gottlieb. Cause and prejudice, abuse of the writ, successive petitions, adequate and independent state court grounds—each of these seem to me to be an opportunity to avoid looking at what really happened at trial, what really happened in that court room several years ago.

The structure of the new law, the Anti-Terrorism and Effective Death Penalty Act, essentially consists of two components. One was Chapter 153,[60] which applies to the non-capital habeas cases. Those are the rules that are also applying to, I assume, all capital cases right now because the second chapter, Chapter 154,[61] which creates special rules for death penalty cases, as far as I know, has not yet taken effect in any particular area. Essentially, Chapter 154 would create even shorter time limitations for persons under sentence of death. Where Chapter 153 provides a one-year statute of limitations, Chapter 154 would chop that year down to a six-month or a 180-day period of time.[62] It would also impose limits on the courts' time frames to make their decisions. District courts would have 180 days within which to rule on a habeas petition.[63] Appellate courts would have to render their decision within 120 days, and so on.[64]

In order to take advantage of that faster track of habeas cases—and again it would only apply in capital cases—the state would have to meet certain requirements for

58. Edwards v. Carpenter, 529 U.S. 446, 454 (2000) (Breyer, J., concurring).
59. *Id.* at 458.
60. 28 U.S.C. § 2241-2255 (1995).
61. 28 U.S.C. § 2261-2266 (Supp. II 1996).
62. 28 U.S.C. § 2263(a).
63. 28 U.S.C. § 2266(b).
64. *Id.*

the appointment of competent counsel with adequate resources in state post-conviction proceedings. Now the statute takes great pains to assure all of us that Congress has no intention of creating any right to effective assistance of counsel with respect to either the state court proceedings or the federal habeas proceedings. But it will be interesting to see how various jurisdictions litigate that issue about whether they have in place an adequate mechanism for the protection of death row inmates in state post-conviction proceedings so that we can trigger the provisions of Chapter 154 and put these death row inmates on an even faster track than the general provisions provided in Chapter 153.

So what that means as a practical matter is that Chapter 153, the provisions that Professor Gottlieb was talking about, really is the law that's in place even in capital habeas cases. Until states affirmatively opt-into Chapter 154 and the quicker provisions, we're going to be left with the body of law as it exists with respect to the general non-capital habeas cases. It's important and worth noting that before 1996, when the Anti-Terrorism and Effective Death Penalty Act was passed, there was no statute of limitations on habeas actions and there have been cases in which habeas relief was granted twenty to twenty-five years after the conviction was in place.

Now, of course, the limitations period is one year and in capital cases may someday be whittled down to six months. On the back of the handout I provided you, there is a list of persons found to be innocent after having been sentenced to death throughout the country. You'll see the names of a number of folks who were convicted within the Tenth Circuit. There are several in Oklahoma that I have had the occasion to meet since their release from death row.

There was a case out of the Ninth Circuit where the district court initially dismissed the petitioner's claim because it wasn't ripe: Arizona hadn't set his execution date.[65] Well, Arizona got around to setting an execution date and the argument then became, well, this is the second or successive petition. You had your first bite of the apple and now you're coming back again. And happily, for those of us on the defense side more often than the prosecution side, the Supreme Court held seven to two that they would not treat this case as a successive petition.[66]

That 1998 decision, along with the *Slack*[67] case that Professor Gottlieb mentioned, and the language in various opinions, particularly those of Justice Kennedy and Justice O'Connor in recent Supreme Court decisions, give me hope that there at least remains one fair opportunity, one bite at the apple. The apple not being some arcane procedural rule but being the merits of a constitutional claim. Professor Gottlieb and I were discussing this at lunch, it's almost as if for years and years the Supreme Court was winnowing away at habeas corpus, and winnowing away and cutting back and cutting back and then Congress jumped in with its cleaver and hammer and the Supreme Court said, "Hey, that's our job. Don't do it." So the results of the interpretation of that statute, the Anti-Terrorism and Effective Death Penalty Act, are remarkable.

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65. *See* Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).
66. *See id.* at 645.
67. Slack v. McDaniel, 529 U.S. 473 (2000).

