AMERICAN BAR ASSOCIATION

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STATEMENT OF

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ON BEHALF OF THE

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the subject of

HABEAS CORPUS PROCEEDINGS AND ISSUES OF ACTUAL INNOCENCE

JULY 13, 2005

Executive Summary

S. 1088 should not be enacted. Its primary effect would be to insure that the federal courts did not hear compelling claims – including claims of actual innocence. Any possible gain in speed would be offset by the certain loss of justice. As the ABA has long advocated, true reform lies in the direction of eliminating the technical barriers whose elaboration now occupies so much of the time of the federal courts dealing with habeas corpus petitions in favor of having those courts promptly reach the constitutional merits.

Meanwhile, in the interests of both speed and justice, the Congress should strengthen the right to counsel. At a minimum, it should reject S. 1088, which takes major strides in the opposite direction.

Mr. Chairman and Members of the Committee:

Introduction

I am Eric M. Freedman, the Maurice A. Deane Distinguished Professor of Constitutional Law at the Hofstra Law School. I testify on behalf of the American Bar Association and its more than 400,000 members at the request of its President, Robert J. Grey, Jr. to express its views on increasing the fairness and accuracy of the federal habeas corpus system and on S. 1088, the "Streamlined Procedures Act of 2005." I served as the Reporter for the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2d ed., 2003), *reprinted in* 31 Hofstra L.R. 913 (2003), a heavily-documented work of 175 pages that codifies "the national standard of practice for the defense of capital cases,"[1] and am currently a member of the Steering Committee for the ABA's Death Penalty Representation Project.

By way of personal background, I am a graduate of Yale College and Yale Law School, and an elected member of the American Law Institute. I held a judicial

[1]These and other ABA criminal justice guidelines have been repeatedly cited by the United States Supreme Court as "standards to which we have long referred as 'guides to determining what is reasonable'" when considering the performance of defense counsel, *Wiggins v. Smith*, 123 S.Ct. 2527, 2536-37 (2003) (O'Connor, J.) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). The Court did so most recently just a few weeks ago in *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-66 (2005).

clerkship with the United States Court of Appeals for the Second Circuit and practiced for seven years at a major New York Law firm, where I first engaged in pro bono capital represenation, before becoming a professor at Hofstra Law School in 1988. I remain on the faculty there today and have recently been honored by being named the Maurice A. Deane Distinguished Professor of Constitutional Law. The courses I teach include Constitutional Law, Civil Procedure, Legal History, and The Death Penalty.

I am the author of HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (NYU Press 2002; Paperback ed. 2003) ("Habeas Corpus"), as well as a number of scholarly articles in that field. As a result, I lecture regularly on the subject to federal judges and others in the federal court system.

I am also a specialist in the death penalty, both on the scholarly level and as a very active practitioner in seeking to obtain post-conviction review for Death Row inmates. Last June, the American Association on Mental Retardation presented me with its Dybwad Humanitarian Award for my efforts since 1985 on behalf of Earl Washington, Jr., a mentally retarded black man who was the first person ever released from Death Row in Virginia on the grounds of innocence – an event that occurred when, after years of litigation on other subjects, he eventually benefitted from the very advanced DNA work that Professor Barry Scheck was able to bring to bear on the case. *See* Eric M. Freedman, *Earl Washington's Ordeal*, 29 Hofstra L.R. 1089, 1100-03 (2001).[2]

[2]In is worth noting that the release of Mr. Washington, who had come within nine days of electrocution, required gubenatorial action. The federal habeas courts were ready to let him go to his death. Reviewing Mr. Washington's claim that trial counsel had been ineffective in not

I have annexed a full version of my resume to the written copy of my testimony. The final page is an addendum specifically detailing my habeas corpus and death penalty work.

S. 1088

Turning to the legislation that triggered these hearings, the ABA firmly opposes enactment of S. 1088. In its specific provisions and in its overall approach it would take the justice system in precisely the opposite direction from that which the ABA has consistently urged after a number of careful studies.

I have attached to my written submission a section-by-section analysis of the bill, which details the way in which it overrules years of Supreme Court jurisprudence in a variety of fields and elaborates on the issues that ABA President Grey raised in his letter of June 28 to the committee. While I will of course be happy to answer questions about any particular provision, I wanted to devote my statement to explaining why the overall thrust of this bill is so antithetical to what real reform would require.

The ABA is not opposed to the death penalty, but it is in favor of justice[3] in

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presenting forensic evidence of innocence the Fourth Circuit decided that counsel's performance had indeed been deficient but that Mr. Washington had not suffered any "prejudice" as a result. *See Washington v. Murray*, 4 F.3d 1285, 1292 (4th Cir. 1993). *See generally* Margaret Edds, AN EXPENDABLE MAN: THE NEAR EXECUTION OF EARL WASHINGTON JR. 127-29 (NYU Press 2003).

