PANEL DISCUSSION

DEAD MAN WALKING WITHOUT DUE PROCESS? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996

Editors' Note: This discussion took place at the August 1996 annual meeting of the American Bar Association and was organized and moderated by Ronald J. Tabak, Special Counsel with Skadden, Arps, Slate, Meagher & Flom, and Chair of the Death Penalty Committee of the A.B.A. Section of Individual Rights and Responsibilities. Mr. Tabak and the participants have updated their comments to reflect recent developments in the law, including the recent U.S. Supreme Court decision in Lindh v. Murphy, *1997 U.S. Lexis 3998 (June 23, 1997).*

RONALD J. TABAK: We decided to have this program—"Dead Man Walking Without Due Process?"—because of ongoing concern about due process violations in capital cases. There was already real concern about how fairly capital cases were handled. Then, this year, we suffered the double-barreled blow of the defunding of the resource centers[1] and the substantial revision of the federal habeas corpus statute.[2]

Speaking today are a variety of experts and a special guest: Lori Rozsa, a reporter for the Miami Herald who is going to tell you about the Spaziano case, in which a man who has been on death row in Florida for about two decades is now, thanks to her reporting, going to be given, it appears, a new trial because it appears highly likely that he is innocent.

Before we get to Lori and to Susan Cary, our expert on mitigation, we will start with three experts on the subject of habeas corpus. I will introduce all three of them now because they are going to be interweaving among themselves. The first expert is Professor Leon Friedman of Hofstra Law School. Leon was for many years a leading litigator for the American Civil Liberties Union on a wide variety of constitutional matters. He is now a professor at Hofstra Law School, specializing in subjects such as constitutional law and legal ethics. He has been asked to be part of a training program for federal judges about the new habeas corpus law this September. We are really delighted to have him here today.

1. Ann Woolner, *Capital Defenders, Critical Conditions,* Am. Lawyer (Dec. 1996), at 46-47.

2. Anti-Terrorism and Effective Death Penalty Act of 1996, Title I, Pub. L. 104-132, 110 Stat. 1214 (1996) (sometimes referred to as the "Effective Death Penalty Act") (codified at scattered sections of 28 U.S.C.).

Our second speaker, Mark Olive, used to teach at the University of North Carolina College of Law. In 1985, he left there to become the director of the Volunteer Lawyers Resource Center here in Florida. Since that time, he has also been the litigation director of the State of Florida Capital Collateral Representative Office and the Director of the Georgia and Virginia Resource Centers. He is now in private practice in Tallahassee, Florida, and is counsel with the Habeas Assistance and Training Counsel which is an extremely modest effort by the Administrative Office of the United States Courts to deal with the defunding of the resource centers and to give some guidance to people handling these cases. He has been counsel in several cases heard before the United States Supreme Court[3] including most recently the *Felker*[4] case. He has worked on innumerable cases throughout the various circuits and in various states, particularly in the death belt of the South.

I first really got to know Mark when I was asked by him to give guidance as a consultant on the Aubrey Dennis Adams case.[5] I did give guidance and then I did the reply brief and oral argument, with a lot of help from Mark, in the Eleventh Circuit.

The Adams case is relevant to the jury override in Florida, which was also an issue in Spaziano's case. In *Spaziano*, the jury recommended a life verdict which the judge overrode so as to impose death. There is a legal standard in Florida that allows the judge to do that but only if virtually no reasonable jury could have imposed the life sentence.[6] One wonders how you can live with a conviction rendered by those same jurors if they were not reasonable in their life versus death determination. In any event, in *Spaziano* the United States Supreme Court held that the override was constitutional.[7]

In the Adams case, which Mark helped us with, we won in the Eleventh Circuit because the judge had on numerous occasions told the jurors that they would have nothing to do with the sentencing outcome. They would make a recommendation but it would not make any great difference;

3. *E.g.*, Darden v. Wainwright, 477 U.S. 168 (1986); Herrera v. Collins, 506 U.S. 390 (1993); Gray v. Netherland, 116 S.Ct. 2074 (1996); Lambrix v. Singletary, 117 S.Ct. 380 (1996).

4. Felker v. Turpin, 116 S.Ct. 2333 (1996).

5. Adams v. Wainwright, 804 F.2d 1526, 1528 (11th Cir. 1986), *modified and reh'g denied sub nom.* Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (per curiam), *rev'd sub nom.* Dugger v. Adams, 489 U.S. 401 (1989).

6. Tedder v. Florida, 322 So.2d 908, 910 (Fla. 1975) ("In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."); Ferry v. Florida, 507 So.2d 1373, 1376 (Fla. 1987) (interpreting *Tedder* as holding that "[w]hen there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.").

7. Spaziano v. Florida, 468 U.S. 447, 463-65 (1984) (holding that the trial court's imposition of the death sentence after the jury recommended life imprisonment did not violate the U.S. Constitution).

it would not be on their conscience. Yet, under Florida law the rule was that the judge, although he could override the jury, had to give their recommendation great weight because the jurors are the conscience of the community.[8] So, the judge was telling the "conscience of the community" that the sentence would not be on their consciences. But when the United States Supreme Court granted certiorari, it decided that because the trial lawyer for Mr. Adams had not objected to the judge's many misstatements regarding the jury's role, the issue was procedurally barred.[9]

The four dissenters said that this was a fundamental miscarriage of justice because if the jury had not misunderstood what they were doing the sentencing outcome might have been different.[10] But the majority said that the Court should not hold that it is a fundamental miscarriage of justice each time the United States Constitution is seriously violated through a non-harmless error that could have affected the sentencing outcome in a capital case.[11] So, they allowed Mr. Adams to be executed. While that outcome was not a happy one for any of us involved, the case enabled me to appreciate the talent and legal skill and intensity of Mark Olive. I am glad he is on our program today.

The third of our speakers is Tom Dunn. He has now come back to my state of New York, which has just reinstated the death penalty, as the first Deputy Capital Defender with the New York Capital Defender Office. This office is going to handle some cases themselves and in other cases will provide guidance to trial lawyers to try to prevent district attorneys from seeking or securing the death penalty. Prior to this appointment, Tom spent a half dozen years representing death row inmates in the deep South, principally here in Florida and also in Georgia. He was with the Office of the Capital Collateral Representative and the Volunteer Lawyers Resource Center here and also was Executive Director of the Georgia Appellate Practice and Educational Resource Center, which is where I first got to know him because I have a Georgia case. He has frequently lectured on the death penalty, and has been an expert witness. He recently testified as an expert witness on the due diligence of counsel in the *Spaziano* case. He is also a major in the United States Army Reserve and is a Special Projects Officer with the United States Army Trial Defense Service, the Army's Public Defender Office. He served on active duty, including in Desert Storm, and got a bronze star. Each year, he is involved semi-annually with the Trial Defense Service Capital Litigation Seminar for Military Defense Counsel.

Those are the three opening speakers. We will start with Professor Friedman, who will talk about why anybody should care about habeas

8. *Adams*, 804 F.2d at 1528.
9. Dugger v. Adams, 489 U.S. 401 (1989).
10. *Id.* at 422-25 (Blackmun, J., dissenting).
11. 489 U.S. at 410-12 n.6.

corpus and about what had already been happening to habeas corpus due to Supreme Court decisions before the recent statutory revision was enacted. Mark Olive will then give an overview of what the new statute does. Mark's presentation will be followed by Mark, Leon, and Tom discussing, in specific terms, various aspects of the new statute. Finally, Tom will talk about the practical ramifications for practitioners representing death row inmates, focusing in particular on the statute's time deadlines and the removal of funding for resource centers.

PROFESSOR LEON FRIEDMAN: My opening discussion addresses the question, "Why is habeas corpus a good thing?" I think a little history is helpful here. The first habeas corpus statute allowing federal courts to pass upon state court convictions was passed in 1867.[12] It was a Reconstruction Act measure and it was the first federal statute that gave federal courts any kind of general federal question jurisdiction on constitutional matters. Federal courts did not have general federal question jurisdiction until 1875,[13] and yet they were given by Congress the power to pass on constitutional matters affecting criminal cases 8 years earlier, in 1867.

For a long time the federal habeas corpus statute relating to state court convictions was very rarely invoked because a doctrine developed that a state court conviction was valid unless the state court acted in such an outrageous way that it in effect lacked jurisdiction.[14] So during the 1920's and 1930's, indeed in the 1940's, there was very limited scope for federal habeas corpus review of state court convictions. Then, in 1953, the Supreme Court decided *Brown v. Allen*.[15] *Brown v. Allen* held that federal courts can review state court convictions for any and all constitutional errors. It did not have to be an outrageous error that eliminated the state court's jurisdiction; any error was enough. The reason for that was that the federal courts had developed special expertise in the constitutional field. By 1953, the lower federal courts were in the vanguard and were the most important forum for determining federal constitutional matters. In addition, because of lifetime tenure in the federal courts, federal judges were in a particularly good position to review constitutional errors. The Supreme Court was very conscious of the fact that in the 1950's, as is still true in the 1990's, many state court judges were elected, did not have lifetime tenure, were subject to political pressure and therefore were not as concerned with constitutional adjudication as a federal judge who has lifetime tenure and never has to worry about the popularity of any of his or her decisions. Finally, and most importantly, the Supreme Court always had the ability to review final state

12. Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (now authorized by 28 U.S.C. § 2254(a) (1994), as amended by the Effective Death Penalty Act of 1996).

13. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (now authorized by 28 U.S.C. § 1331 (1994)).

14. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); Mooney v. Holphan, 294 U.S. 103 (1935); Moore v. Dempsey, 261 U.S. 86 (1923).

15. 344 U.S. 443 (1953).

court convictions. But in the 1950's, the Supreme Court could not take on direct review all of the state court determinations that had been made. Its docket simply would not allow it to take every criminal case from the state court system. So what *Brown v. Allen* did was subdelegate to the lower federal courts, acting through the writ of habeas corpus, the function of federal court constitutional review of state court convictions.