Justice Souter has referred to it as being more like a sow's ear than a silk purse. And those of you who labor with it daily in your chambers or in your offices I suspect might agree.

SCOTT BRADEN:[68] I don't really have questions, Randy, as much as a comment on the requirement of competency to be executed. The question arises when the person becomes insane while he is in prison, which does happen, and you didn't have the opportunity to present it the first time. I think the question is still kind of percolating in the Supreme Court, and the Tenth Circuit has answered by saying that if you didn't have the foresight to know the person was going to be insane when you filed the first habeas petition, you can't come back in a second petition. But you know that still remains the big question. The operative fact that you didn't know was the person's insanity. Or it could be something other than insanity. It could be that the person suffered a stroke in prison. Some of the guys in prison are old. You could get beat up and be in a coma. The question of insanity means the opportunity to assist your lawyers and understand what's happening regardless of whether you are mentally insane or however you find it. I really think, based on what's happening, that *Wainwright v. Sykes*[69] really is not the law anymore.

COYNE: So the Tenth Circuit has overruled the Supreme Court. Is that what you're saying?

BRADEN: I'm sorry, that's my opinion. I shouldn't say that with the judges here. Me and my big mouth.

KESSLER: How do most states in the circuit provide counsel for post-conviction remedies in death penalty cases? Does Oklahoma have a special group that does that or a capital defenders office?

COYNE: Susan, do you want to answer that question? You handle those cases.

SUSAN OTTO:[70] Well, the defense system is currently funded to provide some services for post-conviction. They do not have a separate fund for conflict cases. So you're vying for dollars with the funding agency if you're a private practitioner on the panel and you're taking a conflict case. The funding for post-conviction is always variable.

COYNE: Does it come separately from the defense or is it part of the overall budget?

OTTO: It is part of the overall budget and it's not separate. So, you really are vying for these dollars. And the state post-conviction process has been amended in Oklahoma so that now you have to file your post-conviction application with the Oklahoma Court of Criminal Appeals within ninety days after you filed your direct appeal. And many times, your first post-conviction may be denied while direct appeal gets decided.

COYNE: Well, in Oklahoma it's a real twisted system because, as Susan said, the post-conviction petition can be denied before you're down for direct appeal. The habeas corpus clock sometimes begins when you're denied from your direct appeal certiorari petition as opposed to what you normally would think would be the post-

68. Assistant Public Defender, Oklahoma City, Oklahoma.
69. 433 U.S. 72 (1977).
70. Federal Public Defender, Oklahoma City, Oklahoma.

conviction certiorari petitions. You're already out of court on post-conviction and sometimes a year or more will pass before your direct appeal is completed.

OTTO: And then, of course, the other interesting correlating question to that is, who's keeping track of this? Because I can assure you that the men who are on death row are in no position to be doing this. And that leads to another question. So far, no one that I'm aware of has been thrown out of federal court based on this deadline. Not that I'm aware of.

COYNE: If I may, on the question of statute of limitations, the statute of limitations in the 1996 Act does apply to both state and federal prisoners, that yearlong statute of limitations. But the question has been raised: What if a federal prisoner was denied habeas corpus at the district court level, but doesn't apply for certiorari? Some federal courts of appeals are saying, in effect, that the year begins to run from the issuance of the mandate from the court of appeals and other circuits are chiming in saying that even if the inmate doesn't file for certiorari, the statute doesn't begin to run until the time for filing for certiorari has run. And there is currently a split in the circuits—I believe five circuits in favor of the former view and two in favor of the latter view. The state inmates have their statute of limitations, their one-year period tolled, as long as they properly filed application for state post-conviction or other collateral relief. This raises the question of what "properly filed" means and the circuits are split on that. Is it a question of state law? Four circuits say yes. Is it a question of federal law? Two circuits say it's a question of federal law.

JUDGE SVEN HOLMES:[71] Randy, in your materials it points out that only eight of the cases of the eighty-seven that have been freed from death row were DNA cases?

