

The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996

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I. INTRODUCTION

Imagine a defendant pleading guilty to an offense and being sentenced to life in prison after his court-appointed attorney informed him that, under the plea, he will be eligible for release after ten years. His attorney reiterates this understanding in open court at sentencing, and neither the prosecutor nor the judge refutes him. Now imagine that, when the defendant arrives at prison, he learns that—contrary to his counsel's information—he will never be released from prison.¹

Under such circumstances a person should be able to receive some sort of relief from the court system. What happens, however, if the state court system refuses to rectify the matter? Traditionally, a defendant could turn to the federal courts, but for nearly a decade access to the federal courts has not always been available due to a devastating combination: pro se litigation² and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).³

* I am an inmate in the Florida Department of Corrections, Inmate ID #0-124004. From 1997 through 2000, I educated myself in the law. In 2001, I completed a paralegal correspondence course through the University of Florida.

In this Article, I use some footnotes to define terms that are unnecessary for the legal community. These footnotes are included for the benefit of fellow inmates and pro se litigants.

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¹ This hypothetical situation is based on the case of Kenneth Brian Victoria. *See State v. Victoria*, Case No. 1986-6167 (Fla. Cir. Ct. Apr. 3, 1987).

² A pro se litigant is “[o]ne who represents oneself in a court proceeding without the assistance of a lawyer.” *BLACK’S LAW DICTIONARY* 1258 (8th ed. 2004).

³ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 (1994) and adding 28 U.S.C. §§ 2261–2266 (2000)). Mr. Victoria, for example, has sought judicial relief pro se, but any federal review sought would be untimely under AEDPA. He has been in prison for twenty years, is currently housed at DeSoto Correctional Institution and is serving a life sentence. *See Fla. Dep’t of Corr., Inmate Population Information Detail*,

I have been a “jailhouse lawyer” since 1997, and I have encountered hundreds of situations like this.⁴ These cases are not limited to defendants who entered into negotiated pleas based on incorrect information provided by defense counsel, but also encompass defendants whose defense counsel failed to investigate alibi witnesses or exculpatory evidence, seek the dismissal of sleeping jurors, object to prosecutorial misconduct, etc. In all of these cases, defendants have been unable to seek federal review of their claims.

I have been incarcerated since June 10, 1995, and I am serving two concurrent life sentences in the Florida Department of Corrections for robbery while armed with a firearm and attempted first degree murder of a law enforcement officer.⁵ Because of my financial inability to retain an attorney to pursue any post-conviction matters for me, I had to engage in two *extremely* difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.

In this Article, I will discuss the difficulties faced by those of us who, because we cannot afford to hire counsel, must challenge violations of our federal constitutional rights ourselves.

When Congress enacted AEDPA, it curbed the federal judiciary’s habeas corpus jurisdiction⁶ and undermined the ability of pro se prisoners to file meaningful federal habeas corpus petitions. As a result of this, many individuals incarcerated in the state prison systems are unable to obtain federal review of potential constitutional violations, simply because they cannot afford to retain counsel to pursue post-conviction matters on their behalf.⁷

In this Article, I will demonstrate the unreasonableness of AEDPA by addressing some of the problems that plague indigent pro se litigation by prisoners—problems which AEDPA greatly enhanced. In Part II of this Article, I will present a brief summary of the writ of habeas corpus and its purpose. In Part III, I will discuss AEDPA and the changes it created. Because the most critical component of pro se litigation is the pris-

<http://www.dc.state.fl.us/appcommon/searchall.asp> (last visited Apr. 22, 2006).

⁴ A jailhouse lawyer is “a person who has taught himself or herself law while serving time, is knowledgeable about technical legal matters, and gives legal advice, esp. to fellow prisoners.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1022 (1996).

⁵ See Transcript of Plea and Sentencing Hearing, *State v. Richards*, No. 95-92-CF (Fla. Cir. Ct. Jan. 25, 1996); Second Amended Information, *State v. Richards*, No. 95-92-CF (Fla. Cir. Ct. Sept. 15, 1995).

⁶ For a description of habeas corpus, see *infra* Part II.

⁷ Indigent prisoners do not have a right to court-appointed counsel for pursuing collateral post-conviction motions. See *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (Rehnquist, C.J., plurality opinion) (no right to counsel in state post-conviction proceedings for death row inmate); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (no right to counsel in state post-conviction proceedings).

oner himself,⁸ I will devote Part IV to an examination of the prisoner and the resources available to him. Specifically, I will examine the educational background and mental health of prisoners, as well as the process of memory acquisition as it may affect a prisoner's memory of his trial. I will also explore some of the defects and inadequacies of prison law libraries, of the legal assistance available to prisoners, and of prison officials' application of the Supreme Court holdings attempting to minimize the hurdles indigent prisoners face in pursuing judicial remedies. In Part V, I will use my own criminal case to demonstrate how AEDPA is preventing federal judicial review of violations of federal constitutional rights. I will conclude, in Part VI, that AEDPA's restrictive provisions should be repealed because they are unreasonable and unnecessary.

I hope this Article brings to light a matter I believe was overlooked by Congress when it enacted AEDPA: the reality of pro se prisoner litigation.

II. THE IMPORTANCE AND HISTORY OF HABEAS CORPUS

Habeas corpus, also known as the "Great Writ," has long held a place in the American legal system.⁹ Moreover, it is of such importance, that it was once claimed that it, along with the Ex Post Facto Clause of the Constitution,¹⁰ eliminated any need for a Bill of Rights.¹¹

The Great Writ was available as part of common law¹² in the American colonies¹³ and was included in the U.S. Constitution after the colonies won independence from England.¹⁴ The very first statute enacted by the First Congress empowered the federal courts "to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."¹⁵ This authority, however, was limited to cases involving federal prisoners.¹⁶

⁸ The *Harvard Civil Rights-Civil Liberties Law Review's* policy is to use the feminine article. Since my experience is with all-male prisons, and because most prisoners are male, I will use the masculine.

⁹ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (referring to habeas corpus as the "Great Writ"). "Habeas corpus" is a Latin phrase meaning "that you have the body." BLACK'S LAW DICTIONARY, *supra* note 2, at 728.

¹⁰ U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

¹¹ THE FEDERALIST NO. 84, at 345 (Alexander Hamilton) (Buccaneer Books 1992).

¹² Common law is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." BLACK'S LAW DICTIONARY, *supra* note 2, at 293.

¹³ See *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973).

¹⁴ See U.S. CONST. art. I, § 9, cl. 2 (the Suspension Clause) ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

¹⁵ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (codified as amended at 28 U.S.C. § 2241 (1948)).

¹⁶ *Id.* ("[W]rits of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the *United States*, or are committed for trial before some court of the same . . .") (emphasis added); see also *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845).

Since Congress did not define the term “habeas corpus,” courts had to resort to the common law for clarification of the statute. Even though the purpose of the Great Writ was to secure the liberation of those unlawfully incarcerated, at common law, a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that the confinement was legal. Thus, such a judgment, without more, prevented issuance of a writ.¹⁷

In 1861, at the beginning of the Civil War, President Lincoln suspended the writ of habeas corpus. This suspension was met with the immediate protest of Chief Justice Roger B. Taney, who claimed that only Congress held the authority to suspend the Great Writ.¹⁸ Chief Justice Salmon P. Chase later reaffirmed the magnitude of habeas corpus, describing it as “the best and only sufficient defence [sic] of personal freedom.”¹⁹ With the Judiciary Act of 1867, Congress changed the common law rule by providing for an inquiry into the facts of detention, a process now referred to as an evidentiary hearing, and expanded the federal courts’ habeas corpus authority to encompass state prisoners.²⁰ Over time, the habeas corpus statute was recodified several times, but the basic grant of authority to issue the writ remained unchanged.²¹

¹⁷ See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 197 (1830).

¹⁸ See *Ex parte Merryman*, 17 F. Cas. 144, 151-52 (No. 9,487) (C.C.D. Md. 1861). In response to Chief Justice Taney’s protest, Congress soon thereafter delegated the authority to suspend the writ. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265 (1970). Including the suspension by Lincoln, codified by Congress in the Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, the Great Writ has only been suspended four times. Limited suspensions were invoked in 1871 and 1905 by Presidents Ulysses S. Grant and Theodore Roosevelt, respectively. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 178 n.190 (1980); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 14–15 (suspension under Grant); Act of July 1, 1902, ch. 1369, 32 Stat. 692 (suspension under Roosevelt). The most recent suspension took place in Hawaii in 1941, when territorial governor Joseph B. Poindexter suspended the writ following the attack at Pearl Harbor. *Duncan v. Kahanamoku*, 327 U.S. 304, 307–08 & nn.1–2 (1946). Pursuant to Section 67 of the Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141 (1900), Poindexter suspended habeas corpus, placed Hawaii under martial law, and relinquished civilian gubernatorial and judicial authority to U.S. Army General Walter C. Short. *Kahanamoku*, 327 U.S. at 353–54 & n.6. General Short closed all civilian courts and created military tribunals that had the power to try civilians for violating territorial or federal law, as well as violating orders of the military government he had established. See Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospective on Martial Law in Hawai’i*, 19 HAWAII L. REV. 477, 487–88 (1997). This governmental regime lasted until October 1944. *Id.* at 488, 611. In *Duncan v. Kahanamoku*, this habeas suspension was ruled illegal, not unconstitutional, on the basis that the Organic Act’s authorization of martial law did not include the power to supplant civilian courts with military tribunals for trials of civilians. 327 U.S. at 322–24.

¹⁹ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869).

²⁰ Act of Feb. 5, 1987, ch. 28, § 1, 14 Stat. 385 (“[T]he several courts of the United States, and the several justices and judges of such courts . . . shall have power to grant writs of habeas corpus in *all* cases where *any* person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . .”) (emphasis added).

²¹ The provisions from the Act of 1867 did not change in any important way until 1948, when they were codified in 28 U.S.C. §§ 2241–2255. See Act of June 25, 1948, ch.

For centuries a person deprived of his liberty has had habeas corpus available to deliver him from unjust confinement.²² However, this beacon of hope is beginning to fade, and the writ of habeas corpus may now be evolving into what could be considered the “Great Unobtainable Writ.”

Until recently, two important characteristics of habeas corpus remained unchanged. There was no statute of limitations²³ for seeking the writ because it was believed that the right of personal freedom from illegal restraint never lapses.²⁴ Also, there was no prohibition against successive applications for a writ.²⁵ Sadly, public perception of these essential characteristics contributed to the mistaken belief that the Great Writ was being abused,²⁶ and on April 24, 1996, they faded into history when President Clinton signed AEDPA into law.²⁷

153, § 2241, 62 Stat. 964, 964–65. Although the revision did not significantly change the grounds for challenges to detention or the prisoners to whom the writ extended, it created a new section, § 2254, dealing with challenges to custody from state court. See RICHARD H. FALLON JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1288 (5th ed. 2003). This structure remained for nearly a half-century, with only small alterations, until the passage of AEDPA in 1996. See *id.*

²² The roots of habeas corpus are usually attributed to Clause 39 of the Magna Carta: “No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.” MAGNA CARTA CH. 39 (1215).

²³ A “statute of limitations” is a statute establishing a maximum period of time in which an action may be brought. See BLACK’S LAW DICTIONARY, *supra* note 2, at 1450.

²⁴ See *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (“The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.”); *United States v. Smith*, 331 U.S. 469, 475 (1947) (“habeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time”); see also Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2127–28 (2002).

²⁵ None of the amendments mentioned in this Part included any sort of prohibition on filing successive habeas applications. For a review of other amendments, see 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 69–78 (4th ed. 2001).

²⁶ Compare 142 CONG. REC. S3454, 3459 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) (“[Habeas corpus] is being abused all over the country.”), with 142 CONG. REC. S3427, 3439 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan) (“I make the point that the abuse of habeas corpus . . . is hugely overstated.”).