From 1953 onward, lower federal courts, acting after petitions for writs of habeas corpus were submitted to them, acted as substitutes for the United States Supreme Court in reviewing claims of constitutional error made in connection with state criminal convictions.

Over the years, the number of writs increased and a backlash developed. It is not that *Brown v. Allen* was wrongly decided and was a mistake. The federal courts were doing precisely the job that the Supreme Court had required them to do. But they were doing it too well. In the 1970's, the Supreme Court said this was getting out of hand—there were too many federal habeas corpus petitions being filed. The early Supreme Court decisions from this period talk repeatedly about the number of habeas petitions being filed by state prisoners. By the way, the percentage has gone down because the total number of state prisoners has gone up. But in absolute terms, the number of petitions did increase.

In a series of decisions starting in the early 1970's—I think *Stone v. Powell*[16] was the first—the Supreme Court said it wanted to put roadblocks in the way of federal habeas corpus relief. There were, over 20 years, about a half dozen roadblocks put in the way of federal courts reviewing habeas corpus petitions. I just mentioned the first. *Stone v. Powell* held that you cannot present a Fourth Amendment claim by habeas corpus. The reason, allegedly, was that Fourth Amendment claims have nothing to do with guilt or innocence and, therefore, federal habeas corpus is not a proper vehicle for a Fourth Amendment claim.

The Supreme Court decided in *Wainwright v. Sykes*[17] that if a petitioner defaulted in state court—that is to say, did not present his or her constitutional claim in accordance with state procedural rules and as a result forfeited his or her right to have the state court consider that claim—then he or she has forfeited that claim in federal court. This is known as procedural default. In a later case, *Teague v. Lane*,[18] the Supreme Court said that habeas corpus review is possible only with respect to law that was established before the state conviction became final. So, in effect, the situation is frozen as of the moment the state court conviction became final. And even if new law developed after the conviction that would render the conviction unconstitutional, the federal habeas corpus court must ignore the new law and must pretend as if that new law did not develop and must

16. 428 U.S. 465 (1976).
17. 433 U.S. 72 (1977).
18. 489 U.S. 288 (1989).

consider the situation only as of the date that the state court conviction became final.

Another case, *Keeney v. Tamayo-Reyes*,[19] governs situations in which a state prisoner may not have developed the factual record[20] and then, when the case went to federal court, wanted to present various new facts. *Tamayo-Reyes* held that such a state prisoner has in effect defaulted on his or her right to present the facts in state court unless he can show "cause" for the default and "prejudice."[21] The Court thereby incorporated the *Wainwright v. Sykes* criteria in the context of whether a federal factual hearing must be held.

The Supreme Court also held, in *Herrera*,[22] that innocence is not a basis for a habeas corpus petition or review. Thus, even if the prisoner comes forward with very substantial evidence of innocence, he or she can not get habeas corpus review if he or she can not show that constitutional error occurred at the trial.

Another important decision is *McCleskey*,[23] which dealt with successor petitions. The Supreme Court thought that too many prisoners would file a habeas corpus petition, actually litigate the petition to the end, and then think up some new reason for a new petition. So, a second or third or fourth successor petition would be filed. In *McCleskey*, the Court said that if you had the basis for filing a claim at an earlier time but did not include it in your first petition, then unless you can meet a very high standard, you are not permitted to file the claim in a successor petition.

In each of these cases, having given the lower federal courts the job of reviewing federal constitutional error in state criminal cases, the Supreme Court cut back on the lower courts' ability to do that job, largely because of the alleged volume of cases. At the same time, Congress became active. There was tremendous political pressure to reduce habeas corpus still further despite the fact that the Supreme Court was already doing so. So, Congress also got into the job. Over a 20-year period various proposals were made. This year, President Clinton signed a bill which did not even make it through Congress to Presidents Reagan and Bush. Mark will tell us the basic provisions of that new law.

MARK OLIVE: It is hard to cut back on something that does not really exist. The situation described by Professor Friedman—the situation prior to April 24, 1996 when President Clinton signed the Anti-Terrorism and

19. 504 U.S. 1 (1992).

20. For example, by failing to seek a state court evidentiary hearing.

21. 504 U.S. at 11. The court also adopted a narrow exception to the cause-and-prejudice requirement: "A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Id* at 12.

22. Herrera v. Collins, 506 U.S. 390 (1993).

23. McCleskey v. Zant, 499 U.S. 467 (1991).

Effective Death Penalty Act ("AEDPA" or "the Act")[24]—was not great for death-row inmates. What you have just heard described is a habeas corpus system which had as its apparent primary concern *avoiding* addressing constitutional violations. The description just given of the series of cases that the Supreme Court decided had, as its bottom line: "We do not care if your federal constitutional rights were violated; indeed, we will acknowledge and agree that your federal constitutional rights were violated. But it does not matter to this federal court that your rights were violated because you did not file the right piece of paper on the right date or in the right manner, or the time when your direct appeal became final was a time when, for some reason or other, the law which clearly shows your conviction or sentence is unconstitutional was not yet fully developed." I echo and reiterate these points in order to say, simply, that the system, from the viewpoint of not wanting to grant federal habeas corpus relief, was not broken before Congress acted. The "fix" that Congress came up with may or may not make things less hospitable for habeas petitioners in the future. When you go about fixing things that do not need fixing, you sometimes create quite a mess. I am not sure Congress bargained for what actually may come out of the AEDPA.

Let me give you an overview of what the fix is for the system which I think was not exactly broken. I am going to briefly highlight six provisions of AEDPA, which, if you believe the sound bites from the elected Congresspersons, are pretty dramatic. It has yet to be determined what the judiciary will do with these "dramatic" revisions.

First, and this may be the most drastic and dramatic part of the Act, there is now for the first time a statute of limitations on federal habeas corpus petitions. The timing of petitions used to be governed by Rule 9(a)[25] (most recently interpreted and applied by the Supreme Court last term in *Lonchar*[26]), which says you can wait forever in bringing your first federal constitutional challenge to a state court conviction or death sentence, and that that delay is not a problem so long as no prejudice has occurred with respect to the respondent warden or state. That has now

24. Pub. L. 104-132, 110 Stat. 1214 (1996).

25. Habeas Corpus Rule 9 provides: "(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."
RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS Rule 9(a).

26. Lonchar v. Thomas, 116 S.Ct. 1293 (1996).

changed under section 101 of the Act. This section creates a one year statute of limitations for the filing of federal habeas corpus petition.[27] That time is tolled if you have a state post-conviction action pending.[28]

Second, there is an opt-in provision in the new law. We call it opt-in although the phrase "opt-in" does not appear in the body of the Act. AEDPA's sections 101 through 106 (which amend Chapter 153 of the Judicial Code) apply to everyone who wants to file a habeas petition. Section 107 (which creates a new Chapter 154 to the Judicial Code) creates special provisions for capital cases.[29] It says that in capital cases, if a state provides a proper mechanism for appointing counsel and provides reasonable litigation expenses in state post-conviction proceedings, then the *quid pro quo* is that capital habeas petitioners will have six months from the time of direct review, rather than one year, to file a habeas corpus petition in federal court.[30] Also, the statute's opt-in provisions pull in special substantive provisions intended to curtail the manner in which federal judges can review and adjudicate claims.[31] I will be talking about those provisions in a little while. Professor Friedman will talk about the statute of limitations.[32]

Third, the Act includes a section on exhaustion which changes the circumstances under which a federal judge may deny a petition.[33] Professor Friedman will talk about that also.[34]

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27. AEDPA § 101 (modifying 28 U.S.C. § 2244). The new 28 U.S.C. § 2244(d)(1) provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of—
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28. *Id.* The new 28 U.S.C. § 2244(d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

29. AEDPA § 107 (creating 28 U.S.C. §§ 2261 to 2266).

30. 28 U.S.C. § 2261 details the requirements that the state must meet. 28 U.S.C. § 2263 creates the six-month statute of limitations.

31. *See* 28 U.S.C. § 2264(b) (referring to 28 U.S.C. § 2254(a), (d), & (e)).

32. *See infra* page 174.

33. AEDPA § 104 (codified at 28 U.S.C. § 2254). 28 U.S.C. § 2254(b)(2) provides, "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts on the state."

34. *See infra* page 175.

Fourth and fifth, federal courts have historically, in capital habeas and non-capital habeas settings, applied the federal constitution *de novo*. Federal courts have done that on the basis of the fullest possible factual record that can be developed. Two provisions of the new act purport to restrict both of those traditional Federal functions. First, evidentiary hearings and the right to an evidentiary hearing in federal court—the purpose of which is to develop a full factual record—may have been curtailed by the Act in some relatively significant ways. This is what the language of the statute suggests.[35] But these hearings may not have been curtailed significantly if you read the interpretations of the Act that have been rendered to date.[36] Tom Dunn will talk about evidentiary hearings.[37] As for the adjudication standard, it used to be *de novo* application of the federal constitution by federal judges—sort of what they were appointed to do. Now, the act purports not to authorize federal courts to conduct *de novo* review of *claims*, but instead to conduct review of *opinions* and *judgments* by state court judges.[38]

Finally, Rule 9(b) prevented the adjudication of successive federal habeas corpus petitions in the absence of certain specified circumstances.[39] You could file a successor petition in the district court, appeal it to the circuit court if you lost, and then file for certiorari. That has purportedly changed dramatically under the new section 2244(b).[40] But, again, it is my

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35. 28 U.S.C. § 2254(e) (as amended by AEDPA § 104) provides:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

36. *See* Hunter v. Vasquez, 1996 WL 612484 (N.D.Cal. Oct. 3, 1996); Douglas v. Calderon, No. CV-91-3055 RSWL (C.D.Cal. 1996).

37. *See infra* page 176.

38. AEDPA § 104 (as codified at 28 U.S.C. § 2254(d)).

39. Habeas Corpus Rule 9 provides: "(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."
RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS Rule 9(b).

40. 28 U.S.C. § 2244 (as amended by AEDPA § 106) provides:

belief that the system really has not changed that dramatically, even though the legislation itself purports to have created a dramatic change.