COYNE: That's right. And in Oklahoma our governor recently signed a bill that gives hope to folks that they will be able to use DNA increasingly as a tool to demonstrate the exoneration of capital inmates. There was a fellow on death row in Oklahoma for a number of years, Robert Miller, who asserted his innocence, always and forever. There was no funding available in Oklahoma to have the DNA testing done. This was the rape and murder of an elderly woman. The lawyer was casting about, trying desperately to find funds. Some television show, *20-20*, came forward and said here's the deal: we'll do the DNA testing and we'll reveal the results on nationwide television, sort of in the nature of Geraldo Rivera discovering Al Capone's long-lost safe. I don't know, good for ratings, maybe good for the client, maybe bad. Robert Miller said, "Yeah, yeah. Let's go for it." The attorney was less sanguine and didn't get the DNA testing done then. Ultimately it was done. Robert was released after a period of seven to nine years on our death row. So DNA promises to be of great value to those states that are going to take a look at innocence seriously.

JUDGE ROBERT HENRY:[72] What strikes me is that it is much less of a contributor to the findings of innocence than people generally believe. In fact, of the three death row habeas cases that I've done, one of which I granted relief, two I did

71. United States District Judge, Tenth Circuit, Tulsa, Oklahoma.
72. United States Circuit Judge, Tenth Circuit, Oklahoma City, Oklahoma.

not, actual innocence was never an issue. They had DNA for years, but they never even raised the notion of actual innocence and these cases cause me to believe that actual innocence, which is certainly compelling as a reason to pause on any capital case, is not the real reason why so many people are being freed, it is less than one percent.

COYNE: And, as you know, actual innocence doesn't get you to federal court in and of itself. So if you have it, it's only a justification for whatever procedural bypasses may have occurred. So it's something that has to be litigated at the state level.

The thing about actual innocence in the habeas context is, it's not a federal client, but what *Herrera v. Collins*[73] basically says, and what Justice O'Connor talks about is, what is the client's underlying constitutional violation? But I can guarantee you as a habeas corpus practitioner, if you've got an innocent person who is on death row, there damned sure is a constitutional violation in there somewhere.

There is a debate I think, and I think Justice O'Connor pointed it out, that they may think that executing an innocent person is a violation of the Eighth Amendment, but the Supreme Court has not said that. There is no law that says that right now. So if you have no other claim, other than that the client is purely innocent, I'm not sure you're going to get into federal court.

GOTTLIEB: Well, at least *Williamson v. Ward*[74] is an example. It was a case where there were thirty-seven legal theories advanced. I'm not sure that thirty-six of them weren't infirm, but everyone knew that if Judge Seay thought the guy didn't do it, that was good enough for us to back up and take another look.

OTTO: I think one of the reasons that DNA testing may not be done in the principle round is that, with the exception of very, very few cases, it's extremely difficult to get access to the samples. The Oklahoma statute that's been passed fell short of the Illinois model. The Illinois model gives you a right and access to the samples, and then to get back into the court on those claims, and the compromise was that you would have to have access to money to fund this. But it's still up to the district attorney's office to decide whether they're going to give the samples. In Oklahoma City, for example, we had a continuing struggle to find evidence. A bunch of evidence would simply disappear, because it had not been held in custody properly.

I know that one of the cases that we have now, but for the fact that I could make a demonstration that we had money to do this testing, I would not have received the sample. It wasn't going to cost the state of Oklahoma any money. They were worried about spending money on this, and that was why the Oklahoma court of appeals said, "Go ahead and give them the samples and let them test them."

I can't imagine a circumstance where a federal judge who is presented with actual evidence would send it on to the court of appeals, when there's an opportunity right here and they have to address it. But that is a rare circumstance. Just because your guy may be guilty perhaps, doesn't necessarily mean the Constitution hasn't been violated. The whole point of habeas is to find out if the Constitution was violated.

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73. 506 U.S. 390, 425 (1993) (O'Connor, J., concurring), *reh'g denied*, 507 U.S. 1001 (1993).
74. Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997).

It's not a question of somebody's innocence, if you boil it down, it's really hard to get past, particularly for the general public.