My assertion that Senator Hatch’s belief is “mistaken” is well-founded. In fact, between 1980 and 1996, the per-prisoner habeas filing rate for state and federal prisoners declined by forty-seven percent. See JOHN SCALIA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURT, 1980–1996, at 4–5 (1997). According to statistics from 1995, most federal habeas petitions were terminated in district court in less than one year. *Id.* at 7. For an explanation of the problems with restricting successive habeas corpus petitions, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002).

²⁷ President William J. Clinton, Statement on Antiterrorism Bill Signing (Apr. 24, 1996) (“I have today signed into law . . . the ‘Antiterrorism and Effective Death Penalty Act of 1996.’”).

For the first time in history, habeas corpus petitions were subject to a statute of limitations, and successive applications for a writ were prohibited.²⁸ These amendments²⁹ to habeas corpus procedures have tragically “eviscerate[d] the ancient writ of Habeas Corpus”³⁰

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 19, 1995, a tragic event occurred that would dramatically change the Great Writ: a bomb exploded in the Alfred P. Murray Federal Building in Oklahoma City, killing 168 people and injuring nearly 500 more. As a result of this terrible bombing, AEDPA “was drafted, enacted, and signed in an atmosphere of anger and fear.”³¹ At this point let me make it clear that I do believe legislation was warranted to combat terrorism. However, limitations on habeas corpus procedures do not serve that purpose.

AEDPA did contain many provisions that were related to terrorism prevention and victims of terrorist attacks.³² The habeas provisions, however, were called a “knee-jerk reaction”³³ to the Oklahoma City bombings. As the *New York Times* noted, including these habeas provisions in this antiterrorism bill was nothing more than an “exploit[ation of] public concerns about terrorism to threaten basic civil liberties.”³⁴

It was claimed that these habeas provisions were “the only legislation Congress [could] pass as a part of [AEDPA] that [would] have a direct effect on the Oklahoma City bombing case.”³⁵ Such legislation, though, does nothing to *prevent* terrorism or to *fight* terrorism: “To truly protect citizens of this Nation, terrorists must be stopped before they strike”³⁶ In order for a terrorist to be affected by a change in habeas proceedings, the terrorist must already have committed an act of terrorism.³⁷ As Senator Feingold stated:

²⁸ See 28 U.S.C. § 2244(d)(1)–(2) (2006) (AEDPA’s new time limitation); 28 U.S.C. § 2244(b) (2006) (AEDPA’s new restrictions on successive petitions).

²⁹ An amendment is an alteration by modification, deletion, or addition. See BLACK’S LAW DICTIONARY, *supra* note 2, at 89–90.

³⁰ 142 CONG. REC. S3454, 3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy).

³¹ Stevenson, *supra* note 26, at 701.

³² See, e.g., 28 U.S.C. § 2339B (2006) (prohibition on international terrorism fundraising); 28 U.S.C. § 2332(d) (2006) (prohibition on assistance to terrorist states); 18 U.S.C. § 3663A (2006) (mandatory victim restitution).

³³ 142 CONG. REC. E638-01 (statement of Rep. Young) (“I strongly feel this legislation is a knee-jerk reaction to a most heinous crime.”).

³⁴ Editorial, *Grave Trouble for the Great Writ*, N.Y. TIMES, Apr. 8, 1996, at A14.

³⁵ 142 CONG. REC. S3352, 3353 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

³⁶ 142 CONG. REC. S3454, 3462 (daily ed. Apr. 17, 1996) [hereinafter Feingold Statement] (statement of Sen. Feingold).

³⁷ 142 CONG. REC. S3352, 3357 (daily ed. Apr. 16, 1996) (statement of Sen. Biden) (“Remember, folks, you already have to be in jail, convicted of a crime, in order to be able to file one of these [habeas] petitions . . .”).

The link between habeas corpus and keeping the people of this Nation free from acts of terrorism is tenuous at best. The argument that [the habeas provisions in AEDPA] will prevent another Oklahoma City [was] one which [was] manufactured solely to justify inclusion of these unrelated provisions in a bill originally meant to address terrorism.³⁸

Because of AEDPA, habeas corpus proceedings for state prisoners now have: (1) a one-year statute of limitations;³⁹ (2) a prohibition against successive applications for a writ, except when, in very limited circumstances, an appellate⁴⁰ court grants prior approval;⁴¹ (3) restrictive limits on obtaining permission to appeal⁴² decisions of the trial court;⁴³ (4) modified exhaustion of remedies⁴⁴ requirements for pursuing claims prior to seeking federal review;⁴⁵ (5) a requirement that federal courts defer to state court determinations on federal constitutional issues;⁴⁶ and (6) additional restrictive procedures that become available to states if they conform with certain requirements.⁴⁷

To prevent a prisoner's federal habeas corpus time limitation from expiring prior to the exhaustion of his state court remedies, Congress included a "tolling" provision in AEDPA.⁴⁸ This tolling provision functions like a time clock. Whenever a prisoner's conviction and sentence become final at the conclusion of direct review, the time clock starts. Whenever a state post-conviction motion is properly filed with the state courts, the time clock pauses until completion of the proceeding.⁴⁹ Once the proceeding is complete, the time clock begins to run from the point in time that it left off. The time limit does not start over at the completion of each state court proceeding, unless either the prisoner is re-tried, or an adjustment

³⁸ Feingold Statement, *supra* note 36.

³⁹ 28 U.S.C. § 2244(d)(1) (2006) ("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.").

⁴⁰ An appellate court is a court with jurisdiction to review decisions of lower courts or administrative agencies. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 378.

⁴¹ 28 U.S.C. § 2244(b) (2006).

⁴² To appeal is "[t]o seek review (from a lower court's decision) by a higher court." BLACK'S LAW DICTIONARY, *supra* note 2, at 106.

⁴³ 28 U.S.C. § 2253 (2006).

⁴⁴ Exhaustion of remedies refers to taking advantage of all available remedies. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 613–14.

⁴⁵ 28 U.S.C. § 2254(b)–(c) (2006).

⁴⁶ 28 U.S.C. § 2254(d) (2006).

⁴⁷ 28 U.S.C. §§ 2261–2266 (2006).

⁴⁸ 28 U.S.C. § 2244(d)(2) (2006) ("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.").

⁴⁹ In *Artuz v. Bennett*, the U.S. Supreme Court examined AEDPA's tolling provision and explained that a "properly filed" state post-conviction motion was one that complied with applicable filing requirements. 531 U.S. 4, 9–10 (2000).

is made to his sentence.⁵⁰ This time clock runs until either the prisoner files his federal habeas petition, or a total of 365 days has elapsed during which he has no properly filed motion pending in state court.

For the pro se indigent prisoner, seeking federal habeas corpus relief prior to AEDPA was already an extremely daunting task that was rarely achieved.⁵¹ The pro se prisoner had to teach himself complex criminal procedure,⁵² legal reasoning,⁵³ legal doctrines,⁵⁴ how to research claims, and how to write legal briefs and motions;⁵⁵ only then could he actually initiate a proceeding. In the post-AEDPA world, the pro se prisoner must still learn the same procedures, doctrines, and skills, but now must do so within an unrealistic and unreasonable one-year time period.

Because of the reality of the circumstances facing pro se prisoners, which I will discuss in the next section, the new statute of limitations for seeking a writ of habeas corpus has resulted in an untold number of indigent prisoners having federal review of potential federal constitutional violations completely foreclosed to them.⁵⁶

Not only is the one-year statute of limitations unreasonable and unrealistic, it is also unnecessary. In all of the time that I have been incarcerated and been a jailhouse lawyer, I have never witnessed a situation in which a pro se prisoner wished to delay his post-conviction remedies. Those of us who are incarcerated and pursuing such proceedings are doing so because we wish to be free. Intentionally or needlessly delaying the pursuit of these remedies would be illogical and contrary to the reason we file the petitions in the first place.

⁵⁰ See *Walker v. Crosby*, 341 F.3d 1240, 1246 (11th Cir. 2003) (“[T]he statute of limitations for a habeas application challenging a resentencing court’s judgment begins to run on the date the resentencing judgment becomes final and not the date the original judgment becomes final.”).

⁵¹ In 1995, prior to the passage of AEDPA, only 1.2% of state prisoners’ habeas petitions disposed of in U.S. district courts resulted in judgments for the inmate. SCALIA, *supra* note 26, at 6. The percentage was only slightly higher for federal prisoners. *Id.*

⁵² Some procedures that I had to teach myself include: types and availability of pre-trial motions, discovery procedures, rules of evidence, procedures for suppression of inadmissible evidence, jury selection procedures, procedures for direct and cross-examination of witnesses, types of objections, types of motions available during trial, procedures for requesting curative instructions or mistrials, post-trial motions, sentencing procedures, rules of appellate procedure, rules governing state post-conviction procedures, and rules governing federal post-conviction procedures.

⁵³ This includes understanding and developing trial strategies and trial tactics, coherent theories of defense, etc.

⁵⁴ For example, this could include: the “fruits of the poisonous tree” doctrine, exclusionary rules, good-faith exceptions, fundamental/plain error analysis, harmless error analysis, Mansfield Doctrine, res judicata, last antecedent rule, express mention/implied exclusion, ejusdem generis, stare decisis, etc.

⁵⁵ A brief is “[a] written statement setting out the legal contentions of a party in litigation, esp. on appeal.” BLACK’S LAW DICTIONARY, *supra* note 2, at 204. A motion is “[a] written or oral application requesting a court to make a specified ruling or order.” *Id.* at 1036.

⁵⁶ Unfortunately, I am one such pro se prisoner who is unable to seek federal review because of AEDPA’s time limitation.

Moreover, the time limitation has a perverse effect, as prisoners no longer have sufficient time to learn legal procedures and research potential claims adequately. Therefore, many pro se prisoners, rushed to file petitions, end up filing claims that may not warrant reversal of a conviction while overlooking claims that may.⁵⁷

Based on my years of personal experience with pro se litigation and pro se prisoners, I can assert that prisoners do not intentionally file petitions raising claims they know are without merit. We research claims to the best of our ability using what limited legal knowledge and legal reference materials we have at our disposal. With these constraints, just researching claims consumes a great deal, if not all, of AEDPA's time limitation for filing a habeas petition. The one-year statute of limitations has forced many of us to file petitions without being able to research some claims adequately. In my experience AEDPA has, therefore, had the perverse result of *increasing* the number of meritless claims filed by pro se litigants. At times it is only after we file petitions—trying to comply with AEDPA—that we learn that a claim may not have the merit we originally believed it to have.

IV. AEDPA AND PRISONER LITIGATION

In nearly eleven years of incarceration, I have never seen, nor heard of, a non-death row prisoner having a court-appointed or pro bono attorney research, draft, and file post-conviction pleadings for him. These matters have all been performed without guidance from counsel, using what legal materials and assistance were available within the prison walls.

It goes without saying that an indigent pro se prisoner faces greater hurdles to gaining meaningful access to the courts than does an affluent free citizen.⁵⁸ Recognizing this fact, the U.S. Supreme Court handed down an entire body of case law attempting to reduce the additional burdens of indigency and incarceration. *Lane v. Brown* prohibited the states from adopting regulations that leave indigent defendants cut off from the appellate process by virtue of their indigence.⁵⁹ *Burns v. Ohio* required that indigent prisoners be allowed to file appeals and habeas corpus petitions without paying docketing fees.⁶⁰ *Griffin v. Illinois* ruled that, when necessary, trial records must be provided at no charge to inmates who are unable to afford them.⁶¹ *Younger v. Gilmore* affirmed a district court's opinion in-

⁵⁷ These assertions are based on my experiences as a jailhouse lawyer.

⁵⁸ In contrast to an indigent prisoner, an affluent free citizen may simply retain an attorney to pursue legal remedies on his behalf.

⁵⁹ 372 U.S. 477, 481 (1963).

⁶⁰ 360 U.S. 252, 257–58 (1959).