To date, there have been more applications of the new section 2244(b) than any of the other new habeas corpus provisions. This is because judges have had to decide, with executions looming, matters with respect to successors.[41] With respect to the other provisions, judges have resisted making decisions about what the statute means where they have not been forced to do so.

RONALD TABAK (ON JUNE 24, 1997): If you had a federal habeas corpus petition on file by April 24, 1996, do any of the provisions of the Act, substantive or procedural, apply to you? The Supreme Court answered that question, with regard to states which are not opt-in states (which, at this time, appears to be all states), in *Lindh v. Murphy*, 1997 U.S. Lexis 3998 (June 23, 1997). The answer is "No." Reversing the Seventh Circuit, the Supreme Court held as follows: "We hold that. . .the new provisions of chapter 153 generally apply only to cases filed after the Act became effective. . . ."[42] The Court further explained that the only sections of Chapter 153 which apply to cases pending as of April 24, 1996, and then only in capital cases in opt-in states, are the new 28 U.S.C. §§ 2254(d) and (e), which deal principally with "the adequacy of state factual determinations as bearing on a right to federal relief, and the presumption of correctness to be given such state determinations. 110 Stat. 1219."[43]

So, the substantive and the procedural provisions of the new statute, including the statute of limitations, do not apply at all in non-opt-in states in federal habeas corpus cases that were pending as of April 24, 1996. And, if there were any *opt-in* states, these provisions would not apply to non-capital cases.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed 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 factfinder would have found the applicant guilty of the underlying offense.

41. *See, e.g.*, Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997); Denton v. Norris, 104 F.3d 166 (8th Cir. 1997); *In re* Mills, 101 F.3d 1369 (11th Cir. 1996); Felker v. Turpin, 101 F.3d 657 (11th Cir.), *cert. dismissed*, 116 S.Ct. 2333 (1996).

42. *Lindh*, 1997 U.S. Lexis 3998, at *28.

43. *Id.* at 21-22.

MARK OLIVE: If you are in an opt-in state, however, you face a different situation. Under section 107 of the Act, if a state has provided a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings—it will be a nightmare to litigate what that means and if it has been satisfied—then the state is entitled in federal district court to special provisions for the processing of *capital* habeas cases.[44] Those special provisions include the statute of limitations being six months for the filing of a petition, rather than a year.[45] The rationale is that if you have had competent counsel in state post-conviction proceedings and reasonable litigation expenses, you do not need as much time to get ready for federal court as someone who did not have those benefits.

Moreover, in opt-in states, the habeas petition has to be decided by the federal district court judge within 180 days—another six month provision.[46] There is no right to amend your petition at all after an answer has been filed.[47] The real kicker of section 107 is that it pulls in the changes in the standards regarding whether you get an evidentiary hearing or not. It also changes the "deference" owed to state court decisions. Thus, if you are not in an opt-in state and you had a pending federal habeas corpus petition when the Act was signed into law, the majority of courts to date hold that none of the substantive provisions of the Act apply to you. But if you *are* in an opt-in state, the opt-in provisions carry with them the substantive provisions, and the opt-in provisions say that the substantive provisions *do* apply to cases pending at the time the Act came into effect.[48] So, if there ever is an opt-in state, there will be an argument that the substantive provisions apply to those cases which were pending on April 23, 1996. However, the Supreme Court recognized in *Lindh* that while the Act's section 107(c) makes "it clear as a general matter that chapter 154 [which deals with capital cases in opt-in states] applies to pending cases when its terms fit those cases at the particular procedural points they have reached," there nevertheless "may well be difficult issues" regarding retroactivity, "and it may be that application of" the Supreme Court's retroactivity analysis in *Landgraf v. USI Film Products*[49] "will be necessary to settle some of them."[50]

To date, no state has been found to provide the mechanism to satisfy the opt-in requirements. There is, however, a series of cases in which states have been found not to satisfy the opt-in requirements.[51] So, no state has

44. *See supra* notes 29-30 and accompanying text.

45. AEDPA § 107 (codified in 28 U.S.C. §§ 2261 to 2266). 28 U.S.C. § 2263 provides for the six month statute of limitations.

46. 28 U.S.C. § 2266(b)(1)(A).

47. 28 U.S.C. § 2266(b)(3)(B).

48. AEDPA § 107.

49. 511 U.S. 244 (1994).

50. *Lindh*, 1997 U.S. Lexis 3998, at *14.

51. Ashmus v. Calderon, 935 F.Supp. 1048 (N.D. Cal. 1996); Leavitt v. Arave, 927 F.Supp. 394 (D. Idaho 1996); Rahman v. Bell, 927 F.Supp. 262 (M.D. Tenn. 1996); *see also*

demonstrated that it has been providing counsel in state post-conviction proceedings in such a way that will satisfy the statute. That comes as no surprise to us. The reason you need federal habeas corpus proceedings is that the state courts are so pitiful in providing counsel and services. Indeed, this need is made clearer by the fact that no state satisfies the opt-in provisions. The fear is that states will start passing statutes that purport to satisfy section 107. Under the Act, there is an argument that once you establish such a system, everyone from that state—whether they got the benefit of that new statutory enactment or not—will be subject to the opt-in provisions. That argument makes no sense and should fall on deaf ears, but there may be some courts that would buy it.

Professor Friedman will now speak about the statute of limitations.

PROFESSOR LEON FRIEDMAN: Perhaps the most significant change in the new law is that there is now a statute of limitations for filing a habeas corpus petition. This limitation is codified in 28 U.S.C. § 2244(d)(1), which provides that a prisoner must file a habeas corpus petition within one year of the completion of the state direct appeal proceedings. That sounds simple enough, but in practice there are four dates to be concerned about: (1) the date when final state direct appeal review was completed; (2) the date when, if there was an impediment to filing any state post-conviction remedy, that impediment was removed; (3) the date when a new Supreme Court decision came down which allowed the prisoner to bring a new claim; and (4) the date when the factual predicate for a claim became available.[52] If you look at section 2244, it seems simple enough: Prisoners have one year from whichever of these dates is applicable.

The trouble is that a capital defendant often has more than one claim. He may have raised a claim on direct review, which has now ended. Then he goes to state post-conviction review with some new claim, such as a *Brady*[53] claim or a jury selection claim, about which he did not know at an earlier time. He might also bring an ineffective assistance of counsel claim. What the statute says is that once you have finished one round of review on direct appeal, the clock starts to tick, and when it ticks three hundred and sixty-five days and you do not have something pending in state court, your ability to go to a federal court is precluded.

Section 2244(d)(2) says that the statute is tolled for any time a properly filed application for state post-conviction review is pending. What will happen, particularly with respect to state prisoners who have more than

Death Row Prisoners of Pennsylvania v. Ridge, 106 F.3d 35 (3d Cir. 1997); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996); Langford v. Day, 102 F.3d 1551, 1557 n.2 (9th Cir. 1996); Hill v. Butterworth, 1997 WL 16132 (N.D. Fla. Jan. 16, 1997); Jackson v. Johnson, 56-ca-71655 (W.D. Tex. Oct. 29, 1996).

52. For example, where a witness to a previously unknown fact has come forward.

53. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that prosecutors are required to turn over to the defense evidence that tends to support acquittal, regardless of the good faith of the prosecutor).

one claim adjudicated in the state court system at different times, is that whenever there is a period of time when no claim is actively being considered in the state court system, time is being deducted from the 365 days. For example, if after losing on direct review, you wait three months and then start a post-conviction proceeding on one claim and then, when that is over, you wait another three months to seek a post-conviction remedy on another claim, you have used up six months. When you have used up twelve months, you are precluded from filing a federal habeas corpus petition.

The new statute makes two changes in the exhaustion requirement. The first change affects waiver of the exhaustion requirement. In the old days, the state could implicitly waive the exhaustion requirement; that is, if the State did not raise exhaustion, the federal courts could consider a petition containing non-exhausted claims. In *Granberry*,[54] the Supreme Court said that a state may indeed ignore the exhaustion defect and allow the case to be adjudicated. Now, the new statute says that, if a state waives exhaustion, it must do so explicitly on the record.[55] No implicit waiver of exhaustion is permitted.

The second change is that a federal court may ignore the fact of non-exhaustion and adjudicate the decision on the merits if it *rejects* the prisoner's claim.[56] Could the federal court ignore exhaustion and grant the claim? No. It can ignore the non-exhaustion requirement only to reject the claim. This will eliminate situations where the federal court believes that the claim has no merit whatsoever and sends it back for exhaustion even though it thinks it knows that it will reject the claim thereafter. What the statute does is give the State an extra weapon with respect to asserting exhaustion while allowing the whole exhaustion issue to be sidestepped if the federal court is going to reject the constitutional claim on the merits.

MARK OLIVE: What do you think will happen if the district court judge dismisses an unexhausted claim on the ground that there is no basis for it, and the circuit court says that is an error? What happens to the entire case at that point?

PROFESSOR FRIEDMAN: I do not think it changes the old law on that. At that point, the petitioner would still have to go back and exhaust that claim.

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54. Granberry v. Greer, 481 U.S. 129, 134 (1987) (holding that the court may determine whether to address the merits or to require exhaustion).

55. AEDPA § 104 (modifying 28 U.S.C. § 2254). The new § 2254(b)(3) provides, "A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

56. *Id.* The new § 2254(b)(2) provides, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

RONALD TABAK: Let me ask one question on the ticking clock. Does the ticking clock of the statute of limitations run in a non-opt-in state, if there is no system for providing counsel for a state post-conviction proceeding and no counsel has been found?

PROFESSOR FRIEDMAN: The clock keeps ticking.

RONALD TABAK: So, if you could begin a state post-conviction proceeding but no one is able to find you counsel, then, unless you manage during that year to get a federal court to appoint counsel who then begins the state court proceeding before that year runs out, you are dead—literally dead in the capital cases—without ever having post-conviction or habeas counsel.