QUESTIONS AND ANSWERS SESSION ONE

AUDIENCE MEMBER: One more question on *Apprendi*. Do you think the Supreme Court will grant certiorari separately on the drug statute or do you think they're going to let it percolate for a while?

GOTTLIEB: Since I could have never predicted this case, it's crazy for me to try to predict that one. There are so many drug defendants. In this case, unlike the Federal Sentencing Guidelines, where you're reaching with the concurring opinion and the dissenting opinion to get to the invalidation of the Federal Sentencing Guidelines, you don't have to go far at all for the drug statutes. So I think it would be responsible for them to take a case fairly quickly.

AUDIENCE MEMBER: *Apprendi* has got to be held retroactive in order for the successive petitions to be successful. If *Apprendi* is held retroactive, then successive petitions fit within the rule under the AEDPA, don't they?

GOTTLIEB: Yes. You have a finding here of a new constitutional principle or at least an expansion of a constitutional principle that ought to go to the accuracy and, it seems to me, the right of a jury trial goes to the accuracy of the fact finding; at least there's an argument there.

QUESTIONS AND ANSWERS SESSION TWO

HENRY: How many states have enacted the Chapter 154?

COYNE: No state has yet opted into Chapter 154. Tennessee is seeking to get that status. In order to opt-into 154, in order to get the benefits of the six-month statute of limitations, you have to demonstrate that you are providing, as I said, competent counsel and adequate resources to your capital convicts during their state post-conviction appeals. Thus far, everyone's under Chapter 153 because Chapter 154 hasn't been litigated to the point where anyone would say, "Okay, you're not going to get the benefit of the short extension."

HENRY: There was a question about criteria, which is a good question. Is there any guidance on what those terms mean?

COYNE: None that I see in the face of the statute itself. Now, if we looked at the legislative history, maybe we'd find a little bit more about what they mean. My sense is that there is so much benefit in the revisions to Chapter 153 that the states don't really need to cut back from one year to six months, so that may be some of their reluctance. Why litigate these issues and chop the time in half? The problem with compressing the time is, if you look at the latter part of the handout I distributed, you'll notice the folks that have been released from death row after demonstrations of innocence since 1973. I think seven folks in Oklahoma have been released as innocent. They are not people whose constitutional rights had been violated, but who have been found not to have committed the factual crime. The evidence in support of those claims tends to percolate up after years and years. Maybe a new district attorney comes in and decides to do the right thing. Maybe an investigator leaves and the file ends up in the hands of a lawyer. Maybe for the first time a competent lawyer is asking and looking at the factual predicate for the case.

It seems to me, we're talking about executing people who are innocent, but even now, the mindset of some of the Justices of the Supreme Court is at a point where there's a growing sentiment, that yes, that's going to happen. And the debate has maybe shifted: Is that an acceptable cost? If so, what percent are we going to tolerate?

HENRY: It seems to me that Oklahoma ought to do the right thing and provide good counsel anyway; but as a judge, I hate it when Congress helps us by giving us deadlines, particularly on death cases, to decide something in 120 days. Every case is hard, and they're hard on chambers; they're hard on judges. I don't know a judge who likes them.

And we're supposed to be conservative, but I don't know any judge who likes them. I know a lot of judges would like to get rid of them. I broached this point to a couple of legislators in Oklahoma and got no action. I wondered how you evaluate it?

COYNE: From my standpoint, the death penalty is siphoning off huge resources. I'm glad you mentioned that. You have to look at the toll that the death penalty takes, not just on defense lawyers, and not just on the families of the victims who have to go through the ordeal, but the prison staff. They have to prepare the inmate for execution. They've gone to work every day for seven, eight, nine years and seen this fellow and maybe they have a rapport with him and the next thing they know, they're asking him what he wants to eat for his last meal. They're perhaps part of the team that's being required to prepare him for execution. It's really incalculable, the kind of harm it does. But death penalty defense lawyers lose lots of cases and they're a pretty callous, hard-drinking, pretty depressed lot. Hard to stay in this—I'm speaking from personal experience, not for anyone here—it has its toll. In terms of Oklahoma, a study done by the University of Oklahoma showed the argument with respect to deterrence. We were going to resume executing in 1990, and we did with Charles Coleman. A couple of professors at the University of Oklahoma wanted to look at whether or not this highly publicized execution would deter, whether people would learn from it. Instead, what they found was a zero effect in most categories, and the only significant effect was an increase in stranger-on-stranger homicides, which they described as a "brutalization" effect.