⁶¹ 351 U.S. 12, 19–20 (1956). The Supreme Court has only rejected an indigent defendant's claim to transcripts where an adequate alternative was available but not used, *see* *Britt v. North Carolina*, 404 U.S. 226, 230 (1971), or because the request was plainly frivolous and a prior opportunity to obtain a transcript had been waived. *See* *United States v.*

validating an overly restrictive California prison regulation limiting prisoners' access to books and a law library.⁶² *Ex parte Hull* struck down a regulation that required prisoners to obtain a determination from a parole board "legal investigator" that a petition was properly drawn prior to filing.⁶³ *Johnson v. Avery* invalidated a prison regulation that prohibited inmates from assisting one another with habeas corpus petitions.⁶⁴ *Bounds v. Smith* held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."⁶⁵ More recently, in *Lewis v. Casey*, the Supreme Court limited the *Bounds* decision but reaffirmed a prisoner's constitutional right to have the capability of bringing contemplated challenges to his conviction and sentence.⁶⁶

The foregoing body of case law creates the impression that everyone has equal access to the courts, whether they are affluent or indigent, imprisoned or free. The efforts of the Supreme Court to place indigent, pro se prisoners on equal footing with non-indigent litigants appears to imply that any imposition on the habeas corpus right would affect everyone equally. Unfortunately for indigent, pro se prisoners, things are not always as they appear.

An individual who is involved in the judicial process on a daily basis can attest to the fact that the judicial system consists of two entirely different "systems" that can best be described as the "myth system" and the "real system."⁶⁷

The "myth system" is the way the judicial system is designed to work: an indigent defendant has a constitutional right to court-appointed counsel;⁶⁸ the right to appointed counsel extends to direct appellate review;⁶⁹ and the defendant has a constitutional right for counsel to provide adequate and effective representation.⁷⁰ The "real system" is the reality of the judicial process. Indigent defendants *do* receive appointed counsel, but these attorneys regularly have such an overburdened caseload that they

MacCollom, 426 U.S. 317, 328–29 (1976).

⁶² 404 U.S. 15, 15 (1971) (*aff'g* 319 F. Supp. 105 (N.D. Cal. 1970)).

⁶³ 312 U.S. 546, 549 (1941).

⁶⁴ 393 U.S. 483, 490 (1969).

⁶⁵ 430 U.S. 817, 828 (1977).

⁶⁶ 518 U.S. 343, 356 (1996).

⁶⁷ The "myth system" and "real system" to which I refer are similar to the "myth system" and "operational code" described by Professors Reisman and Schrieber. See W. MICHAEL REISMAN & AARON M. SCHRIEBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 23–35 (1987).

⁶⁸ See *Gideon v. Wainwright*, 372 U.S. 335, 339–42 (1963); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

⁶⁹ See *Halbert v. Michigan*, 125 S. Ct. 2582, 2593–94 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963).

⁷⁰ See *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

are unable to spend sufficient time on any one particular case.⁷¹ Counsel, in the majority of cases, lack funds to retain expert witnesses or to perform independent tests on evidence and must use tests performed by the prosecution.⁷² Many of the attorneys lack funds to hire enough investigators to prepare the cases adequately.⁷³

The “myth system” and the “real system” problem is not limited to the innocence/guilt phase of the judicial process, but also extends to post-conviction proceedings.

The efforts of the U.S. Supreme Court to place indigent prisoners on equal footing with non-indigent non-prisoners, as laudable as they were, unfortunately are part of the “myth system.” Comprehending the reality of pro se prisoner litigation requires looking beyond the case law and examining the average pro se prisoner, the challenges he faces, and the regulations imposed upon him and implemented by prison officials in response to governing laws.

This Part of the Article discusses the reality of pro se litigation as I have witnessed and experienced it. I will show that the average prisoner lacks the education, and sometimes the mental competency, necessary to pursue meaningful and timely post-conviction remedies. Prisoners must count on unreliable memories of trial court proceedings and may not be able to obtain a record of their trial in time to meet AEDPA’s deadline. In addition, prisoners sometimes cannot obtain assistance from prison law clerks, and cannot receive assistance from other prisoners without fear of being subjected to disciplinary action. Even the limited assistance that clerks provide is not always helpful because law clerks are often insufficiently trained or incapable of providing necessary legal assistance. The above hurdles, taken together with the fact that prison law libraries are inadequate and governed by outrageously restrictive regulations, make the pursuit of meaningful pro se litigation from prison prohibitively difficult.

A. The Educational Background of Prisoners

Because every facet of pro se prisoner litigation begins with the prisoner, understanding the effects of AEDPA requires understanding the average prisoner. Prisoners do not enter the prison system armed with a legal education and skilled in the art of legal advocacy; rather, they must acquire what legal knowledge they can once in prison. This can be an extremely daunting task. As the Supreme Court long ago acknowledged, “[prisons] include among their inmates a high percentage of persons who

⁷¹ Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005).

⁷² *Id.*

⁷³ *Id.* at 1735.

are totally or functionally illiterate, whose educational attainments are slight and whose intelligence is limited.”⁷⁴

The claim that prisoners have “slight” educational attainments is an understatement. In fiscal year 2003-04, using the Test of Adult Basic Education (“TABE”), the Florida Department of Corrections (“F.D.O.C.”) found that the average tested prisoner has obtained an education equivalent to a 5.5 grade level.⁷⁵ This TABE grade level score is consistent with the tests performed in each of the four preceding years.⁷⁶ For an inmate to be considered even functionally literate, he must achieve at least a 6.0 grade level TABE score.⁷⁷ Since reading and language skills are essential to judicial litigation, these two areas of the TABE should be examined in particular. The average reading score of a Florida inmate is a 6.0 grade level, while the average language score is a mere 4.8 grade level.⁷⁸

A person with such slight educational attainments can hardly be expected to teach himself complex legal procedures and how to research viable post-conviction claims, and then to pursue meaningful post-conviction remedies pro se. As unrealistic as these expectations are, they are even more unrealistic in light of AEDPA’s one-year time limitation.

B. *The Mental Health of Prisoners*

A significant portion of the U.S. prison population lacks the mental competency necessary to proceed pro se adequately and effectively. In fact, the rate of mental illness among prisoners is more than *triple* the rate in the rest of the U.S. population.⁷⁹ A Bureau of Justice Statistics

⁷⁴ Johnson v. Avery, 393 U.S. 483, 487 (1969) (citing Note, *Constitutional Law: Prison “No-Assistance” Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347–48, 360–61 (1968)).

⁷⁵ FLA. DEP’T OF CORR., ANNUAL REPORT 2003-2004 M23, available at <http://www.dc.state.fl.us/pub/annual/0304/pdfs/education.pdf> [hereinafter ANNUAL REPORT 2003-2004]. The TABE is a standardized test that assesses a person’s general education level in math, reading, and language comprehension skills. A test score reflects the person’s approximate grade level. For example, a TABE score of 5.0 means the person’s approximate level of education in that area is a beginning fifth grade level. The highest score achievable on the TABE is a 12.9 grade level, which indicates an education level of at least a high school graduate. Cf. Sys. for Adult Basic Educ. Support, *Glossary of Useful Terms*, <http://www.sabes.org/assessment/glossary.htm> (last visited Apr. 22, 2006).

⁷⁶ ANNUAL REPORT 2003-2004, *supra* note 75, at M24.

⁷⁷ FLA. DEP’T CORR., PROCEDURES MANUAL 501.106 (2002).

⁷⁸ See ANNUAL REPORT 2003-2004, *supra* note 75, at M23.

⁷⁹ A National Alliance on Mental Illness (NAMI) fact sheet updated in January 2001 indicates that approximately 5.4% of the U.S. population suffers from mental illness. Nat’l Alliance on Mental Illness, *About Mental Illness*, <http://www.nami.org/helpline/factsandfigures.html> (last visited Apr. 22, 2006) (cited in SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS n.12 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>). The American Psychiatric Association has reported that one out of every five (twenty percent) inmates in the U.S. prison population suffers from serious mental illness. AM. PSYCHIATRIC ASS’N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS xix (2d ed. 2000) (cited in ABRAMSKY & FELLNER, *supra*, at n.13). This disproportionate rate of mental illness was confirmed in a

report describes the extent of this phenomenon, finding that approximately sixteen percent of prisoners in the United States are mentally ill.⁸⁰ The National Commission on Correctional Health Care similarly finds that:

On any given day, between 2.3 and 3.9 percent of inmates in State prisons are estimated to have schizophrenia or other psychotic disorder, between 13.1 and 18.6 percent major depression, and between 2.1 and 4.3 percent bipolar disorder (manic episode). A substantial percentage of inmates exhibit symptoms of other disorders as well, including between 8.4 and 13.4 percent with dysthymia, between 22.0 and 30.1 percent with an anxiety disorder, and between 6.2 and 11.7 percent with post-traumatic stress disorder.⁸¹

Nearly ten percent of all State inmates are being treated with psychotropic medications.⁸² This percentage increases to nearly twenty percent in Hawaii, Maine, Montana, Nebraska, and Oregon.⁸³ These medications do not necessarily alleviate the psychological encumbrances faced by the prisoners. In many instances these medications may actually increase the difficulties for these prisoners because of the cognitive side effects of the psychotropic medications. These side effects are well-documented and may include: decreased psychomotor speed and general intelligence, and memory loss; sedation, drowsiness, and deficits in learning, attention, and concentration; and psychosis, confusion, and somnolence.⁸⁴

telephone interview with my brother Sid E. O'Bryant, Ph.D. Telephone Interview with Sid E. O'Bryant, Ph.D., Assistant Professor, Dep't of Neuropsychiatry and Behavioral Scis., Texas Tech University Health Science Center, in Lubbock, Tex. (Sept. 3, 2005).

⁸⁰ PAULA M. DITTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999) (*cited in* ABRAMSKY & FELLNER, *supra* note 79, at n.16), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>.

⁸¹ I NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 25 (2002) (*cited in* ABRAMSKY & FELLNER, *supra* note 79, at n.15), *available at* [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf). Dysthymia is "morbid anxiety and depression accompanied by obsession." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 712 (1981).

⁸² See ALLEN J. BECK & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 4 (2001), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf>. Psychotropic medications are medications prescribed by a psychiatrist that "affect mental activity, behavior, or perception." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY, *supra* note 4, at 1562.

⁸³ BECK & MARUSCHAK, *supra* note 82, at 1.

⁸⁴ See generally JERROLD G. BERNSTEIN, HANDBOOK OF DRUG THERAPY IN PSYCHIATRY 266-97 (3d ed. 1995); S. J. ENNA & JOSEPH T. COYLE, PHARMACOLOGICAL MANAGEMENT OF NEUROLOGICAL AND PSYCHIATRIC DISORDERS 22-24 (1998); Joseph F. Goldberg & Katherine E. Burdick, *Cognitive Side Effects of Anticonvulsants*, 62 J. CLIN. PSYCHIATRY (SUPP. 14) 27-33 (1998); Michael Kolber et al., *Adverse Events with Zyan (Bupropion)*, 169(2) CAN. MED. ASS'N J. 103-04 (2003); Oriano Mecarelli et al., *Clinical, Cognitive, and Neurophysiological Correlates of Short Term Treatment with Carbamazepine, Oxcar-*

Considering the foregoing information, it is both unreasonable and unrealistic to expect mentally ill prisoners to file meaningful petitions within a one-year time limitation. Under the guidance of *Bounds v. Smith*, a prisoner meeting the foregoing description should be provided “adequate assistance from persons trained in the law.”⁸⁵

Prison officials in states such as Florida *have* adopted regulations pertaining to mentally ill prisoners.⁸⁶ These vague regulations, though, are woefully inadequate to satisfy any “adequate assistance” standard and do not establish any set criteria to consider in determining what constitutes a “mentally disordered” inmate. For the purpose of this Article, I can use myself as an example to show the deficiencies in these regulations when a prisoner such as I have been describing attempts to engage in pro se litigation. I am an inmate in the Florida Department of Corrections who was treated with psychotropic medications for approximately two years of my incarceration.