PROFESSOR FRIEDMAN: The clock starts to tick when the judgment is final, and there is no tolling for lack of counsel.[57]

RONALD TABAK: What about stays of execution? The Powell Committee report[58] said that there ought to be an automatic stay of execution for one full round of habeas. What is the situation in light of this new statute?

PROFESSOR FRIEDMAN: The statute has not changed the law on stays of execution. What the Supreme Court said in a case this year was that on an initial petition, unless under Rule 4 of the habeas corpus rules the claim is plainly dismissable, the court must grant a stay.[59] So, on the first time a petitioner goes into federal court, if the petition is not frivolous on its face, the federal judge must grant a stay of execution. In a decision the year before, *McFarland*,[60] the Supreme Court said that even if a formal petition is not filed, a request for counsel is the commencement of a habeas corpus proceeding, and a stay must be issued in that case as well. So, when a petitioner is in federal court for the first time and his claims are not all frivolous on their face, a stay of execution must be granted. The standard for successor petitions is much more difficult.

RONALD TABAK: We will now turn to Tom Dunn to talk about what this new statute does with respect to evidentiary hearings.

THOMAS H. DUNN: I am here today as a private member of the Florida and New York Bars and not in any way in my capacity as an employee of the State of New York or the Capital Defender Office. Having said that, I

57. *Editors' Note:* A recent Ninth Circuit case has held that AEDPA's statute of limitations is subject to equitable tolling, and that "extraordinary circumstances" warranting tolling existed where petitioner's counsel "withdrew after accepting employment in another state, and much of the work product he left behind was not usable by replacement counsel." Calderon v. U.S. Dist. Ct., 112 F.3d 386, 391 (9th Cir. 1997).

58. Ad Hoc Committee on Federal Habeas Corpus Cases, *Report on Habeas Corpus in Capital Cases, reprinted in* 45 CRIM. L. REP. (BNA) 3239 (Sept. 27, 1989).

59. Lonchar v. Thomas, 116 S.Ct. 1293 (1996).

60. McFarland v. Scott, 512 U.S. 849 (1994).

will talk briefly about the changes in the habeas statute as it deals with evidentiary hearings.

We talked earlier today about the shift in focus of habeas corpus actions and the restrictions placed upon access to such relief. One point on which we would all agree is that during the post-*Furman*[61] period, there has been a dramatic shift in the type of litigation that we see in post-conviction proceedings and specifically in federal habeas proceedings. Up until probably the mid-1980's, the focus of much of federal habeas litigation was on legal claims. These cases addressed the meaning of *Gregg*[62] and its progeny and asked whether specific state statutes complied with the requirements of *Gregg*. In about 1985, we saw a shift in focus away from heavy reliance upon legal claims and towards the importance of factual claims and factual development in post-conviction proceedings. Today, anyone who does any post-conviction litigation will agree that factual investigation and development is the core of state post-conviction and federal habeas litigation in the capital context. Thus, any curtailment of the ability to develop a factual record in federal court could have a significant impact.

Most of the provisions in this new law are procedural. There are reforms that are ostensibly meant to streamline and expedite the processing of capital habeas cases in federal court. Given that, a fair reading of the law leads me to conclude that the Effective Death Penalty Act of 1996 leaves untouched the federal courts' authority and responsibility to exercise independent judgment on the merits of federal constitutional claims. That includes factual matters.

If you compare the provision dealing with evidentiary hearings, set forth in 28 U.S.C. § 2254(e)(2), with the old statute's section 2254(e), your first response is likely to be panic over the apparent curtailment in the ability to develop a factual record in federal court. Although such curtailment is one possible reading of the change in the law, it is not the one Congress intended. Again, the purpose of The Effective Death Penalty Act of 1996 is to streamline and expedite. Clearly, what Congress is after is to make sure that these cases are handled in an efficient and expedited but fair way. Indeed, the language of section 2254(e)(2) indicates that the restriction on evidentiary development deals only with those cases in which "the applicant has failed to develop the factual basis of a claim in state court proceedings."

The issue of when an applicant has failed in that regard has been posed in numerous Supreme Court cases prior to this statute's enactment, the

61. Furman v. Georgia, 408 U.S. 238 (1972) (holding that death sentences, as then being imposed, violated the Eighth Amendment).

62. Gregg v. Georgia, 428 U.S. 153 (1976) (holding the new Georgia death penalty statute constitutional).

leading recent case being *Keeney v. Tamayo-Reyes*.[63] Clearly, if the material facts were not developed in state court because of a fault of the petitioner, then this provision does apply, and it goes a long way to restrict even further the federal court's ability to have an evidentiary hearing.

In *Keeney*, the Supreme Court held that when the petitioner defaults factual development in state court proceedings, the only way he could be entitled to an evidentiary hearing on that issue would be to show "cause" and "prejudice" or to establish that he would meet the innocence exception.

On the other hand, there are many bases for a federal court to grant an evidentiary hearing even if there has been a state evidentiary hearing on other issues. The statute can be read as to not overrule the landmark case of *Townsend v. Sain*,[64] a Supreme Court case dealing with the federal courts' ability to allow factual development concerning federal Constitutional claims in the capital context. I believe that *Townsend* remains in effect with regard to all of the contexts it enumerates other than the failure to adequately develop material facts in state court where that is the failure of the petitioner. For example, imagine a petitioner who is unable to raise a particular claim in state court even though an evidentiary hearing has been granted on other claims, because the prosecutor has suppressed decisive evidence which the petitioner has found only after the state court post-conviction proceedings have been held. Clearly, under *Townsend*, that would be an exception which would allow the federal district court to grant an evidentiary hearing, and to allow the petitioner the ability to factually develop the record in federal court.

The big change, if you accept the fact that *Townsend* remains the law in most contexts, is that as bad as *Keeney v. Tamayo-Reyes* was in the one context where *Townsend* is inapplicable, what has replaced it is even worse. What we have now is what some have referred to as a "cause and innocence exception." The statute states that the federal court shall not hold an evidentiary hearing on a claim where the underlying facts were not adequately developed in state court due to a failure of petitioner, unless the petitioner shows the existence of (A) a new rule of constitutional law that was previously unavailable which the Supreme Court has made retroactive to cases on collateral review or newly discovered evidence that could not

63. 504 U.S. 1 (1992).

64. 372 U.S. 293 (1963) (holding that the District Court erred in denying a writ of habeas corpus without a plenary evidentiary hearing. The Court outlined a test for determining when an evidentiary hearing must be held. Where a federal prisoner alleges disputed facts which, if proven, entitle the prisoner to relief, the District Court must hold a hearing if (1) the merits of the facts have not been resolved in state proceedings, (2) the state determination of facts is not supported by the record as a whole, (3) the state court procedure was inadequate to insure a full and fair hearing, (4) there is a substantial allegation of newly discovered evidence, (5) the material facts were not adequately developed in the state court hearing, or, (6) for any reason it appears the state trier of fact did not afford the applicant a full and fair hearing).

have been found through due diligence either in trial court and/or state post-conviction proceedings *AND* (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[65] Clearly, the "cause and prejudice" standard set forth in *Keeney* is gone now, and we are left with this "cause and innocence" question.

In looking at the statute, you may initially think that the innocence exception is limited to factual innocence. But, as several cases have found, the *Sawyer v. Whitley*[66] standard of "innocence of the death penalty" also qualifies as an exception.[67] In addition, each of these decisions has indicated that *Townsend v. Sain* is still good law, and that if there are factual reasons *other than* the default of the defendant, such as where the state court refuses to give an evidentiary hearing, the state court refuses to give a full and fair hearing, or the State has withheld evidence, then federal evidentiary hearings still can be granted under the new statute.

MARK OLIVE: I will now talk about the adjudication standard which has changed and is in the amended section 2254(d).

The very reason for habeas is to bring to the attention of a federal judge a state court violation of a federal Constitutional right which the state court has addressed but "got wrong." In such cases, the state court has interpreted the federal Constitution in a way that is wrong. That has been the key to getting into federal court and obtaining relief via merits review of a claim.

An argument can be made that under the new section 2254(d), the fact that a state court simply got a legal question wrong is not a basis for relief. I think it is an argument that will fail,[68] but we have already heard respondents' counsels assert in proceedings that if a habeas petitioner is saying

65. *See* 28 U.S.C. § 2254(e) (1996).

66. 505 U.S. 333 (1992) (holding that to be "innocent" of the death penalty, the petitioner must show clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable law).

67. *See* Rich v. Calderon, No. CIV-S-89-0823 EJG GGH P (E.D. Cal. Aug. 2, 1996) (unpublished memorandum); Silva v. Calderon, No. CV-90-3311 DT (C.D. Cal. June 26, 1996) (unpublished memorandum); Bean v. Calderon, No. CIV S-90-0648 WBS/GGH (E.D. Cal. May 15, 1996) (unpublished memorandum).

68. In Lindh v. Murphy, 96 F.3d 856, 876-77 (7th Cir. 1996) (en banc), the majority, interpreting the new section 2254(d), stated that the statute could be interpreted to require that even where a federal judge had reached an independent determination that the state court got it "wrong," that judge would nevertheless have to deny habeas corpus relief unless the state court decision, while wrong, was not "unreasonable."

Editors' Note: In reversing the Seventh Circuit in *Lindh*, 1997 U.S. Lexis 3998, the Supreme Court's holding addressed only the issue of retroactivity, not the merits of the Seventh Circuit's interpretation of the new section 2254(d). However, since the Supreme Court held that the Seventh Circuit was wrong to consider the new section, it is possible to argue that the Seventh Circuit's discussion of that section's meaning has no precedential value.

that the state court got the federal Constitution wrong and the petitioner wants the federal judge to get it right, the petitioner is not entitled to any review, because if that is all that happened, the doors to the federal habeas court are shut by the new provision.

I think that is wrong and largely counterintuitive. Some federal district court judges may react by saying, "I'm not a potted plant. I'm here to apply the federal law."[69]

The statute says "An 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 in state court proceedings"—such as where the state court has addressed the merits of a claim that a confession was involuntary and determined that indeed it was voluntary and not in violation of the 14th Amendment[70]—unless the state court resolved the merits of the claim 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."[71] That is new. The old standard for all legal questions and mixed questions of law and fact was *de novo* review, in which federal judges said what the federal Constitution means. The new law says that if the state court has said what the federal Constitution means, then Article 3 federal judges, in doing their jobs, may have certain restrictions placed upon them.