[3]Except for opposing execution of persons who are mentally retarded or were under 18 at the time of their crimes (both of which exceptions were eventually recognized by the Supreme Court), the ABA "takes no position on the death penalty"; it simply calls upon all jurisdictions wishing to retain capital punishment to comply with a series of policies, including the Death Penalty Representation Guidelines, intended to insure due process and minimize the risk of execution of the innocent. *See* http://www.abanet.org/moratorium/resolution.html (containing

capital and non-capital cases alike. The bedrock definition of justice in this context is that the legal system function reliably to punish the guilty and acquit the innocent. In considering the role that federal habeas corpus should play within a structure designed to achieve these results, the ABA has long recognized two central facts:

A. The government must provide competent counsel to indigent defendants at each and every phase of the criminal process.[4] If it did, both speed and justice would be immeasurably improved. For so long as it does not, both are in peril.

B. Federal habeas corpus proceedings should be structured in such a way as to insure that meritorious claims – be they claims of innocence or of violations of the procedures mandated by the Constitution to insure fairness and accuracy – are heard on the merits[5] rather than disappearing in a thicket of legalisms that Linda Greenhouse of the New York Times has described as "so complex as to be almost theological."[6] As Professor Scheck's testimony discusses in greater detail, there is a chilling risk that the life of an innocent defendant may be lost in that thicket.

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both ABA resolution of Feb. 3, 1997, which embodies this position, and links to relevant policies).

[4]*See* Death Penalty Representation Guideline1.1.A. It is worth noting that the importance to the system of meeting this requirement is as well understood by prosecutors and judges as by defense lawyers; the Death Penalty Representation Guidelines passed the House of Delegates unanimously and with the sponsorship of numerous Association entities. *See* Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Representation Guidelines*, 31 Hofstra L.R. 1097, 1099-1102 (2003).

[5]*See* ABA Res. 115E, ¶¶ 6-9 (Adopted Feb. 1990).

[6]*See* Commentary to Death Penalty Representation Guideline 1.1, 31 Hofstra L.R. at 936 n.57.

S. 1088 attacks both of these core principles.

A. In passing the Antiterrorism and Effective Death Penalty Act (AEDPA), the Congress offered incentives to the states to provide competent representation throughout the litigation of capital cases. If they did so – and both Congress in the Innocence Protection Act of 2004 and President Bush in his State of the Union Message of 2005 have sought to assist them financially in the effort – they would benefit from more favorable legal standards under AEDPA's Chapter 154.

The sad truth is that the states have found it more to their interests to retain their current inadequate systems for the provision of counsel than to obtain the benefits of Chapter 154. As the proponents of S. 1088 rightly point out, dozens of judges have reviewed a large number of state capital defense systems and found them to be uniformly inadequate.[7] The ABA looks at this pictures and concludes that the state

[7]*See* Spears v. Stewart, 283 F.3d 992, 1019 (9th Cir. 2002) (holding state's failure to comply with Arizona's facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions in instant case); Kreutzer v. Bowersox, 231 F.3d 460, 462-63 (8th Cir. 2000) (stating Missouri does not qualify under Chapter 154); Tucker v. Catoe, 221 F.3d 600, 604-05 (4th Cir. 2000) (holding South Carolina's "mere promulgation of a 'mechanism' [was] not sufficient to permit [it] to invoke [Chapter 154's] provisions[;] . . . those mechanisms and standards must in fact be complied with"); Ashmus v. Woodford, 202 F.3d 1160, 1170 (9th Cir. 2000) (California does not qualify under Chapter 154); Baker v. Corcoran, 220 F.3d 276, 285-87 (4th Cir. 2000) (Maryland does not qualify under Chapter 154), *cert. denied*, 531 U.S. 1193 (2001); Green v. Johnson, 116 F.3d 1115, 1120 (5th Cir. 1997) (Texas does not qualify under Chapter 154); Brown v. Puckett, No. 3:01CV197-D, 2003 WL 21018627, at *2-3 (N.D. Miss. Mar. 12, 2003) (Mississippi does not qualify under Chapter 154); Kasi v. Angelone, 200 F. Supp. 2d 585, 592-93 n.2 (E.D. Va. 2002) (stating that "Virginia does not meet the [opt-in provisions]"); Smith v. Anderson, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio does not qualify under Chapter 154); Ward v. French, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (North Carolina does not qualify under Chapter 154), *aff'd*, 165 F.3d 22 (4th Cir. 1998); Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana does not qualify under Chapter 154). Austin v. Bell, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (finding "Tennessee law

mechanisms are in fact inadequate and should be fixed.[8] The proponents of S. 1088 look at this picture and decide that the states' obligation to provide competent counsel should be diluted. That is the plain meaning of the proposal to shift the review responsibility from the courts to the Attorney General (who would be subject to only the most nominal judicial review). The suggestion that this proposal is justified because the courts have a conflict of interest in that they might be subject to additional time limits in their work is implausible for several reasons.[9] But the most salient is that, as the entire profession has long understood, "All actors in the system share an interest in the effective performance of post-conviction counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed."[10]