Shortly after my arrest⁸⁷ I was given a psychological evaluation and placed on Wellbutrin, Cogentin, Tegretol, and Loxitane at a dosage of 200 mg of each, three times a day.⁸⁸ These medications had me in a continuously drugged state and affected my memory of some of the proceedings concerning my criminal case. Upon my intake into the F.D.O.C. in January 1996, I was evaluated by F.D.O.C. mental health officials, who de-

bazepine, and Levvetiracetam in Healthy Volunteers, 38 ANNALS PHARMACOTHERAPY 1816–22 (2004); J. D. Vanderkooy, *Antidepressant Side Effects in Depression Patients Treated in a Naturalistic Setting: A Study of Bupropion, Moclobemide, Paroxetine, Sertraline, and Venlafaxine*, 47(2) W. CAN. J. PSYCHIATRY 174–80 (2002).

⁸⁵ 430 U.S. 817, 828 (1977).

⁸⁶ See FLA. ADMIN. CODE ANN. r. 33-501.301(3)(e) (2005) (“Inmates who are illiterate or have disabilities that hinder their ability to research the law and prepare legal documents and legal mail, and need research assistance, shall be provided *access* to the law library and to inmate law clerks . . . Upon receipt of [a] . . . request . . . the law library supervisor shall schedule the inmate for a *visit* to the law library or a *visit* with an inmate law clerk.”) (emphasis added); *id.* at r. 33-501.301(7)(c) (“[M]ajor and minor collection law libraries shall be assigned inmates as inmate law clerks to assist inmates in the research and use of the law library collection, and in the drafting of legal documents . . . Institutions shall assign additional inmate law clerks to the law library as needed to ensure that illiterate and impaired inmates are provided research assistance.”).

⁸⁷ On June 10, 1995, while on various drugs and alcohol, I robbed a motel clerk and was involved in a shootout with police. I eventually pled guilty to robbery while armed with a firearm and attempted first degree murder of a law enforcement officer, and was sentenced to two concurrent life sentences. See Transcript of Plea and Sentencing Hearing, *supra* note 5, and accompanying text.

⁸⁸ Wellbutrin is an antidepressant that was used to treat my severe depression. Cogentin was prescribed to me in an attempt to offset the side effects of the other medications. This effort failed. If anything, the side effects I was experiencing increased while I was taking Cogentin. Tegretol was prescribed to me for treatment of severe mood swings. Loxitane is an antipsychotic medication that was given to me because of the hallucinations I was experiencing. See generally MANUAL OF CLINICAL PSYCHOPHARMACOLOGY (5th ed. 2005).

I was severely abusing drugs and alcohol at the time of my arrest. The majority of my mental health issues at the time, I believe, were attributable in part to withdrawal from the illegal drugs and alcohol.

terminated that I was being overmedicated. All of the medications were discontinued, with the exception of Wellbutrin, which was reduced to 100 mg, twice a day. After this adjustment to the psychotropic medications, my mental faculties improved rapidly and significantly.⁸⁹ I was given the TABE in February 1996, approximately two weeks after the adjustment to my medications, and scored a total battery of 12.9 grade level.⁹⁰ In March 1996, I was re-evaluated by mental health officials, and my medication was again adjusted. The Wellbutrin was increased to 200 mg, twice a day, and I was placed on Tegretol at a dosage of 200 mg, twice a day. My mental condition quickly deteriorated. As a result of taking these medications, I began experiencing side effects such as sedation, disorientation, confusion, lack of concentration, memory loss, difficulty comprehending things, and at times I did not even know where I was. It was while I was in this condition that I had to begin pursuing post-conviction remedies pro se, since I could not afford an attorney and Florida does not provide counsel to indigent defendants for the preparation of collateral post-conviction motions or petitions.⁹¹

An inmate law clerk⁹² who worked in the law library at Washington Correctional Institution described his attempts to discuss legal matters with me as follows:

Mr. O'Bryant would just stare at me. He was not able to grasp the concept of different levels of degree [of offenses] (he was sentenced under a life felony as opposed to a first degree felony). Furthermore, he was not even able to grasp the information of how the legal books corresponded to one another. It was as if I was teaching basic legal principles to a 12 year old.

After repeatedly covering any particular subject Mr. O'Bryant would finally say "Now I understand," but the next time I saw him he would only be able to remember a small portion of what was covered previously, leading me to believe that he never really understood to start with.⁹³

⁸⁹ My thoughts were more coherent. I could concentrate on things and could remember events. I was not disoriented.

⁹⁰ A total battery TABE score is the cumulative average of all areas of the TABE test. See ANNUAL REPORT 2003-2004, *supra* note 75, at M23.

⁹¹ FLA. STAT. § 924.066(3) (2005) (effective July 1, 1996) ("A person in a noncapital case who is seeking collateral review under this chapter has no right to a court-appointed lawyer."):

⁹² An inmate law clerk is a prisoner who is given a job assignment in a prison law library and who has been "trained" by prison officials to provide assistance to other inmates in preparing and/or pursuing legal matters. See FLA. ADMIN. CODE ANN. r. 33-501.301(2)(e) (2005).

⁹³ Affidavit of Christopher Todd Benton at 2 (Sept. 29, 2004), *O'Bryant v. Sapp*, No. 3:03-cv-803-J-20MCR (M.D. Fla. 2003) (submitted in support of claim of entitlement to equitable tolling of AEDPA's one-year time limitation) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

Despite my mental condition, my relatively high TABE score (which I achieved during my brief period of clarity when my medications had been reduced) disqualified me from being eligible to have a law clerk assigned to my legal work to help draft a post-conviction motion on my behalf,⁹⁴ even though my medical records demonstrated that I was suffering from psychosis.⁹⁵ If I had been given the TABE test at the time I was trying to get assistance from the law library, and while I was on the increased medications, I believe I would have qualified for assistance.

Dr. Judith O’Jile, director of the Neuropsychology Laboratory of the University of Mississippi Medical Center, reviewed my situation and determined that “the combined side effects of these medications could have easily caused a diminished ability to read, comprehend, and remember the complex legal information necessary for him to complete the legal procedures, research legal issues, and draft legal petitions and/or motions in a timely manner.”⁹⁶

However, because of my ineligibility to have a law clerk assigned to assist me in pursuing post-conviction remedies—which was determined based solely on my TABE score, without any consideration of my psychological status—and my inability to grasp the complex legal information necessary to pursue these remedies myself, I was unable to comply with AEDPA’s one-year time limitation.

My conviction and sentence became final prior to AEDPA’s April 24, 1996, effective date.⁹⁷ Therefore, I had until April 24, 1997, to initiate state post-conviction procedures if I wanted to seek federal habeas corpus relief later.⁹⁸ I was being administered psychotropic medications during this entire time period by prison mental health officials, which rendered me incapable of pursuing such remedies. After discontinuing these medica-

⁹⁴ See *id.* at 3 (“After repeated attempts [sic] of trying to assist Mr. O’Bryant and learning through trial and error that he was unable to prepare [sic] any meaningful post-conviction [motions] I approached my Supervisor Ms. Rhyans [sic] and attempted to have a law clerk assigned to handle his case, unfortunately, Mr. O’Bryant scored high enough on his education testing that resulted in him not being entitled to have a law clerk assigned to handle his case.”).

⁹⁵ See Petitioner’s Notice of Filing Supplemental Documentation, *O’Bryant v. Sapp*, No. 3:03-cv-803-J-20MCR (M.D. Fla. Sept. 29, 2004) (showing multiple drug prescriptions for psychosis) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review). These medical records show that I was suffering from psychosis for approximately nine of the nineteen months that I took to file my first state post-conviction motion on November 7, 1997. By this date, my AEDPA clock had expired.

⁹⁶ Affidavit of Dr. Judith R. O’Jile, *O’Bryant v. Sapp*, No. 3:03-cv-803-J-20MCR (M.D. Fla. Jan. 27, 2005) (submitted as Exhibit B by petitioner) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

⁹⁷ See AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (effective Apr. 24, 1996).

⁹⁸ See *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring in part and concurring in the judgment) (“In the context of AEDPA’s 1-year limitations period . . . the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA’s enactment, for prisoners whose state convictions became final prior to AEDPA.”).

tions in September 1997, my mental health improved, and I filed my first state post-conviction motion on November 7, 1997.

Unfortunately, my time limitation for seeking federal habeas corpus relief had expired on April 24, 1997—five and one-half months before I filed my first state post-conviction motion. Had it not been for these psychotropic medications and their adverse side effects, I would have been able to learn the legal procedures necessary for me to pursue meaningful post-conviction matters earlier and would not be time-barred from the federal courts by AEDPA.

To be clear, I am *not* asserting that prisoners should not be given psychotropic medications because it may render those prisoners unable to pursue legal claims pro se; these medications do have benefits for those who need them.⁹⁹ What I *am* asserting, though, is that prisoners in this situation are being deprived of federal habeas corpus review because the medications they are being given for their diagnosed mental disorders are preventing them from comprehending the legal information they must learn when they cannot afford to retain counsel. Congress either overlooked or completely ignored this aspect of pro se litigation when it enacted AEDPA.

C. Prisoners' Reliance on Memory of Trial Court Proceedings

Even if a prisoner is fortunate enough to be functionally literate and mentally competent, he faces unreasonable hurdles in attempting to comply with AEDPA.

Since AEDPA's time limitation does not begin until the judgment and sentence become final, it might seem logical that the time period in which an appeal of the judgment and sentence is pending would give the pro se litigant a sufficient head start on compliance with AEDPA. However, it is important to take into account another reality of the post-conviction process that prevents the pro se litigant from making use of this time.¹⁰⁰ Unless the pro se prisoner has sufficient funds to purchase a copy of the trial court record, he must attempt to discover and research potential claims based on his memory of the proceedings.¹⁰¹

As mentioned previously, the Supreme Court has held that an indigent defendant is to be given a copy of the trial record, or a reasonable alterna-

⁹⁹ I also believe there are a large number of inmates who are being overmedicated by prison officials. I believe this was my situation. Instead of increasing my medications, I believe I would have been better off if provided counseling to go along with the medications I was already receiving, with the goal of eventually weaning me off psychotropic medication altogether.

¹⁰⁰ From ten years worth of personal observations and experience as a pro se litigant and jailhouse lawyer, I have observed that an appeal in the Florida appellate courts normally takes approximately ten to twelve months.

¹⁰¹ It is noteworthy to mention that some proceedings, such as depositions, are routinely conducted in the absence of the defendant, who is the eventual pro se litigant.

tive, without charge.¹⁰² This copy of the trial court record, however, is provided only if an appeal is taken and it is then given to appellate counsel, *not* to the defendant.¹⁰³ Some courts have even held that the right to free trial court records established in *Griffin v. Illinois* does not apply for the purpose of preparing collateral post-conviction remedies.¹⁰⁴ A prisoner wishing to pursue post-conviction remedies, therefore, will only receive a copy of the trial court records *after* completion of the direct appeal and, in turn, after AEDPA's time limitation has begun. At times, much of the one-year time limitation has elapsed before the prisoner actually receives the record.¹⁰⁵

The Supreme Court has stated that indigent defendants are to be given a copy of the record of their conviction, without charge, because obtaining "adequate and effective . . . review" is impossible without a trial transcript or [an] adequate substitute . . ."¹⁰⁶ This proposition is well-founded. It is extremely unwise to rely on memories of trial court proceedings, especially for a pro se prisoner.

Experts break down the memory process into three major stages: acquisition (when a witness perceives an event and information enters the memory system), retention (the time between acquisition and retrieval), and retrieval (the attempt to recall the event).¹⁰⁷

At each of these three stages, several factors affect the accuracy and reliability of an individual's memory: in the acquisition stage, "witness factors" (expectations, stress/fear) and "event factors" (duration of the event, lighting conditions, noise levels);¹⁰⁸ in the retention stage, the length of the

¹⁰² See *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁰³ Over the years, I have assisted in *numerous* attempts by prisoners to obtain copies of their records of court proceedings. Those who did not have a direct appeal were consistently told by the clerks of the trial courts that they would have to pre-pay to get the records and that the fee would be up to \$4 per page. Those who did pursue a direct appeal were consistently told that they were only entitled to one free copy, that the copy would be furnished to their appellate counsel, and that they could request the copy from appellate counsel when their appeal was finished.