At the time of this August 1996 program, there are no helpful decisions on what the new section 2254(d) means. A brief filed in the *Lindh* case by the ABA in the Seventh Circuit discusses "deference" and whether, if there is deference to state court interpretations of federal Constitutional law, that suspends the writ or has other Constitutional problems. Professor James Liebman who, with Randy Hertz, wrote the marvelous two volume habeas corpus manual,[72] and is counsel in *Lindh*, has analyzed whether and to what degree federal judges have to defer to a state judge's determination of federal Constitutional claims.[73] The most important thing Professor Liebman teaches us is that you have to parse the statute out, piece by piece, and find out before deciding whether to apply the statute *to* something that happened in state court whether some qualifying event *really did happen* in

69. *See Lindh*, 96 F.3d at 886 (Ripple, J., dissenting) ("[I]t is important to note that, both before and after the amendment in question, the fundamental task of the judiciary under the statute remains unchanged: Congress has given the federal courts, including this court, the task of determining whether a state prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.'") (citing 28 U.S.C. § 2254).

70. If the voluntariness determination involved the application of "voluntariness" law to the facts of the case (as opposed to a determination of whether a given practice can provide a basis for a challenge), then the voluntariness determination is a mixed question of law and fact. *See* Withrow v. Williams, 113 S.Ct. 1745, 1754 (1993).

71. 28 U.S.C. § 2254(d)(1) (as amended by AEDPA).

72. JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2d ed. 1994).

73. Brief for Petitioner, Lindh v. Murphy, 1997 U.S. Lexis 3998 (June 23, 1996) (No. 96-6298).

state court. Professor Liebman reads the statute to say that before there could be any "deference" to a state court opinion—to the degree there is going to be any deference—you first have to have a fair state court adjudication on the actual merits of the federal constitutional claim. (Section 2254(d) will not apply if the claim is held defaulted in state court rather than there having been a ruling on the merits of the claim.) There must have been an "adjudication" in a formal state court proceeding that resulted in a "decision." Liebman compares "adjudication" with "decision" and says there is a difference between opinions, adjudications and decisions—distinctions that make great differences vis-a-vis the application of section 2254(d) to a qualifying state court conviction.[74]

But if you have a qualifying state court opinion or state court judgment, what does section 2254(d) mean? What does a federal court judge do? A federal court judge used to look at the substance of your *claim*, the facts of your *claim*. The state court opinion, which previously, although qualifying as other authority, was not controlling and was largely irrelevant to the federal judge's application of the federal Constitution. What the federal court judge must do now is to look at the state court judgment itself, the opinion itself, the adjudication itself. The federal judge, under Professor Liebman's interpretation, must look at the *state court opinion* and determine whether the state court opinion meets some test—not whether the *petitioner's claim* meets some test. The test that the state court opinion has to meet with respect to purely legal questions relates to the law that was in existence at the time of that state court opinion. If the state court decision is based on legal principles that were available to and binding on the state court when it ruled, then the state court decision must have applied those legal principles. The clearly established federal law that has to have been relied upon, and with which the state court decision must not be inconsistent, is the law that was in existence at the time of the state court ruling.

That sounds like *Teague v. Lane*,[75] in saying that the federal courts will not reverse a state court decision on the basis of law which came into being *after* the existence of the state court opinion or judgment. As Professor Liebman has stated, this part of the new statute is actually even stricter than *Teague v. Lane*. It strengthens the *Teague* doctrine in several ways; it also "weakens" *Teague*. The federal court must review the state court

74. The new § 2254(d) applies only when there has been an "adjudication" which "resulted in a decision."

75. Teague v. Lane, 489 U.S. 288 (1988) (holding that a new rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule (1) places an entire category of primary conduct beyond the reach of criminal law or prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense, or (2) applies a new watershed rule of criminal procedure that enhances accuracy and is necessary to the fundamental fairness of the criminal proceeding).

opinion, as I already mentioned, and the federal court may consider only established Supreme Court law, not established circuit law—which is a change from *Teague*.[76] The date on which the law must be "clearly established" has been moved from certiorari denial following direct appeal to when the decision was made by the state court judge. Thus, the statute moves the time when the law of the land needs to be looked to.[77] Finally, the exceptions to *Teague*,[78] it appears, have been abandoned. This is an area where the provision does tighten things up at least a little bit.

But the degree to which it is tightened up remains to be seen. It may actually end up that a federal judge must be able to say that the state court opinion is simply wrong. There is, however, an argument to be made from the words of the statute that the state court being simply wrong (and not unreasonable) is not a basis for federal habeas corpus relief. Under that argument, habeas relief may be granted only if the state court decision is contrary to clearly established Supreme Court law or is unreasonable, and not if the state court decision is simply wrong.[79]

Such an interpretation of the statute, however, would provide a springboard into a wide variety of constitutional arguments. In dealing with such arguments, the federal courts may conclude that they are not rubber stamps and are supposed to determine what the federal Constitution is and apply it, and that Congress cannot restrict their authority to do so. That argument is being made in various cases.

That sort of argument did appeal to the United States Supreme Court in the successor setting. What the Supreme Court said last term in *Felker*[80] amounted to this: "We are good, powerful federal judges. We have been working on habeas reform for ten years or more and now Congress has come in and monkeyed around with it, trying to change what we have already written. We wrote pretty well, and we are going to keep working on these cases."

Felker was the first Supreme Court decision interpreting the new act. The provisions that were being interpreted by the Supreme Court were the

76. *See* Devin v. DeTella, 101 F.3d 1206 (7th Cir. 1996).

77. This may "weaken" *Teague*, because the state court adjudication or decision that is relevant may be the state habeas corpus or post-conviction decision, which is later than the direct appeal decision.

78. If a new constitutional rule does not meet one of the exceptions in *Teague*, it could not, even before enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, be used to attack a conviction on federal habeas corpus. The Court has interpreted the exceptions so narrowly that very few cases qualified under the exceptions. *See generally* Sawyer v. Smith, 497 U.S. 227 (1990) (holding that the petitioner was not entitled to federal habeas corpus relief because the new rule did not come within either of the *Teague* exceptions).

79. Some courts have held that the *de novo* review standard attaches to pure questions of law while some other review attaches to mixed questions of law and fact. *See* Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996).

80. Felker v. Turpin, 116 S.Ct. 2333 (1996).

successor provisions. It used to be that under Federal Rule of Civil Procedure 9(b), you could file a successor petition in district court and process it through the courts in the same way you processed the first habeas petition. The new statute changes this in the following ways: You cannot file a successor petition at all, unless you obtain permission. That is, you must go to a circuit court and file a motion requesting leave to file a petition. Thus, Congress, in wanting to shorten the process, sort of added a step to the process. If leave to file is granted by the circuit court, you do not go forward, you go backwards, to the district court. Thus, there are now more steps for a successor petition than for an initial habeas petition. I will leave it to others to say whether that is irrational. But that is what Congress did. In addition, when asking the circuit court for permission to go to the district court, you have to make a *prima facie* showing that you are entitled to relief under the Act.

In successor petitions, your entitlement to relief depends on the following circumstances. First, you are not entitled to relief if you are raising a claim that you raised before.[81] If, however, you are raising a claim that you *did not* raise before, and it is a claim that is predicated upon a United States Supreme Court opinion regarding a new rule that was not previously available to you, and which the United States Supreme Court has made retroactive, you can raise that, even if you are "guilty as sin." There is no requirement that you be innocent or have any colorable claim of innocence—which is an interesting change from the old law on successor cases.[82] Thus, a newly announced Supreme Court rule that was not previously available to you can be raised in a successor petition. But if you raised that issue in the first petition before it became a new rule, because you had a good, prescient lawyer, you can not raise the issue in a second petition once the new rule has been announced. Perhaps you can raise that in some other manner, which I am about to get into.

Finally, you can raise a constitutional claim combined with a showing of innocence of the crime, where that is based on newly discovered evidence which was not previously available to you through the exercise of due diligence. But you arguably cannot raise a constitutional claim that makes you innocent of the death penalty—something you could have raised in a successor petition under the old law. So, if you are in fact ineligible to receive the death penalty although very, very guilty, that is arguably not a basis for habeas corpus relief in a successor petition and you can be executed under the statute. For example, if there is one statutory aggravating circumstance in the case that is obliterated by virtue of your newly

81. AEDPA § 106 (codified as 28 U.S.C. § 2244). The new § 2244(b)(1) provides, "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior applications shall be dismissed."

82. For a discussion of the previous rule, see *Sawyer v. Whitley*, 505 U.S. 333 (1992).

discovered evidence or new law, that will not matter. Even though you are demonstrably ineligible for capital punishment, you will be executed.[83]

If the circuit court determines that you should not be granted permission to file a successor petition in the district court, that decision, according to the statute, is not reviewable by the United States Supreme Court. This is different than but akin to this extreme interpretation of the adjudication standard: "federal court, apply what the state applied if it looks like it might be right; *don't act like a federal judge.*"

Counsel in *Felker*, upon reading that a certiorari petition could not be filed, promptly filed a certiorari petition, and the United States Supreme Court stayed the execution. Counsel also filed, in combination with that, an original petition for habeas corpus in the United States Supreme Court. What the Supreme Court said, in effect, is: "Yes, we have read this statute, but we've got original habeas jurisdiction, and we will exercise original habeas jurisdiction, and so come to us. We know we've been writing for 10 years about how Congress can restrict this writ, but Congress can not restrict it *that* much. We are still players in this game."