Even the Supreme Court, it seems to me, is dropping the deterrence argument. Clearly, there is special deterrence. Those people that are executed don't stand up and re-offend. There's only one case reported where anyone was ever put to death and actually went on to re-offend, and that was a fellow named Jesus from a Middle Eastern jurisdiction; and that doesn't apply in the Tenth Circuit, as far as I know, or in Oklahoma. Changing minds, boy, I don't know. There is a lot of attention paid to innocence; the presidential election focuses a lot of energy on it. It's a tough, tough issue.

ROB RAMANA:[75] I wondered if you had any more thoughts on the term, "objectively unreasonable," or where the courts might go with that? My thought is that it sounds the most like the qualified immunity standard in civil rights cases.[76]

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75. Law Clerk to Judge Robert Henry, Oklahoma City, Oklahoma.

76. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing

COYNE: My view is that there is, and I may be proved wrong, less there than meets the eye, because I just think that even though the standard has been de novo review, if you plug in de novo review with the *Teague* Doctrine,[77] you just do not have a lot of cases where courts have been granting habeas corpus writs where they don't believe that the state is really seriously misguided. I suppose in some months we'll find a circuit court decision that is going to say, "This violated the Constitution, but I don't think it was objectively unreasonable." But I would be willing to lay reasonable odds that that is going to be an incredibly small category when stacked up against, "This was okay," or "This violated the Constitution and it was unreasonable."

I have looked at how few writs have been granted and I have done the research and I am amazed at what I found. In non-death cases, there are courts in this country that are just not granting writs and there's nowhere for these individuals to go, as far as I'm concerned.

I know I'm not giving you any legal gloss to put on this, but I think that most courts in the *Strickland*[78] case are going to say, "I not only think that that is objectively reasonable, but, most judges would find that objectively reasonable, or I wouldn't have ruled that way in the first place."[79] Particularly in *Strickland*, you're starting with a presumption in favor of attorney competence. You're starting with the presumption against hindsight. In order to find them unreasonable to begin with in *Strickland*, you have got this fairly significant hurdle to overcome. Well, I think if you get that far, you're very likely to have met the standard in the statute.

AUDIENCE MEMBER: I had a question for Professor Coyne about the *Liebman Study*. I'm kind of playing devil's advocate because I'm a public defender, so I don't espouse this necessarily, but it seems to me the argument can be made that those were liberal courts that were reaching out to find error to prevent someone from being put to death and, therefore, the *Leibman Study* doesn't really mean that much.

COYNE: Right. Now, that old saw, "Lies, Damned Lies and Statistics," I suppose comes to mind. I know Jim Liebman, and I know he took extraordinary care anticipating this type of criticism. I haven't gone through the mountain of information that he did to make a defense for him, but in terms of its reliability, let the critics have at it and see where the chips fall. You're right, it is in so many other areas vulnerable to that kind of criticism and that kind of attack.

And there has been a sense that over time, and certainly since 1973 to 1995, the courts have become more conservative. The Supreme Court has told them they must become more conservative in the granting of the writ and so on. So, I wouldn't be surprised if his research showed that the cases in which relief was granted were heavy-loaded in the 1970s and less in the 1980s and perhaps less still in the 1990s. I just don't know.

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discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

77. Teague v. Lane, 489 U.S. 288 (1989).

78. Strickland v. Washington, 466 U.S. 668 (1984).

79. The speaker is referring to the standard applied in cases in which the convicted defendant complains of the ineffectiveness of counsel. In *Strickland*, the Court held that a defendant claiming ineffective assistance of counsel must show the representation he received fell below an objective standard of reasonableness. *Id.* at 687-88.