¹⁰⁴ See, e.g., *Hansen v. United States*, 956 F.2d 245, 248 (11th Cir. 1992) ("We do not agree, however, that this right [to free trial court records] extends to access to the record for the purpose of *preparing* a collateral attack on a conviction.").

¹⁰⁵ See *Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) ("Day's third argument was that the state public defenders withheld his trial transcripts for 352 days, and the delay cost him time in which he could have worked towards filing his appeals.").

¹⁰⁶ *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

¹⁰⁷ ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 21 (Harvard Univ. Press 1996) (1979). This particular work concerns eyewitness testimony of events and the identification of a suspect by the witness.

I know of no studies concentrating on the accuracy or reliability of a defendant's memory of trial proceedings. However, a defendant witnessing his criminal trial might well go through the same memory process as an individual witnessing a crime, and each stage of his memory process would be subject to the same factors. The reasoning set forth in LOFTUS, *supra*, therefore would apply to a criminal defendant as well.

¹⁰⁸ See *id.* at 21, 32.

retention interval and the timing of post-event information;¹⁰⁹ in the retrieval stage, factors such as method of questioning and confidence level.¹¹⁰ The education level or mental competency of a prisoner could be “witness factors” that negatively impact the acquisition stage, and therefore affect the accuracy of his memory of his trial. The “stress/fear” factor and “expectation” factor of trial court proceedings could also heavily influence the memory process.

As anyone who has ever been a defendant in a criminal trial can attest, it is an *extremely* stressful and fearful experience.¹¹¹ The prosecution describes everything in the worst possible context, using “experts,” “scientific evidence,” and “distinguished law enforcement officers.” All the while, a panel of complete strangers weighs the evidence and testimony and decides a defendant’s fate, which in some instances may very well be a decision between life and death.¹¹² Some defendants, because of the level of stress, experience nausea, disorientation, and feel as if they are in a daze throughout the trial.¹¹³ Pro se prisoners must rely on these memories to prepare requests for post-conviction remedies in order to take advantage of the supposed “head start” on AEDPA’s time limitation. Due to the unreliability of the memories acquired during such a situation, some pro se prisoners find themselves having to begin anew the process of attempting to discover and research potential post-conviction claims when—and if—they manage to obtain the record of their conviction. In some instances this may contribute to the pro se litigant being time-barred under AEDPA. According to one inmate:

When I got my trial transcripts, I thought they’d been altered. There were things I thought happened that were nowhere in the transcripts. And these were the issues I’d been trying to learn about so I could file my state post-conviction motion. The entire time I spent trying to learn about those issues was dead time. I

¹⁰⁹ See *id.* at 54, 64.

¹¹⁰ ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL & CRIMINAL 31–32 (1987).

¹¹¹ Interview with Teddy Sean Stokes, Inmate in Holmes Corr. Inst., Bonifay, Fla. (Oct. 18, 2005) [hereinafter Stokes Interview]. Stokes told me:

There were times during my trial that I thought I was gonna faint. It felt like I was in a bad dream. My lawyer never told me what to expect, so I was getting hit with so much stuff I’d never heard before that I couldn’t keep up with everything. During recess a couple of times, when I was in the holding cell, I thought I was gonna vomit I was so stressed out, you know, not knowing what the jury was thinking about this.

Id.

¹¹² This “life or death” assertion is not an exaggeration. If the State is seeking the death penalty, these complete strangers will decide whether the State should kill the defendant for his alleged actions.

¹¹³ See Stokes Interview, *supra* note 111.

had to start all over again. By the time I filed my state post-conviction motion, I was already time barred in the federal court.¹¹⁴

This is not an uncommon occurrence.¹¹⁵ Many times while assisting other inmates I have had them tell me, very adamantly, that their trial transcripts have been altered and that things happened differently from what the transcripts actually reflect.¹¹⁶

If a pro se prisoner waits until he obtains a copy of the transcripts of his conviction to begin preparing state post-conviction motions, he runs the danger of failing to comply with AEDPA. If the prisoner attempts to pursue state post-conviction remedies prior to receiving the transcripts, he then runs the danger of filing motions the courts deem frivolous and meritless, and of potentially overlooking (and in some instances, thereby waiving) viable claims that are supported by the record.¹¹⁷

The time period in which a direct appeal of a judgment and sentence is pending, which delays the triggering of AEDPA's one-year time limitation, is therefore of little meaningful benefit to the prisoner as far as discovering and researching post-conviction claims.

D. Law Clerks, Jailhouse Lawyers, Prison Law Libraries, and Other Barriers to Legal Assistance

The time in which a direct appeal is pending should be an excellent opportunity for the pro se prisoner to begin learning legal research and writing, legal reasoning, legal theories and doctrines, and legal procedures, even if the prisoner cannot effectively research viable post-conviction claims until he obtains the record of his conviction. However, *Bounds v. Smith* was a limited decision that left prison officials—who are experienced in prison administration, *not* in judicial or post-conviction matters—without any mandates to follow in *assisting* prisoners with access to the courts.¹¹⁸

¹¹⁴ Interview with Donald D. Wood, Inmate in Holmes Corr. Inst., Bonifay, Fla. (Oct. 15, 2005).

¹¹⁵ This assertion is based on my own personal experience, as well as my years of experience as a jailhouse lawyer.

¹¹⁶ I have even experienced this myself after receiving the transcripts of a state court evidentiary hearing conducted in my own case on November 15, 2000.

¹¹⁷ This is especially true of situations in which proceedings were held in the absence of the defendant. For instance, imagine that a witness makes a statement at a deposition conducted without the defendant present. At trial, the witness's testimony is inconsistent with the prior statement and the defense counsel fails to impeach the witness. The defendant will not be aware of the inconsistency because he was not at the deposition. Therefore he will not know to research the potential "ineffectiveness of counsel" claim until he receives the record. If the defendant has already filed a state post-conviction motion, he may be prohibited under state filing requirements from raising the claim in a successive motion, and the claim is now waived or barred from federal review because it was not exhausted in state court proceedings. This is not a far-fetched or unreasonable scenario, but is rather one I have seen.

¹¹⁸ 430 U.S. 817, 830–32 (1977) ("[W]hile adequate law libraries are one constitution-

The Supreme Court later modified *Bounds* in *Lewis v. Casey*, where it held that *Bounds* did not recognize a freestanding, absolute right to “physical access to excellent law libraries *plus* help from legal assistants and law clerks.”¹¹⁹ *Bounds*, according to *Lewis*, “guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences”¹²⁰ Therefore, “it is that capability, rather than the capability of turning pages in a law library, that is the touchstone [to adequate law libraries and adequate assistance from persons trained in the law].”¹²¹

Examining prison law libraries, inmates’ access to law libraries, the training provided to law clerks, and other hurdles reveals another aspect of the “real system” of pro se litigation. In this Section, I will address the reality of the resources provided to prisoners, which they must use to develop the “capability” of launching meaningful post-conviction challenges to their convictions.

1. Law Clerks

Speaking from personal experience and personal observations, I can confidently assert that a prisoner untrained in the law needs guidance when he first visits a prison law library to begin pursuing post-conviction remedies. To obtain the necessary guidance, a prisoner must turn to prison law clerks—the inmates to whom prison officials assign jobs in the prison law libraries.

Prison officials *do* provide training to inmates working in the law library so they can assist other inmates in the preparation of legal documents.¹²² Whether the training, education, and experience of these inmate law clerks satisfies an “adequate assistance from persons trained in the law” standard, or any “confer[red] capability” standard,¹²³ is another matter.¹²⁴ To begin with, the qualifications to become a law clerk are meager, to say

ally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal. . . . [A] legal access program need not include any particular element we have discussed, and we encourage local experimentation.”)

¹¹⁹ 518 U.S. 343, 356 (1996).

¹²⁰ *Id.*

¹²¹ *Id.* at 356–57. It is worth mentioning that, from my observation, shortly after the Supreme Court handed down its decision in *Lewis*, the F.D.O.C. began destroying research materials that were already contained in the law libraries, stopped providing certain periodicals, and reduced the number of hours each week that the law libraries were required to be open.

¹²² See FLA. ADMIN. CODE ANN. r. 33-501.301(7)(e) (2005) (law clerk training program).

¹²³ See *supra* notes 118–121 and accompanying text.

¹²⁴ In all fairness to inmate clerks, I must say that some of them do try to do what they can, and some are competent in the law. For the most part, though, these clerks do not provide adequate assistance to inmates attempting to pursue meaningful state post-conviction remedies or to comply with AEDPA.

the least. For example, in Florida a prisoner wishing to work as a law clerk only needs to have: (1) either a high school diploma, *or* a GED, *or* a 9.0 grade level score on the TABE, *or* demonstrate sufficient reading and language skills; (2) enough time remaining on his sentence to complete the research aide training program and work in the law library; (3) a satisfactory adjustment to prison; and (4) a demonstrated willingness to work with others.¹²⁵

An inmate with a TABE score in the range of a 9.0 grade level is on the borderline of functional literacy. Should such an inmate be charged with the responsibility of assisting other inmates with the preparation of legal documents and complying with AEDPA? What about a law clerk who has a TABE grade level score below 9.0 and is allowed to work in the law library?

Moreover, the qualifications set by F.D.O.C. to become a law clerk do not establish any requirements concerning mental health.¹²⁶ It would seem logical that an inmate with a diagnosed mental disorder being treated with psychotropic medications would not be entrusted with a task as serious as providing legal assistance.¹²⁷ This, however, is not the way things are in the “real system” of pro se litigation. Prison officials not only allow mentally disordered inmates to work in the law libraries, but will certify them as inmate law clerks as well. In fact, in November 2005, the F.D.O.C. held a law clerk training and certification seminar at Apalachee Correctional Institution (“A.C.I.”). The primary purpose behind A.C.I. being selected as the site for this seminar was so that the F.D.O.C. could certify more “psych inmates” as law clerks.¹²⁸

One must wonder whether “psych inmates” were the types of “persons trained in the law” that the Supreme Court envisioned when it handed down its decisions in *Bounds* and *Lewis*.¹²⁹ Apparently F.D.O.C. officials believe they are.

Prisoners are trained as law clerks so they can provide legal assistance to other inmates. I do not believe that “psych inmates” should be used as law clerks, mainly because they may be prone to psychotic episodes, they may be in need of psychiatric intervention at any time without any warning, and they might be affected by cognitive side effects of the medications

¹²⁵ FLA. ADMIN. CODE ANN. r. 33-501.301(7)(d)(1)-(4) (2005).

¹²⁶ *See id.* This section of the Florida Administrative Code covers the only qualifications to become a certified law clerk. There is no mention of any mental health criteria.

¹²⁷ Such inmates may be experiencing the common side effects of psychotropic medications as mentioned in Part IV.B, *supra*. Also, inmates with diagnosed mental disorders may be prone to psychotic episodes and in need of psychiatric intervention without warning.

¹²⁸ When Inmate Harold Bush was informed that he was going to the law clerk training seminar at A.C.I., prison officials told him that the seminar was being held at A.C.I. for the purpose of certifying some “psych inmates.” I personally heard prison officials inform inmate Bush of this. A “psych inmate” is an inmate who has been diagnosed as mentally disordered by prison mental health staff and is being treated with psychotropic medications.

¹²⁹ *See supra* notes 118–121 and accompanying text.

used in their treatment.¹³⁰ I am not implying that such inmates should be prohibited from performing legal research and drafting motions. I believe they should be allowed to work on their own cases if they so choose but *not* on other inmates' cases. The F.D.O.C. has a limited budget allotted for training law clerks. I believe these resources should be used to train the most competent and able inmates available so the inmate population may receive the greatest benefit possible from these limited funds.