To allow states with inadequate systems for the provision of counsel to erect yet more barriers to reviewing the results of trials that are simply unreliable in ascertaining the truth is misguided as a matter of public policy. Instead, the ABA encourages the

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[providing] for the appointment of counsel to habeas petitioners did not satisfy prerequisites of § 2261(b)"); Ryan v. Hopkins, No. 4:CV95-3391, 1996 WL 539220, *3-4 (D. Neb. July 31, 1996) (stating "Nebraska's framework for appointing counsel in post-conviction capital cases [was not] in compliance with subsections (b) and (c) of section 2261").

[8]*See* Commentary to Guideline 1.1., 31 Hofstra L. Rev. at 928-29, 932 n.47

[9]Indeed, it is judges who have taken the lead in attempting to make sure that the cases that come before them have been competently litigated. *See* Commentary to Guideline 1.1., 31 Hofstra L. Rev. at 928-29.

[10]Comm. on Civil Rights, Ass'n of the Bar of the City of N.Y., *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Rec. Assoc. Bar 848, 854 (1989).

Congress, as it does the states, to provide the resources necessary to implement its guidelines.[11] As they do so, the courts can and should take this into account in making Chapter 154 determinations.[12]

B. As more fully detailed in the section-by-section analysis, numerous provisions of S. 1088 seek to shield state court determinations from undergoing the scrutiny of their constitutional merits that federal habeas corpus was designed to insure in the first place. Thus, for instance, under Section 4 if a state court declares a claim to have been procedurally defaulted or under Section 6 if it declares a sentencing error to have been harmless, there can be no federal review without a claim of innocence in the first case or a decision of the United States Supreme Court that an error of that type cannot be harmless in the second.

The escape hatch for innocence, as Professor Scheck describes further in his testimony, is illusory. Evidence of innocence ordinarily only emerges after years of effort by effective counsel.[13] If proceedings that are tainted by underlying flaws, whether in the performance of counsel or in the state's violation of other constitutional obligations (such as the production of exculpatory evidence), are shielded from scrutiny

[11]With particular respect to Arizona, one of whose representatives is to testify here this morning, the Director of the ABA's Death Penalty Representation Project visited that state last January and held productive discussions with all segments of the legal community about what additional efforts would be needed for its system to comply with the Death Penalty Guidelines – a goal that all constituencies shared.

[12]*See* Commentary to Death Penalty Representation Guideline 10.1, 31 Hofstra L. Rev. at 990.

[13]*See* Commentary to Death Penalty Representation Guideline 10.7, 31 Hofstra L. Rev. at 1017-18.

by overbroad concepts of "procedural default," the true facts are unlikely to emerge.[14]

As to the harmless error issue, a defendant who has been sentenced to death on the basis of unconstitutional jury instructions certainly has a legitimate grievance[15] regardless of whether the state post-conviction court has pronounced the error that concededly took place in its own system to be harmless.[16]

More centrally, a system in which the federal habeas corpus courts spend an enormous percentage of the time dealing with such issues as exhaustion, procedural default, harmless error, retroactivity, and many others to the virtual exclusion of the question of whether in any particular case the state turned square constitutional corners in obtaining the conviction and sentence under review is a system that exalts form over substance.

S. 1088 would take the system farther in that direction. Speed and accuracy both will be impaired by the enactment of a bill that diverts the courts from the merits while inviting numerous challenges to the validity of its provisions, challenges that will have

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[14]S. 1088 would have the federal courts simply defer to a state court's declaration that a procedural default had taken place. Existing doctrine recognizes a variety of circumstances in which considerations of justice require the federal courts to reach the merits. *See* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-conviction Proceedings*, 5 J. App. Prac. & Proc. 327, 342-43 (2003).

[15]*See* Death Penalty Representation Guideline 10.11.K.

[16]Thus, for instance, if S. 1088 had been in effect, the petitioner in *Allen v. Lee*, 366 F.3d 319 (4th cir. 2004) would have been executed notwithstanding the conclusion of the en banc court, applying Supreme Court precedent regarding the very statute at issue, that the jury had been misinformed as to how it was to deal with mitigating circumstances and might have reached a different outcome if properly instructed.

to be litigated just as the law under AEDPA is becoming relatively stable. Speed and accuracy both would be enhanced by reform proposals that center upon the provision of competent counsel and a judicial focus on the vindication of constitutional guarantees.

Conclusion

For the reasons stated, the ABA opposes the enactment of S.B 1088 in its present form and urges the Committee to work with it in crafting legislation that its architects will be able to view with pride as a long-term improvement to our system of justice.

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