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November 8, 2005

The Honorable Bobby Scott
1201 Longworth O.B.
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Scott:

We understand that during consideration by the House of Representatives of H.R. 1751, the Safe Access to Justice and Court Protection Act of 2005, an amendment will be offered by Representative Jeff Flake (R-AZ) to propose a range of changes in the law governing federal habeas corpus review of capital cases. The ABA strongly opposes this amendment and urges House members to reject it.

This amendment proposes a number of technical changes in a complicated area of law without the benefit of hearings or any previous consideration by the House Judiciary Committee. It is inconsistent with other pending House and Senate legislation and its enactment would create more confusion and chaos in a complex area of law.

We are particularly concerned about a provision in the amendment that would completely remove federal court jurisdiction for all sentencing phase claims, not just those found harmless by the state courts. Under this proposal, unless the claim goes to the validity of the conviction itself, it is not cognizable in the federal courts.

If such a profound change in law were enacted, there would no longer be a federal forum for claims of ineffective assistance of counsel at the sentencing phase. As a result, no matter how inadequate the representation (e.g., the sleeping lawyer case), the court would be without jurisdiction. Claims of prosecutorial misconduct relating to the penalty phase would not be cognizable. For example, if the prosecution suppressed evidence about the identity of the trigger-man, that would also not be cognizable. At a resentencing proceeding ordered by a state court on direct appeal, a prosecutor could commit a flagrant violation of *Batson v. Kentucky* by striking all African-Americans from the jury, and a federal court would be powerless to do anything about it. In short, no

matter how unreasonable the state court decision was, there would be no federal jurisdiction for sentencing phase issues. The House should not act on such far-reaching changes in the law of federal habeas corpus jurisdiction without more careful consideration and should reject the Flake amendment when it considers H.R.1751. Fairness and justice demand no less.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans". The letters are fluid and connected, with a prominent initial 'R'.

Robert D. Evans