The law clerk training seminar, even for a prisoner who is functionally literate and not mentally disordered, is insufficient to render him qualified to assist other prisoners with legal research and the drafting of legal motions. The law clerk training seminar in Florida lasts approximately thirty hours, spread out over two weeks. It briefly touches on only an *extremely* small portion of the things a prisoner needs to know to provide adequate assistance to other prisoners.¹³¹

For a prisoner to become a "certified" law clerk, and thereby become authorized under prison regulations to provide legal assistance and advice, the prisoner only needs to take the seminar, complete a few written exercises during the seminar, and receive a passing score on the final examination.¹³² This final examination is a test consisting of fifty true/false and multiple choice questions. Before taking the examination, the prisoner is given the option of either answering the first thirty questions "closed book" or answering all fifty questions "open book," using any manuals and notes available. A "passing score" is a mere seventy percent.¹³³

The law clerk training seminar held in November 2005 by F.D.O.C. officials at A.C.I. used a different final exam for the completion of the seminar and for certification. A passing score on this particular test was eighty percent, but the test consisted of only twenty-five questions and the inmates were allowed three hours to complete the test using any materials in the law library—including the assistance of others. Whether this test was just for the "psych inmates" or will be the test used from now on has yet to be seen.

Over the years that I have been a jailhouse lawyer, I have had to show certified law clerks how to research claims, explain that introductory sig-

¹³⁰ See *supra* text accompanying notes 110–112.

¹³¹ This information concerning the length of the seminar was provided by inmate Sean Russell, who attended the seminar at Wakulla Correctional Institution in June 2005, and inmate Harold Bush, who attended the seminar at A.C.I. in November 2005. Interview with Harold Bush, inmate, Holmes Correctional Institution, Bonifay, Fla. (Dec. 7, 2005); Interview with Sean Russell, inmate, Holmes Correctional Institution, Bonifay, Fla. (Nov. 11, 2005) [hereinafter Russell interview]. My assertion about the seminar covering only a small portion of the legal matters necessary to provide quality assistance is based on my interviews with Russell and Bush, as well as my examinations of the law clerk training manuals used over the years by the F.D.O.C.

¹³² See FLA. ADMIN. CODE ANN. r. 33-501.301(7)(e)(1) (2005).

¹³³ I questioned Mr. Russell about the law clerk training seminar and its final exam on Friday, November 11, 2005. I also asked him for his opinion on the quality of the seminar and the difficulty level of its final exam. In response, Russell laughed and stated, "It's a complete joke. Any moron can pass it." Russell interview, *supra* note 131.

nals to a citation *do* actually have meaning and are *not* merely a portion of the title of the book or journal the cited authority is published in,¹³⁴ and show that the West Key Numbering System cross-references state case law with federal case law. I have even had to assist certified law clerks in preparing their own motions because, as they admitted, they did not know what to do or where to begin. These certified law clerks, however, are the prisoners who the F.D.O.C. officials assert meet the “adequate assistance from persons trained in the law” requirement of *Bounds* and the “conferral of capability” requirement of *Lewis*.¹³⁵

2. Jailhouse Lawyers

There are prisoners among the prison population, other than the ones working in prison law libraries, to whom prisoners may turn in order to gain legal knowledge and assistance. Some of these jailhouse lawyers were trained by prison officials initially to be law clerks, some trained themselves, and some enrolled in correspondence courses.¹³⁶

The Supreme Court has addressed prison regulations concerning jailhouse lawyers providing assistance to other prisoners. In *Johnson v. Avery*, the Supreme Court struck down a Tennessee prison regulation that prohibited jailhouse lawyers from assisting others with legal matters and would have effectively barred illiterate prisoners from filing habeas corpus petitions. The Court held that the regulation violated a prisoner’s right of access to the courts.¹³⁷

Given the Supreme Court’s decision in *Johnson*, a prospective pro se prisoner should be able to seek out jailhouse lawyers to find guidance in gaining the necessary legal knowledge to prepare for post-conviction procedures. Prison officials in some states, such as Florida, have adopted regulations in response to *Johnson*.¹³⁸ Florida’s regulation states: “Inmates may assist other inmates in the preparation of legal documents and legal mail.”¹³⁹ The F.D.O.C., however, has also adopted regulations that, in effect, operate to prevent the assistance authorized in *Johnson*.¹⁴⁰

¹³⁴ When I was explaining this to the certified law clerk, I asked him to get “The Blue-book.” His response was that I needed to be more specific and give him the book’s title because there were several books in the law library that were blue. I told him “The Blue-book” was the title. He claimed that there was no legal book or citation book with such a name.

¹³⁵ See *supra* notes 118–121 and accompanying text.

¹³⁶ Some prisoners, such as myself, acquired legal knowledge through a combination of all of these methods.

¹³⁷ *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

¹³⁸ See, e.g., FLA. ADMIN. CODE ANN. r. 33-210.102 (2005).

¹³⁹ *Id.* at r. 33-210.102(12).

¹⁴⁰ See *id.* at r. 33-602.203(1)(b) (“Any item or article not originally contraband shall be deemed contraband if it is passed from one inmate to another without authorization.”); *id.* at r. 33-602.201(7)(a) (impounded property) (“If the property . . . does not belong to the inmate in possession of the property, an investigation shall be conducted to determine if

In order for a jailhouse lawyer to “assist other inmates in the preparation of legal documents and legal mail,”¹⁴¹ the jailhouse lawyer must be able to read the inmate’s legal documents. For the jailhouse lawyer to read these documents, he must possess them—and therein lies the problem. Prison officials prohibit an inmate from possessing property belonging to another inmate, including legal documents and papers.¹⁴²

I have personally been subjected to disciplinary action for assisting other inmates in the preparation of legal documents.¹⁴³ I was given fifteen days in disciplinary confinement,¹⁴⁴ and lost twenty days of incentive gain time,¹⁴⁵ for assisting other inmates in attempting to file timely state post-conviction motions in order to comply with AEDPA. I could have been punished more severely, and I have been informed that I will be given the maximum penalty if I am found in possession of another inmate’s legal papers again.¹⁴⁶ The maximum penalty for possession of “contraband” in Florida is fifteen days disciplinary confinement and loss of thirty days incentive gain time.¹⁴⁷ This, however, is *not* the end of the punishment.

“An inmate is not eligible to receive incentive gain time for the month in which there is an infraction of the rules,”¹⁴⁸ nor is the inmate eligible to receive incentive gain time for the three months following the month the rule infraction occurred.¹⁴⁹ Therefore, if a jailhouse lawyer provides assistance to an inmate in Florida, and the jailhouse lawyer is found in possession of that inmate’s legal papers, the jailhouse lawyer can spend

the owner of the property knowingly permitted the use of the property. If so, the property shall be handled as contraband.”).

¹⁴¹ *Id.* at r. 33-210.102(12).

¹⁴² *See supra* note 140.

¹⁴³ F.D.O.C. Charging Disciplinary Report Log #107-050088 states:

On Tuesday, January 18, 2005 . . . myself [Sergeant Michael S. White] and Officer [Mitchell] Finch were conducting a routine search of cell H-2107, housing Inmate O’Bryant During the search of Inmate O’Bryant’s property, legal work belonging to Inmate Martin, Richard . . . was found. The shift OIC was notified for appropriate action. Inmate O’Bryant remains in disciplinary confinement pending the charge 3-12 possession of any other contraband.

See also F.D.O.C. Charging Disciplinary Report Log #107-050463.

¹⁴⁴ F.D.O.C. Disciplinary Hearing Worksheet Log #107-20050463. Disciplinary confinement is segregation/isolation. An inmate is locked in a cell with no out-of-cell recreation for the first thirty days; is only allowed to shower Mondays, Wednesdays, and Fridays; and is denied telephone/television privileges, any reading material, with the exception of a Bible, and numerous other privileges. *See* FLA. ADMIN. CODE ANN. r. 33-602.222 (2005).

¹⁴⁵ F.D.O.C. Disciplinary Report Hearing Information Log #107-050088. Incentive gain time, also called “good time,” is early release credits. One day of gain time represents one day earlier an inmate is released from prison. For the full regulations governing incentive gain time, *see* FLA. ADMIN. CODE ANN. r. 33-601.101 (2005).

¹⁴⁶ I was told this by the Disciplinary Hearing Team for Disciplinary Report Log #107-050463 on April 7, 2005.

¹⁴⁷ *See* FLA. ADMIN. CODE ANN. r. 33-601.314 (2005).

¹⁴⁸ *Id.* at r. 33-601.101(5)(a).

¹⁴⁹ *Id.* at r. 33-601.101(5)(a)(2).

anywhere from five to nine days in administrative confinement¹⁵⁰ pending a disciplinary hearing,¹⁵¹ fifteen days in disciplinary confinement after the hearing, and an additional seventy days in prison. These disciplinary sanctions act as *quite* a deterrent and severely hinder many prospective pro se prisoners.

Over the years, I have seen competent jailhouse lawyers who were within a year or two of being released turn down other inmates needing assistance because they were, understandably, afraid of getting caught providing assistance and having to accrue prison extra time for it.

3. Prison Law Libraries

Prison officials are required to provide prisoners with law libraries.¹⁵² These law libraries should be evaluated to determine whether, in light of AEDPA, they guarantee a “conferral of a capability” to prisoners to gain meaningful access to the courts.¹⁵³ An examination of these law libraries reveals that they fall short of being “adequate” to assist prisoners with obtaining post-conviction relief.¹⁵⁴

Ineffective assistance of counsel (“I.A.C.”) is “the most frequently cited reason for habeas corpus petitions filed by State inmates.”¹⁵⁵ I.A.C. claims, therefore, are an appropriate reference point for an examination of prison law libraries.

In order for the pro se prisoner to establish an I.A.C. claim, the prisoner must satisfy the two-prong test announced in *Strickland v. Washington*.¹⁵⁶ This is an extremely difficult task for anyone to accomplish, but even

¹⁵⁰ Administrative confinement is not “disciplinary” in nature. As opposed to disciplinary confinement, inmates in administrative confinement are allowed reading material and radios. *See id.* at r. 33-602.220. This is about the only difference.

¹⁵¹ A disciplinary hearing is a hearing where an inmate appears before a classification officer and a security officer (lieutenant rank or above) and enters a plea of guilty, not guilty, or no contest, and is allowed to make a statement on his behalf concerning the alleged rule infraction. *Id.* at r. 33-601.307. These hearings are often referred to by inmates as “DR Court” (DR stands for disciplinary report) or “Kangaroo Court.”

¹⁵² *Id.* at r. 33-501.301(1).

¹⁵³ *See Lewis v. Casey*, 518 U.S. 343, 356 (1996). It needs to be pointed out that *Lewis* was argued before the Supreme Court on November 29, 1995, and was decided on June 24, 1996. Therefore, when the Court rendered its decision in this case, which was based on the fact that any “actual harm” suffered by the inmates was not “systemwide,” the implications of AEDPA and its systematic effects on prisoner litigation were not before the Court for consideration. This fact alone should warrant the Court revisiting the issue of “adequate” libraries and assistance.

¹⁵⁴ *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

¹⁵⁵ SCALIA, *supra* note 26, at 14 (citing ROGER A. HANSON & HENRY W. K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995)).

¹⁵⁶ In *Strickland*, the Supreme Court established a two-prong test to determine whether a criminal defendant’s Sixth Amendment right to the effective assistance of counsel has been violated. 466 U.S. 668 (1984). With regards to the first prong—the performance prong—the defendant must show that defense counsel’s representation fell below an objective level of reasonableness. *See id.* at 680–81. In the second prong—the prejudice prong—the de-

more so for the pro se prisoner. Not only must the pro se prisoner teach himself complex legal procedures, but he must also become a “jack-of-all-trades” in the fields of evidence and witness testimony. If testimony is presented concerning DNA, the pro se prisoner must learn about biology, genetics, population statistics, and the methods of DNA analysis. If an autopsy was performed, the pro se prisoner must become familiar with forensic pathology. If a police officer testifies concerning police procedure, the pro se prisoner needs to be familiar with the police department’s standard operating procedures. If a records custodian testifies, the pro se prisoner must learn about the business’s record keeping practices. Without learning these things, the pro se prisoner cannot determine whether proper procedures were followed, whether the witness was qualified to testify, whether the testimony and evidence were reliable and admissible, or whether defense counsel rendered deficient representation for not properly objecting or impeaching. The pro se prisoner must also learn about the psychology behind a jury’s decision-making process to be able to determine whether defense counsel’s errors or omissions were prejudicial.