We have yet to see what the Supreme Court would say if Congress were to go back and eliminate the section regarding the Supreme Court's original habeas jurisdiction. Congress might have overlooked the section that left Supreme Court original jurisdiction intact and allowed the Court to exercise it. But there were some hints in the *Felker* opinion to this effect: "You cannot get rid of us, no matter what you do; we are still in it."[84]

Since *Felker*, although the Supreme Court has denied relief in several successor cases, the Court has not yet denied relief in any case which probably would have won under the old pre-Act law. I think that people who are innocent but who go a year without filing a state post-conviction petition because the State does not provide them with counsel and who cannot, under the statute's one-year statute of limitations, get into federal court will still have the Supreme Court's original habeas jurisdiction or other paths available to them. Also, issues such as innocence of the death penalty may be cognizable in original habeas petitions before the United States Supreme Court.

RONALD TABAK: We are now going to move to some practical implications of all this. We will start with Tom Dunn, who will talk about whether

83. Some courts have held that "innocence" under the Act includes "innocence of the death penalty." *See* Rich v. Calderon, No. CIV-S-89-0823 EJG GGH P (E.D. Cal. Aug. 2, 1996) (unpublished memorandum); Silva v. Calderon, No. CV-90-3311 DT (C.D. Cal. June 26, 1996) (unpublished memorandum); Bean v. Calderon, No. CIV S-90-0648 WBS/GGH (E.D. Cal. May 15, 1996) (unpublished memorandum).

84. 116 S.Ct. at 2339 ("the critical language of Article III, §2, of the Constitution provides that, apart from several classes of cases where specifically enumerated in this Court's original jurisdiction, '[i]n all the other Cases .... The Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.'").

these cases can be handled within the new time limits, given the defunding of resource centers.

THOMAS H. DUNN: I will talk briefly about what the Effective Death Penalty Act of 1996 means for us as practitioners in capital litigation. In 1994, a report of the Judicial Conference of the United States said two very important things. The first was that Eighth Amendment jurisprudence and habeas corpus litigation in the capital context in a federal court is probably one of the most complex and difficult areas of the law to understand. This report recognized the ever-changing nature of habeas corpus reviews, and the procedural traps and roadblocks to effective review of constitutional claims. More importantly, it recognized that the post-conviction defender organizations were essential and critical to the effective litigation of capital federal habeas corpus cases in the federal court system. Thus, the Judicial Conference of the United States recognized the complexity of Eighth Amendment jurisprudence and the need for post-conviction defender organizations, experts in this area, to be involved not only in direct representation but also in assisting the private bar in handling these cases.

In 1995, the Judicial Conference of the United States appointed the Cox Subcommittee to study death penalty representation. It was chaired by Judge Emmett Cox from the 11th Circuit, a fairly conservative judge in this area of the law. The Cox Subcommittee reiterated the Judicial Conference's 1994 findings. The Cox Subcommittee concluded that:

> The post-conviction defender organizations have both facilitated the provision of counsel to death sentenced inmates and enhanced the quality of representation. The promise of expert advice and assistance from post-conviction defender organization attorneys has encouraged private counsel to provide representation for death sentenced inmates. Private lawyers who communicated with the subcommittee almost uniformly expressed the view that they would not willingly represent a death sentenced inmate without the assistance of the post-conviction defender organization or a similar organization. State and federal judges agreed that the post-conviction defender organization assistance was critical to the recruitment of private attorneys to the representation of death sentenced inmates. Furthermore, the defender organizations employ staff who have developed significant legal expertise in the fields of capital punishment and habeas corpus law. This expertise assists private counsel in providing quality representation of death sentenced inmates. Post-conviction defender organizations can also enhance the quality of representation, providing continued continuity of counsel over the course of the case.[85]

85. JUDGE EMMETT COX, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES SUBCOMMITTEE ON DEATH PENALTY REPRESENTATION (1995).

Despite those clear and resounding findings by the judiciary, Congress, in addition to passing AEDPA, has defunded post-conviction defender organizations. All this is very troubling. It presents a potential for disaster. It presents the potential for a bloodbath devoid of due process.

The complexity of AEDPA and the need to litigate its meaning, its applicability, and perhaps even the constitutionality of its provisions, make what everyone considers one of the most complex areas of law even more complex now. Added to that are the time limits. The requirement that a federal habeas petition be filed within one year, even assuming there will never be an opt-in state, adds increasing pressure, not only to the understanding of the statute itself and the litigation concerning the applicability and constitutionality of the statute, but also to the factual development which is so critical to post-conviction litigation.

An additional change is the defunding of the resource centers. The lawyers at these centers had special legal expertise concerning capital punishment law and, more importantly, federal habeas law. They also had expertise in the factual development and investigation of these cases. As a result of all of these things, we have a real potential for disaster.

Congress is not the only legislature to act on this matter. Many death penalty states now apply statutes of limitations to their state post-conviction proceedings. So what we see today is a potential for disaster that only we, as members of the bar, by providing representation to indigent capital defendants, can avoid.

In light of the new statute and the defunding of the post-conviction organizations, a much tighter defense community is required. Before, you could have looked at this litigation as a relay race: The trial attorney would hand off to the direct appeal attorney and the direct appeal attorney could throw the baton on the ground, and when someone came along to pick it up, that person could continue with the race. Clearly, we can no longer rely upon that kind of race. There needs to be a well-honed, thoughtful handoff of the baton. We cannot afford to drop it anymore.

As Professor Friedman indicated, the biggest danger of this statute is not whether it changes the substantive law, not whether it changes issues concerning exhaustion, but whether in fact some people will be executed because they never filed a petition. Obviously, that is a frightening concept unlike anything we have had to deal with before.

What do we do to insure that that does not happen? Despite the fact that there are no more federally funded post-conviction defender organizations, there are still many committed specialists in the field who are willing to help. Clearly, the bar needs to continue with its role. What we are faced with is really the same game. The rules have changed, but what it takes to win has not changed (we hope). Clearly, what was a difficult area of the law is going to be even more difficult now because of the time limitations.

There are areas in which you can get help. Mark Olive and John Blume have recently been able to get funding so that they are basically federal resource attorneys providing guidance to attorneys who are handling habeas capital cases. Some of the state post-conviction defender organizations have been able to remain in business and are limping along. They are not as effective as they used to be, but they are still out there. Professor Friedman is available. Other scholars who know the law are available by phone and willing to help.

The bar needs to do its part. Although the rules have changed, the reasons for getting involved in habeas activity are even greater than before. I call upon the bar to stay involved and to not merely pick up dropped batons but rather to get effective handoffs. We need to make sure that we continue to defend the great writ and what it stands for.

RONALD TABAK: In that regard, *Murray v. Giarratano*[86] may be instructive. In *Giarratano*, the Supreme Court held by a one-justice majority that there is no constitutional right to have counsel in state post-conviction proceedings. The concurring opinion by Justice Kennedy assumed that people would be getting adequate means of access to the courts in any event. Now, unlike the situation in *Giarratano* there is a one year statute of limitations, whose clock keeps ticking even if you have no counsel in state court. If a disaster impends at some point in certain cases, some new way of looking at issues raised in *Giarratano* should be advanced in light of this new statute. I am sure that the American Bar Association ("ABA") will be right in there if that happens.

To further discuss the implications of the new habeas statute, and particularly its statute of limitations, we have as our next speaker Susan Cary. Before graduating from Florida State University Law School in 1977, Susan worked on a death penalty case in 1974 as a law student with Tobias Simon, a civil rights attorney from Miami.[87] She now works for the Public Defender in Florida's Fifteenth Judicial Circuit. Ms. Cary spends a great deal of her time working with people on death row and their families.

That work is extremely important. When I first got involved in capital post-conviction cases, I thought I could just look at the case law and argue cases in appellate courts. But in part because of the teaching I have gotten from Susan Cary, I now recognize that getting to know my clients and their families greatly enhances my ability to argue even the legal issues in these cases.

Accordingly, it is my pleasure to introduce Susan Cary.

SUSAN CARY: In one of my careers before I went to law school, I was a middle school teacher. In 1974, I was a law student and had just finished my first semester of law school when I read in the newspaper that a 15-

86. 492 U.S. 1 (1989).
87. Vasil v. State, 374 So.2d 465 (Fla. 1979).

year-old boy from Fort Pierce, Florida had been sentenced to death. It really surprised and shocked me to learn that we had sentenced a child to death. I called Tobias Simon, my criminal law professor and lamented with him. He said, "Oh, by the way, this kid's parents called me this morning and asked me if I wanted to do the appeal. Will you help?" I wonder what my life would have been like if I had taken the "No" path, but here I am and here we are these twenty-two years later.

The title of our program today is "Dead Man Walking Without Due Process?" The speakers before me have covered the due process aspect of the current situation. I would like to talk about *people.* We could have long discussions about habeas corpus, abuse of the writ, the new statute of limitations and all that. But much like in court when we go to argue for a stay, one can argue for minutes into hours without ever really saying that what our society is doing here is killing human beings, and trying to do so tomorrow, and how quickly and in what way. Last year, at an ABA annual meeting panel,[88] there were discussions about whether there would be resource centers and what the new restrictive habeas might be. Now, we have to face the new reality.

Much has been said here about time. I would like to talk about time in a slightly different respect—not so much about statutes of limitations, but rather about the time, as well as the resources, it takes to develop different aspects of a case.

As Tom and Mark have both noted, habeas litigation is now often about facts. What happened? Who lied? What evidence was hidden? Those of us who have done this work very long or very often know that much is kept from us by the State. With cases from the United States Supreme Court such as *McCleskey v. Zant,*[89] the law basically is: if the State can hide it long enough, you die. That is the reality of what we are talking about here.

So in post-conviction, what we are talking about now is really reinvestigating the case in a very, very short period of time. In Florida, we have a public records act.[90] So, theoretically at least, after the direct appeal has become final, the defense has access to what are now considered public records. This includes the sheriff's reports, the police reports, and the state attorney files except for what would be considered work product. Months and months of litigation often has to happen, however, just to get these officers of the court to turn over these records which everyone agrees we are due. So it is not fanciful to fear that prosecutors will drag things out so

88. Panel Discussion, *Is There Any Habeas Left In This Corpus?, with Commentary by Ronald J. Tabak,* 27 LOY. U. CHI. L.J. 523 (1996).