In Florida, prison officials do not provide the materials in prison law libraries to teach the foregoing matters. Florida regulations define a “major collection” law library as containing:

an annotated edition of the Florida Statutes; an annotated edition of the U.S. Constitution and federal statutes governing habeas corpus and prisoner’s rights; Florida and federal case reporters; Florida and federal Shepard’s citation indexes; Florida and federal practice digests; forms manuals; and secondary source materials providing research guidance in the areas of federal habeas corpus, Florida post-conviction and post-sentence remedies, and prisoner’s rights.¹⁵⁷

It seems logical that with the importance of researching subjects such as scientific evidence, jury psychology, and police procedures, prison law libraries would be required to possess resource materials concerning these subjects. This, unfortunately, is *not* the case.

The materials that *are* in the law library can be difficult for prisoners to access, especially federal material, which is critical when attempting to comply with AEDPA. For example, some prisons in Florida have replaced their hardbound volumes of federal case reporters with a CD-ROM collection of these reporters.¹⁵⁸ In theory, this should benefit the pro se prisoner. In reality, it does not.

pendant must show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the results of the proceedings would have been different. *Id.* at 694.

¹⁵⁷ FLA. ADMIN. CODE ANN. r. 33-501.301(2)(1) (2005).

¹⁵⁸ The prison where I am currently housed, Holmes Correctional Institution, is one of the prisons in Florida that, at the time of this writing, has a CD-ROM collection of federal

Performing research of potential claims is much faster and easier with a computer. A person may simply query a keyword or phrase and have numerous case citations available at the touch of a button. What could take days manually searching through volume after volume of cases could, literally, be done in a matter of minutes with a computer and a CD-ROM collection of case reporters. In order for a pro se prisoner to benefit from this, however, the prisoner must first have access to the computer.

Prisoners in Florida are not allowed to use the computers in the law libraries for research purposes.¹⁵⁹ A pro se prisoner needs to know the name and citation of the case he wants to read. He must then give the case citation to a law clerk. The law clerk, when he gets around to it, will then pull up the case on the computer, and the pro se prisoner may then read the case off the computer screen and take notes. At no time during this process is the pro se prisoner allowed to touch the keyboard;¹⁶⁰ the pro se prisoner must have a law clerk available to scroll the text up or down.¹⁶¹ The law library may have three or four computers in it, but *only one* is designated for use by the prisoners who do not work in the law library.¹⁶²

When a prison (like the one where I am housed) has over 1000 prisoners, plus the 350–400 prisoners at a work camp,¹⁶³ one computer is woefully inadequate to accommodate the needs of the prisoners attempting to comply with AEDPA. There have been times when I spent an entire day in the law library and was only able to read two or three cases. Other times I was unable to read *any* federal cases. Needless to say, when attempting to comply with AEDPA, it is of the utmost importance that a pro se prisoner

case reporters in its law library.

¹⁵⁹ In all the time I have been in prison and used the law libraries, I have never been allowed to use a computer, even though I have requested to do so on numerous occasions.

¹⁶⁰ FLA. DEP'T CORR. PROCEDURES MANUAL 501.107 (2003). The only inmates allowed to touch computers are the ones who have job assignments that require them to have the use of a computer. In order for a prisoner to get on a computer, his work supervisor must submit an "Inmate PC Usage Request Approval," and the request must be approved by the warden, the chief of security, and the classification supervisor. FLA. DEP'T CORR. FORM DC6-109 (2000). Therefore, even for the sake of convenience or expediency, the law library supervisor is not authorized to make exceptions to this absurd practice. [*Editor's Note:* The Florida Department of Corrections declined the requests of the *Harvard Civil Rights-Civil Liberties Law Review* to obtain a copy of this manual (e-mail on file with the Harvard Civil Rights-Civil Liberties Law Review).]

¹⁶¹ As ridiculous as it may seem to require that a law clerk scroll a page for the prisoner, this rule is made even more onerous by the fact that the law clerks are not always available because of their other duties (making photocopies, pulling books off the shelves for other inmates, filing papers, etc.) and the prisoner may have to wait for quite a while just to have a page scrolled for him.

¹⁶² This assertion is based on my personal experience and observations at Holmes Correctional Institution.

¹⁶³ A "work camp" is the unit of the prison that houses lower custody prisoners, the majority of whom work outside the prison fences. FLA. ADMIN. CODE ANN. r. 33-501.301(3)(f)(2) (2005) provides that work camp prisoners must use the same law library facilities as the prisoners housed at the main unit.

be able to read federal case law, especially given that AEDPA created a limitation which provides that:

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 unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States¹⁶⁴

It is impossible to determine if something satisfies this requirement if one cannot read “established Federal law, as determined by the Supreme Court of the United States.”

Prisoners who seek to challenge federal convictions are severely disadvantaged by the law library collection in the F.D.O.C. when attempting to comply with AEDPA. Numerous state prisoners also have consecutive federal sentences.¹⁶⁵ There are also federal prisoners being housed in state prisons under intergovernmental agreements.¹⁶⁶ Because the F.D.O.C. prison law libraries only have federal statutes concerning habeas corpus and prisoners’ rights,¹⁶⁷ these prisoners cannot even read the federal statutes under which they were convicted.

Prisons have limited budgets and therefore may not be able to afford to provide prisoners with all-inclusive law libraries and more adequately trained law clerks. But it is not at all obvious that some very helpful reforms would cost the state money.¹⁶⁸ Prisoners, such as myself, are not requesting everything available concerning criminal law, nor are we requesting college-trained law clerks—as nice as that would be.

It would not cost prison officials *any* more money to train prisoners with a minimum TABE score of 12.0 as law clerks than it would to train ones with a 9.0 grade level score. Nor would it cost any additional money to stop destroying legal materials that are already in existing law library collections when the law library has ample space to store those materials.

Whenever an inmate is placed in the law library as a law clerk and begins to demonstrate adequate skills, prison officials are quick to remove him from the law library. I have witnessed this and have been subjected to it

¹⁶⁴ 28 U.S.C. § 2254(d) (2006).

¹⁶⁵ I have helped a few such prisoners during my years as a jailhouse lawyer.

¹⁶⁶ For instance, Intergovernmental Agreement 98-188 is an agreement between Florida and the federal government to exchange prisoners prosecuted under joint state/federal drug task forces. *Cf.* FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 7 (2000), available at <http://www.bop.gov/news/PDFs/sob00.pdf>.

¹⁶⁷ See FLA. ADMIN. CODE ANN. r. 33-501.301(2)(1), (5)(a) (2005).

¹⁶⁸ Because of my incarceration I am unable to perform empirical research to prove that alternative solutions would be cost-free. My assertions that some of my suggestions would be cost-free, however, are logical.

personally. It would not cost any additional money to leave inmates with such skills in the law library.

Improving the training programs may cost additional money, but the additional costs should not be unreasonably burdensome since these expenditures may very well be offset by funds saved in other areas. For instance, how much does it cost the courts each year to entertain insufficient motions and dismiss them for prisoners to correct and re-file? Logically, better-trained prison law clerks could cut back on the number of such pleadings and could save the judiciary money and time, which could be used on other, legally sufficient filings.

A cost-effective solution could also be to thoroughly train ten to fifteen inmates and then use these inmates to teach the certification seminar. Inmates are already used in education departments at institutions to teach literacy courses.¹⁶⁹ The same could be done for the law clerk training program.

Another avenue that could be taken to resolve many problems is to repeal AEDPA. This would not cost prison officials any money and would help maintain the integrity of the judicial process.

4. *Other Barriers Prisoners Face*

If a pro se prisoner is fortunate enough to overcome the barriers discussed above, he still faces many hurdles while pursuing meaningful post-conviction relief and working to comply with AEDPA.

Gaining access to a prison law library is not as simple as walking into the law library and requesting legal books or assistance. All access must be obtained by submitting an "Inmate Request Form," which under prison regulations must "be responded to within 10 days, following receipt by the appropriate official."¹⁷⁰ If a prisoner has a deadline¹⁷¹ and is requesting priority access,¹⁷² then the Inmate Request Form must be answered within three working days.¹⁷³

The rules governing law library access for prisoners with deadlines are different from those governing prisoners without deadlines. Prisoners

¹⁶⁹ FLA. DEP'T CORR. PROCEDURES MANUAL 501.107 (2003).

¹⁷⁰ FLA. DEP'T CORR. FORM DC6-236 (2000) (back of form). An Inmate Request Form is a form used by inmates to ask prison officials questions, to schedule appointments, or to initiate a complaint against a staff member.

¹⁷¹ A deadline is "any requirement imposed by law, court rule or court order that imposes a maximum time limit on the filing of legal documents with the court." FLA. ADMIN. CODE ANN. r. 33-501.301(2)(b) (2005).

¹⁷² "Priority access" is self-explanatory. An inmate who has an upcoming deadline is given a higher priority when scheduling time in the law library than an inmate who does not have an upcoming deadline. *See id.* at r. 33-501.301(2)(q).

¹⁷³ *Id.* at r. 33-501.301(3)(f) ("Department staff shall respond to a request for special access to meet a deadline within 3 working days of receipt of the request, not including the day of receipt.").

in open population¹⁷⁴ who do not have deadlines are expected to use the law library only during their off-duty hours.¹⁷⁵ Because access must be obtained through a written request form, and because prison officials are allowed up to ten days to answer written requests, a prisoner must request access well in advance. Therefore, the only “off-duty” hours the prisoner may request are the prisoner’s regular scheduled off days.¹⁷⁶

It is the stated goal of prison officials to work prisoners at least forty hours per week.¹⁷⁷ The vast majority of prisoners participate in programs or jobs in which they get Saturdays and Sundays off.¹⁷⁸ Prison law libraries in Florida are closed on Sundays and Mondays.¹⁷⁹ The majority of prisoners, therefore, only have access to the law library, its materials, and the assistance of law clerks one day per week—Saturday. That is approximately six hours of access if the prisoner is scheduled for both the morning and afternoon sessions. Conversely, access to the general library is unrestricted by such regulations. Any time a prisoner is off-duty and wants to go to the general library, all he needs to do is get a pass and go. If a prisoner gets a pass to go to the general library and attempts to use the law library, the prisoner can go to confinement for being in an unauthorized area, even though the general library and the law library are in the same room.

The lack of law library access is extremely problematic when considered in the context of AEDPA’s time limitation. In a year, a prospective pro se prisoner may only have *fifty-two days* of law library access in which to learn complex legal procedures, research potential claims, and learn how to draft post-conviction motions.¹⁸⁰ No reasonable person can honestly

¹⁷⁴ “Open population” inmates are inmates who are housed in the general inmate population, as opposed to those who are segregated from other inmates because of special medical conditions, a heightened need for protection, security concerns, or disciplinary action. *See id.* at r. 33-501.301(2)(o).

¹⁷⁵ *Id.* at r. 33-501.301(3)(g). “Off-duty” hours are the hours during which an inmate is not at work at his assigned job or participating in an assigned program, such as education, drug rehabilitation, or pre-release programs.

¹⁷⁶ When a prisoner submits an Inmate Request Form seeking law library access, the prisoner must specifically state on the request form that the desired days are his off-duty days—not off-duty *hours*—or the request will be returned instructing the prisoner to re-submit the request stating his assigned off-duty days.