89. 499 U.S. 467, 490-95 (1991) (holding a successor petition barred where a meritorious *Massiah* claim was omitted from first habeas petition because of the State's false representation that no such constitutional violation had occurred).

90. FLA. STAT. ANN. § 119.01 (West 1996).

that we will not be able to get the information we need within the new time limits.

It is also important to talk about time in terms of what we learn from our clients. As everyone has said, post-conviction ought not, should not and under this statute is not supposed to be done (at least in opt-in states) by the same lawyer who did the trial or the direct appeal. Unfortunately, this new lawyer will have to read what is already in the case record and in public records and also develop new facts within the time limits that are set. To accomplish this the lawyer must develop the trust and faith of the client.

Normally, our clients are not the first ones who tell us about the horrible things that have happened to them which the law recognizes as being grounds for mitigation. Our clients are embarrassed to talk about these things. It is humiliating to have been treated the way our clients have been treated. You should not just go in, shake hands and say, "By the way, what did your father, your brother, your sister, your mom, your whoever do to you?" You would not appreciate it if someone just came in, sat down and started talking to you about those things. Our clients do not appreciate it either. It takes a long time to discover these things and to develop the trust where someone is finally willing to tell you the most humiliating, awful things that happened—particularly when it regards sexual abuse (and even more so when your abused client is a man).

Thus, it takes a lot of skill and a lot of time to search out the mitigating things that have happened in our clients' lives. Sadly, despite all the Continuing Legal Education courses and all the "life over death" training, such mitigation evidence is still not being presented at many, many capital trials. A great many capital trial defense lawyers still do not do family histories. Thus, for example, it can be years before it is determined that a client has been retarded since he was born.

Why does it matter that family histories simply are not done at trial? It matters because under the law on mitigation,[91] the defense is entitled to inform the judge and jury of what happened to this person, how he got from there to here, and what the "there" that he came from was.

I want to give a few examples of cases. These are primarily Florida cases, because those are the ones I am most familiar with.

Florida executed two people in December 1995, one of whom was Jerry White. His was a case that the Volunteer Lawyers Resource Center had handled. The Resource Center has now closed. A state-funded agency, the Office of the Capital Collateral Representative ("CCR"), which is totally overloaded and can not possibly be considered to adequately represent people, was the only alternative. Jerry White was without counsel when his death warrant was signed. Because of the closing of the Resource Center, there was nobody there to represent him. The case

91. *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

was just dumped onto CCR. CCR unsuccessfully asked the Florida Supreme Court for time to prepare, so the clock was ticking. When CCR began to investigate, it discovered that Jerry White was retarded. There was good evidence of that, including childhood IQ scores and school records. But the Eleventh Circuit held that Mr. White's claims concerning his mental retardation had been procedurally defaulted and could not be considered.[92] Judge Kravitch, in a concurring opinion agreeing with the result, said that a severely retarded man would probably be put to death because of the procedural default.[93]

Another Florida case concerned Paul Scott,[94] who never really denied some involvement in the event for which he was convicted but always maintained that he had left the scene of the homicide before any altercations happened. After many demands were made under the Florida public records act, a photograph finally emerged last year—in response to the umpteenth public records request—which is a picture of a bloody ring like that which a glass would make on a table. This photograph corroborated Scott's version of what might have happened and what might have been used as a murder weapon. Under the new habeas statute's time limits, Paul Scott would have been executed years before the State finally produced this exculpatory picture.

In Rickey Roberts' case,[95] his girlfriend, who had been very cooperative with the defense and had consistently stated that Ricky was home with her at the time of the crime, suddenly changed her testimony shortly before trial. After the trial, she disappeared. She was finally located years later. She said she had changed her testimony because the state attorney had told her that she needed to do so in exchange for having prostitution and drug charges against her dropped. The Florida Supreme Court did grant an evidentiary hearing in that case, but went on to suggest that perhaps one remedy would be to change the statute of limitations for perjury.[96] The Florida Supreme Court did not say anything about the state attorney who may or may not have put the witness up to changing her testimony.

One of the first of these cases on which I worked involved a client about whom I "just knew" something was wrong. Finally, I went to Missouri, because the client had been raised in the "boot heel" of Missouri, a very, very depressed area in Appalachia. To my astonishment, I learned from the editor of the little local daily newspaper that this client had literally been raised in the garbage dump. I am not exaggerating. That is not a figure of speech. Our client's father had found an abandoned pick-up truck and had had a top put over it, and that is where the family lived. It was

92. White v. Singletary, 70 F.3d 1198, 1200 (11th Cir. 1995).
93. *Id.* at 1201 (Kravitch, J., concurring).
94. Scott v. State, 657 So.2d 1129 (Fla. 1995).
95. Roberts v. State, 678 So.2d 1232 (Fla. 1996).
96. *Id.* at 1236-37 (Overton, J., concurring in part and dissenting in part).

down by the Mississippi River, and it was in the garbage dump. People remembered the little kids who would come around and sell paper flowers that they had made out of crepe paper. I learned this from the newspaper editor, not from my client. "Sordid" took on a whole new meaning when I learned what had had happened to these children. They had been beaten. There were many allegations that their father had murdered their mother. I did not learn any of this from my client. This is not something that people usually reveal about their families. Often, trial attorneys do not bother to ask and those of us doing mitigation investigation in post-conviction must ferret these things out.

When there has been serious abuse in a family, other family members often make a conscious effort to hide the fact that that abuse took place. Normally, if we find it out at all, it is from a sibling who calls and says, "I couldn't talk to you while Mom was there, but will you come to my workplace?"

We worked on a case of a young man who was executed several years ago. Everything about his way of being was very rigid, and he was clearly mentally disturbed. When our investigator went to the family home in Atlanta, it seemed like a normal middle class family. There was not a thing out of order. Everything was in place on the shelves. All the pillows were arranged perfectly. I believed something must be wrong, but there were no clear indications. Finally, a sister of the client's mother called the investigator and we learned the horrors that had gone on inside that family. The father had taken one of the children out of the crib and thrown him on the floor and broken his legs. Our client had been severely beaten with kitchen implements, with frying pans, electric cords, whatever it had taken. Another child had had bones broken and our client had been old enough to witness it happen. It was just a nightmare existence. But the family—still in this abusive mode—would have preferred him to be executed than to ever tell the truth about what had happened.

These things take time to discover. Trying to do this in a year—much less six months—seems to be almost impossible.

I will now discuss the impact of time on the survivors of the victims of many of the people we represent. I was glad to go the national conference of Parents of Murdered Children in Chicago in 1988. I met several people there. One was a mother from Pennsylvania. I sat next to her at dinner. I was very open about what I do. I attended workshops on mother's grief, and as a mother I thought I could understand some of those things. This woman told me that her daughter had been murdered by an employee of the school board. She had been so angry and outraged and just filled with hate that she had filed a lawsuit against this man, who was judgment proof, of course, but now owes her $6 million. It was not about the money. She wanted to get him in some way. She was filled with hate for a number of years. She had another child who was younger than the daughter who was

murdered. That child never got very involved in Parents of Murdered Children until she finally asked to go to one of its meetings. The mother told her that was fine. When the group was talking in a circle, the daughter got up and told about the effect that her sister's death had had on her and said, very proudly, "I'm learning to hate just as well as mommy does."

The mother told me that that had just struck her to the core with chills, because she realized what she had been doing and that she really did hate this person, who was in her dreams a lot. She decided that she was going to write to him and that if she was going to have a relationship with him in her mind, she might as well have one in reality. She began writing to him. She asked to be able to visit with him. The prison said she would have to undergo psychiatric counseling before she would be allowed to do that, because there is not much support in our system for people who really want to opt-out of the vengeance cycle. She was finally able to visit with him. He was able to tell her things about the last moments of her daughter's life that she never would have known otherwise. She said to me, "What would have happened to me if he had gotten the death penalty and had been executed before I had this time in my healing? I never would have been able to do that."

There are others who feel the same way. There is a national organization called Murder Victims Families for Reconciliation. One member of that group, Sue Zann Bosler, from Florida, was a victim in the homicide that killed her father.[97] The man who killed her father also tried to kill her. She survived. She is very much opposed to the death penalty, as is her family. They consider it an affront to their religious beliefs. Although the State can subpoena her and force her to testify about what happened to her, the Supreme Court of Florida has said that the State does not have to allow her to speak about her family's opposition to the death penalty.[98] So, while the state attorney is allowed to tell the jury that he is acting on behalf of the victims and their families, when a family does not want the death penalty to be imposed, it will not be heard.

Time also relates to the healing that needs to be able to happen during these proceedings. For some people, the people who are angry and wounded at first, it takes a year just to get through the fact that there has been a death of a loved one. It takes longer than that to get through the fact that the death was caused by homicide. So, the time it takes for things to be done properly on the defense side is also time that the victim's survivors, if they are willing to take it and if they want to, need in order to go through their own processes.

There are other important considerations when talking about time and the changes in the habeas law. One of these is the idea of redemption. Many of the people who are rabidly pro death penalty and for vengeance

97. *See* Campbell v. State, 571 So.2d 415 (Fla. 1990).
98. Campbell v. State, 769 So.2d 720, 725 (Fla. 1996).

and for speeding everything up call themselves Christians who believe in the power of redemption. Yet, what we are talking about here is one hundred eighty degrees away from that. That is illustrated by the book *Dead Man Walking*,[99] the story of some of the changes that happened to two death row inmates for whom Sister Helen Prejean was spiritual advisor. They are incredible examples about redemption, about a person being able to change. Certainly, these time limits will curtail the time available for that.

Donald Cabana, who was for many years the warden at Parchman Prison in Mississippi, has written a new book, *Death at Midnight*.[100] Cabana was raised with the death penalty. He was for it. But then he was in charge of two executions, one of which was the subject of the documentary *Fourteen Days in May*.[101] Mr. Cabana writes very eloquently in this book about *his* change, about *his* redemption, about *his* having come full circle and having seen how wrong it was for him to be in charge of killing someone that he knew was a changed person. So, after carrying out the execution of a second inmate, he resigned his position. He is now teaching, and is no longer part of the criminal justice system. That is the change and transformation that he went through because of the *time* he had to go through this change.

One of the other changes is that because this is becoming even more technical an area than it ever was before, it may become too specialized. It would be extremely dangerous if there were to be only a few people in a jurisdiction who have any idea about what is going on. Without the continued involvement, conscience, leadership, information and power of the private bar, things are going to get much worse. I do not think it is any accident that so-called "welfare reform" was passed in the same year as "habeas reform." There are no wealthy people on death row. These are damaged, marginalized, expendable people who need the continued involvement, insights and practices of private law firms that have the judiciary's respect—firms like Skadden, Arps, Hogan & Hartson, Holland & Knight, and Wilmer Cutler & Pickering, to name just a few. If judges see the same people over and over again, their reaction is likely to be, "What else is new?" They need to see a cadre of lawyers from the private bar who continue to say "This is our business. This is wrong. You must not do these things according to some secret specialized process that only a few people could ever really understand about clients that nobody cares about." If that does not happen, we are really going to have a disaster on our hands.

RONALD TABAK: Thank you, Susan. With respect to *Dead Man Walking*, there were, as a practical matter, time limits in at least one of those

99. HELEN PREJEAN, DEAD MAN WALKING (1994).

100. DONALD A. CABANA, DEATH AT MIDNIGHT (1996).

101. FOURTEEN DAYS IN MAY (BBC 1988).

cases, that of Robert Lee Willie.[102] In late 1983, I agreed to prepare Mr. Willie's certiorari petition following his direct appeal. At that time, no one could be found to handle the state post-conviction proceeding, and Mr. Willie had an execution date. I had no experience in investigating a capital case, but I decided to handle the state post-conviction proceeding because I had discovered some very good legal issues on which I believe we would have won if this had not been an extremely notorious case. Within the space of one or two weeks, we were in and out of the state post-conviction trial court and the state post-conviction appellate court, we had a federal evidentiary hearing without even remotely adequate time to prepare properly, we had to write legal papers sufficient to secure a stay from the Fifth Circuit, and we had to prepare for what could have been a telephonic oral argument in the Fifth Circuit. Fortunately, the rollercoaster ride slowed down when the Fifth Circuit granted a stay, but it ordered expedited briefing on the issues, one of which is mentioned in the book *Dead Man Walking*.[103] After the case ended and Mr. Willie was executed in December 1984, I wrote a letter to every judge of the Fifth Circuit urging them to change their local rule which made this kind of rollercoaster possible. But the rule was never changed.

We will now turn to our last speaker. Lori Rozsa will talk about critically important things that may be hidden in capital cases but which may be uncovered after the passage of time. Ms. Rozsa came from Pittsburgh where, among other things, she was a steelworker during the summers. She graduated from the University of Florida in 1985, with a political science major. She was hired by the Miami Herald and was assigned to the state desk. Since 1988, she has worked in the Palm Beach County Bureau. She briefly interrupted her work on the Spaziano story to give birth to a daughter. Here is Lori Rozsa.

LORI ROZSA: What we are really talking about today is time and time limits. Susan explained how in some of these cases you almost never have enough time. Joe Spaziano's case is a good example of that problem. If what I am hearing today about the new habeas corpus statute is true, the problem is becoming even worse.

It could be argued that Joe Spaziano had 20 years of due process and due diligence. Investigators and attorneys tried very hard to do what the Miami Herald was able to do last year. But in this case, I think it was just a matter of timing. The recanting witness, Mr. Dalesio, had been approached several times before and had violently opposed talking to Mr. Spaziano's attorneys and investigators. By the time I got to Mr. Dalesio last year, it was two weeks after Mr. Spaziano's fourth death warrant had been signed. He had been ready for people coming back to him saying "Look, what you

102. Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984), *cert. denied,* 469 U.S. 1002 (1984).
103. *Id.*

said back then was not true." I went and did the same thing that Mr. Spaziano's attorneys had done.

What made the difference was that I was not an attorney or an investigator, but was instead with a neutral third party, the Miami Herald. What was equally crucial was that I came armed with a lot of information. I knew the case cold. I knew everything that this man had testified to. I knew his life story. I knew the life stories of everyone involved. I knew all this only because Mr. Spaziano's attorney, Michael Mello, did a brave and unusual thing. He opened his files to the Miami Herald. He was convinced that his client was innocent and he wanted us to be convinced. So he said, "Here's the proof. Read these thousands of pages of documents and you'll be convinced, too."

We were pretty close to being convinced by those documents. When we heard the recanting witness, we were convinced.

As a result of this experience, I suggest that lawyers be freer with the press and open your files to the press, because you are now under even more severe time constraints and you need a lot of help. The problem is that more times than not, when you go to a newspaper and say that your client is innocent, the newspaper will say, "We don't think so, and we don't care." But I think you should give the fourth estate a chance and give the press all your records, because we can be of big help in a case that deserves it. In *Spaziano*, the case had gone on and on with people trying to get Mr. Dalesio to recant his trial testimony. He was the only witness at trial who had connected Spaziano to the crime. Mr. Dalesio had been a teenager and drug abuser at the time. He had to be hypnotized before he came up with his evidence that linked Spaziano to the crime. It was ripe for error and was an obviously bad case from the get go. But it just took a long, long time for someone to finally "get to" this witness. Before I saw Mr. Dalesio, a couple of people from the Capital Collateral Representative's office under Mike Mello's supervision told Mr. Dalesio that the death warrant had been signed and that if he were going to come clean, he had better do so now. He did not come clean to them, but it is possible that if they had gone back to see him a third time, he may have come clean with them. Or maybe it was simply because the Miami Herald came to him instead of another lawyer that he did come clean.

I guess my point, to add to all this scholarship, is that with your time limitations even more severely constricted than ever before, look for help outside where you would normally look, and look to the press.

MARK OLIVE: I suggest, Lori, that you discuss the role of an aggravating circumstance in Spaziano's case. One of the aggravating circumstances in many capital statutes, including Florida's, is that you have been convicted

of a prior violent felony.[104] That can make you eligible for the death penalty. If the defendant were in fact innocent of that prior violent felony or it was obtained unconstitutionally, that would be a basis for overturning the death penalty in the case in which that prior violent felony was used as an aggravating circumstance.

LORI ROZSA: The reason which Spaziano's trial judge gave for overturning the jury's recommendation that Spaziano be sentenced to life in prison, and for instead imposing the death penalty, was Spaziano's prior conviction for a rape case in which a 16 year-old girl's eyes were slashed.[105] That case had the exact same cast of characters as Spaziano's murder trial. It involved the same family and the same hypnotized witness. The rape case also had a live victim, but she had to be prompted by police before she identified Spaziano.

So, we are looking into that case because we believe that served as a dress rehearsal for the bad murder case. We got the recantation in the murder case pretty quickly, within two weeks after we got Mr. Mello's files. We were able to find the witness, get the true story, put it in the paper, and report on the ensuing stay of execution. But Mr. Spaziano's rape trial has taken me a year to look into, and I have all the resources of the Miami Herald. So, I am not sure how all of you are going to function under the time limits of the new habeas law.

RONALD TABAK: Please describe a little bit more the true story that Mr. Dalesio told you about how he came to testify against Mr. Spaziano at trial.

LORI ROZSA: Mr. Dalesio was at the time a drugged-out, 16 year-old guy who came from a family so dysfunctional that you can not even begin to describe it. Spaziano had worked with Dalesio's father. The father ended up leaving his wife, the mother of his six children, for a young model. The young model allegedly had an affair with Spaziano and with Mr. Dalesio when he was just a teenager. Mr. Dalesio's father found out and swore vengeance on Spaziano.

Spaziano was a very convenient suspect. He was an outlaw biker. At that time, the Orlando area and the rest of Florida were trying to rid themselves of the scourge of motorcycle gangs. At first, the police had another suspect. But when the Dalesio family entered the picture six months after these women's bodies were found, the police had the case all lined up for them, thanks to Ralph Dalesio, the recanting witness' father. He told them, "My son knows who did it, because he saw the bodies. This man took him to see the bodies." So, the police went to see Mr. Dalesio, who was in a juvenile detention home, but he could not remember anything

104. FLA. STAT. ANN. § 921.141(5)(b) (1996).

105. *See* Spaziano v. State, 393 So.2d 1119, 1121 (Fla. 1981) (detailing sentencing court's findings with regard to the defendant's prior felony).

about bodies. He said, "I never saw any bodies. Joe told me this, that and the other thing, but nothing about bodies." They went back to him again, and questioned him a little bit more. He tried to please them because they had charges hanging over his head and he was in the juvenile detention center, and because his father wanted him to testify. But he just could not give them what they wanted.

So they hypnotized him. The hypnotist was Joseph B. McCauley. I do not know if any of you are familiar with the Florida case of Pitts and Lee.[106] They were two men who were about to be executed, based on the testimony of a witness who had been hypnotized by Joseph McCauley. But it turned out that that hypnosis was not good.[107]

And in Spaziano's case, the hypnosis was not good either. It was awful. It was not really hypnosis. Mr. Dalesio just told the hypnotist what the hypnotist wanted to hear, in response to very leading questions. The police used Mr. Dalesio's responses to the hypnotist's leading questions as the basis for their probable cause affidavit which enabled them to be authorized to arrest Mr. Spaziano. But Mr. Dalesio told me last year that he was never hypnotized. He admitted to have just played along. He had done his best to please the police, to please his father, to get out of juvenile detention, and to not be arrested again on the burglary charges against him.

He had a million reasons to lie back then, and he lied very well. The State argues that he is lying now. But I do not know what his reasons would be for lying now.

RONALD TABAK: Thank you all very much.

106. Lee v. State, 166 So.2d 131 (Fla. 1964).

107. James T. Wooton, *"It's Over" For Two Men Wrongly Imprisoned 12 Years*, N.Y. TIMES, Sept. 20, 1975, at A1.