¹⁷⁷ FLA. ADMIN. CODE ANN. r. 33-601.201(1) (2005) (“It is the continuous goal of the department that inmates in work assignments work at least 40 hours per week.”).

¹⁷⁸ Such jobs and programs include inside grounds (cutting grass, picking up trash, sweeping sidewalks), maintenance (plumbing, roofing, painting, electrical work, carpentry), orderly work, educational classes, or staffing the classification or property rooms.

¹⁷⁹ In my experience, these have been the standard hours for libraries and law libraries in the F.D.O.C.

¹⁸⁰ Fifty-two days is an estimate based on one day of library access per week. This assumes that the library will not be closed on an inmate’s off-duty day because of inclement weather, staff shortage, buffing or waxing of the floors, the librarian taking a day off, etc. This also assumes that the prisoner is able to get into the law library each week. The number of prisoners allowed in the law library at any given time is limited by the state fire code. In all of the prisons in which I have been incarcerated, library capacity has been limited to approximately sixty people, which includes library workers, law library workers, general

believe that prisoners facing the problems described above will be able to prepare adequate post-conviction motions in compliance with AEDPA under such circumstances.

Prisoners who seek “priority access” are not in a much better situation. Priority access is a procedure which affords inmates greater access to libraries under certain specified circumstances.¹⁸¹ As unbelievable as it may seem, an AEDPA deadline does *not* qualify a prisoner for priority access to the law library in Florida prisons.¹⁸² Under prison regulations, AEDPA is recognized as a “deadline,”¹⁸³ but “priority access shall be granted if the maximum time limit is *20 or fewer calendar days*.”¹⁸⁴ Therefore, because the AEDPA deadline is one year, priority access is unavailable for prisoners seeking to comply with AEDPA.

Furthermore, prisoners are routinely denied priority access if the time available to them to use the law library during their off-duty hours is more than six hours per week.¹⁸⁵ Pursuant to this practice, if a prisoner has an off-duty day that falls between Tuesday and Saturday, he may very well be denied priority access. To further frustrate matters, even if the prisoner qualifies for priority access, a law library supervisor “shall not excuse an inmate . . . from a work or program assignment to use the law library for more than one-half of the inmate’s workweek.”¹⁸⁶ Moreover, prisoners have restrictions placed on the use of their time while in the law library. Prisoners are not to be “excused from a work or program assignment solely for the purpose of drafting legal documents and legal

library prisoners, and law library prisoners. Therefore, only about thirty to thirty-five prisoners are allowed access to the law library at any given time. With prisons housing over 1000 inmates, regular access to the law library on an off-duty day each week is far from guaranteed.

¹⁸¹ FLA. ADMIN. CODE ANN. r. 33-501.301(2)(q) (2005).

¹⁸² In 1997 and 1998, while assigned a job in the law library at Washington Correctional Institution, I tried numerous times to register prisoners who had three or four months left to file post-conviction motions for priority access. I was told repeatedly that these prisoners did not qualify for priority access because they had more than twenty days remaining to file their motions. In the years since, I have witnessed many other prisoners denied priority access because AEDPA’s one-year time frame exceeds F.D.O.C.’s twenty-day requirement.

¹⁸³ FLA. ADMIN. CODE ANN. r. 33-501.301(2)(b) (2005).

¹⁸⁴ *Id.* at r. 33-501.301(3)(f)(1) (emphasis added).

¹⁸⁵ Florida regulations provide that inmates in open population shall be given priority access to the law library and be excused from work only “when the inmate demonstrates an exceptional need for it. The inmate bears sole responsibility for proving why additional research time in the law library should be provided.” *Id.* at r. 33-501.301(3)(f)(2). Prison regulations do not state what burden the prisoner carries to prove exceptional need. However, it is my understanding and experience that Chapter 33-501.301(f)(2) of the Florida Administrative Code used to declare inmates with six or more off-duty hours ineligible for priority access, and, as a result, prison officials in the F.D.O.C. continue to deny priority access to inmates with more than six hours off-duty time.

¹⁸⁶ *Id.* at r. 33-501.301(3)(f)(2). Since prisoners have five-day work weeks, law library supervisors will not allow a prisoner more than two days of priority access per work week, if they are allowed any days at all.

mail; such activities shall be performed during off-duty hours.”¹⁸⁷ This rule is enforced.

In 1998, while in the law library preparing an initial brief for the appeal of my state post-conviction motion, I was confronted by the law library supervisor concerning this “no drafting motions” regulation. The law library supervisor told me that if I was going to be drafting my brief, I would have to leave and return to work.¹⁸⁸ When I attempted to explain that I was using law library material, the Florida Rules of Court, to ensure that my brief was in compliance with the appellate court’s filing requirements, I was ordered to leave the law library or risk receiving a disciplinary report and being sent to confinement for disobeying institutional rules and regulations. I was informed that drafting my brief was not “research” and was prohibited in the law library, even using the Florida Rules of Court.¹⁸⁹

When an inmate does acquire law library time and is actually in the law library, obtaining assistance from one of the law clerks still may be quite difficult.

While prison officials have adopted regulations concerning prisoners’ access to the courts, some states actually *prohibit* prison law library services from assisting a prisoner during the pendency of his direct appeal. In *Douglas v. California*, the Supreme Court mandated appellate counsel for indigent prisoners.¹⁹⁰ This requirement, while essential for quality appellate review,¹⁹¹ actually prevents some prisoners from being assisted by prison law clerks while their appeals are pending. In Florida, a prospective pro se prisoner will not be allowed to receive such guidance from the inmate law clerks while the prisoner has a direct appeal pending.

This position of the F.D.O.C. is demonstrated by an e-mail communication between two F.D.O.C. officials, Susan Hughes and Barry Rhodes.¹⁹²

¹⁸⁷ *Id.* at r. 33-501.301(3)(g). This rule has been interpreted by prison officials at the seven prisons where I have been housed to mean that no inmate is allowed to use law library time to draft legal documents, regardless of whether they are in the law library on “priority access” or on off-duty hours.

¹⁸⁸ My job assignment at the time was “houseman.” I was responsible for sweeping the floor in my housing unit (there were about ten inmates assigned to this task). My job assignment had been completed, and my work supervisor had given me the afternoon off. Therefore, there was not any work for me to return to.

¹⁸⁹ Fortunately, another prisoner in my housing unit had a copy of the Florida Rules of Court, which he let me use. I had to be careful not to let a guard or officer see me with the book. Because it belonged to another prisoner, it became “contraband” each time it was in my possession; if caught with it, I could have been sent to confinement, and the book could have been confiscated. *See supra* note 140.

¹⁹⁰ 372 U.S. 353 (1963).

¹⁹¹ *See Halbert v. Michigan*, 125 S. Ct. 2582, 2593 (2005) (“Navigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments.”).

¹⁹² Susan Hughes was the Library Program Administrator at the Apalachee Correctional Institution in 2003. See FLORIDA LIBRARY DIRECTORY WITH STATISTICS 152 (listing of Institutional Libraries), available at http://dlis.dos.state.fl.us/bld/Research_Office/2003_LibraryDirectory/2003Institutional_Libraries.pdf. Barry Rhodes is a Research and Training

On December 11, 2001, Ms. Hughes e-mailed Mr. Rhodes about a research aide who had requested permission to send a “status report” to an inmate’s attorney. The inmate, who was illiterate, was represented by the attorney on direct appeal, but had been working with the aide on a post-conviction motion while the direct appeal was pending. Mr. Rhodes responded as follows:

If the inmate has an attorney representing him/her on a case we are not to be involved what-so-ever in the research-assistance-advice cycle

EXCEPTION Some inmates will tell us they are actually writing the court document to file “pro se” and want to send the document to a lawyer just to review We can instruct the inmate to obtain a letter from the lawyer stating that the inmate is acting on his own and filing pro se Then the research aide can help the inmate

However, when an inmate is represented by an attorney we must continue to: retrieve research materials from the shelf for the prisoner; provide appropriate and required forms; and provide supplies such as paper, pen, and envelopes per the rule

If the lawyer is the prisoner’s attorney of record—so be it. In that case instruct the aide to stop assisting the prisoner.¹⁹³

As demonstrated by the foregoing communication, a prospective pro se prisoner is unable to obtain assistance from prison law clerks to begin preparing for eventual post-conviction proceedings while he has an attorney pursuing direct appeal issues on his behalf. Once the direct appeal process is complete, and AEDPA’s one-year time period has begun, a prisoner may use prison law clerks and any guidance they may provide.

Even after the direct review is finished, the very first piece of information given to a prisoner concerning post-conviction remedies is incomplete. When prisoners in Florida are notified by their court-appointed appellate counsel that their direct appeals have been denied, they receive a stan-

Specialist with the F.D.O.C. Bureau of Program Services. See CORRECTIONAL COMPASS: THE OFFICIAL NEWSLETTER OF THE FLORIDA DEPARTMENT OF CORRECTIONS, Oct. 2001, at 12, available at http://www.dc.state.fl.us/pub/compass/0110/Compass_Oct01.pdf. Mr. Rhodes is responsible for overseeing the F.D.O.C. Law Library Services and for training inmates as “research aides” or “law clerks.”

¹⁹³ E-mail from Barry Rhodes to Susan Hughes (Dec. 11, 2001, 09:22 EST) (on file with author). Mr. Rhodes forwarded this e-mail to the librarians, who in turn posted a copy of it on the bulletin boards in the prison law libraries for the inmates to see. I have personally seen this e-mail posted in five different prison law libraries. I was given a copy of this e-mail by the librarian at Okaloosa Correctional Institution in 2002.

standardized form letter that contains the following statement concerning post-conviction remedies and judicial time periods:

I should like to advise you . . . that you may file a motion to mitigate or reduce your sentence. Such motion is filed with the trial judge; it must be *both* filed with the trial judge and heard within sixty (60) days after the decision of the district court [on appeal] becomes final. In informing you of this possible remedy, I make no assessment as to whether it would be successful or not. However, I did feel you should be advised since there is a specified time period for filing a motion to mitigate.

You also have the right to file a motion for post-conviction relief under the Florida Rule of Criminal Procedure 3.850. A Rule 3.850 motion is filed in the trial court, and must be filed within two years of the date that the conviction became final If a Rule 3.850 motion is filed and denied, you would have the right to appeal from the order denying post-conviction relief within 30 days of that order¹⁹⁴

For a pro se prisoner to comply with AEDPA, it is of the utmost importance for the prisoner to be made aware of the one-year time limitation. It has been my experience that court-appointed appellate counsel in Florida, for some unexplainable reason, neglect to inform the prisoner of the existence of a time limitation for seeking federal habeas relief.¹⁹⁵ As a result, prisoners begin preparing for state post-conviction remedies under the mistaken belief that they may use the entire *two-year* period before filing their post-conviction motion in the state court without missing any important deadlines.

I have been asked many times by prisoners who are out of time for seeking federal habeas review, “How can I have only one year to file a federal habeas corpus when I can’t file it until after I finish my state remedies, and I have two years to file state post-conviction motions? Should my federal time not begin *after* I finish with my state post-conviction remedies?” Such a situation does not seem logical, but it *is* the situation.

¹⁹⁴ Letter from Valerie Jonas, Assistant Public Defender, to Inmate Oriel Bernadeu (Apr. 26, 2005) (on file with the author).

¹⁹⁵ I have read literally hundreds of letters over the years from court-appointed appellate attorneys informing prisoners of the denial of an appeal and the availability of state post-conviction motions. In all of the letters I have read, I have *never* read one in which the attorney informed the prisoner that he only had one year to file a federal habeas corpus application.

V. THE END RESULT OF AEDPA

AEDPA has resulted in what could be considered an affront to the very dignity and credibility of the judicial system. In numerous cases, federal review of the constitutionality of a prisoner's conviction and sentence has been barred simply because the prisoner is uneducated, mentally ill, or indigent. Because of AEDPA's time limitation, inadequate and inaccessible prison law libraries, under-trained and poorly chosen prison law clerks, and a host of potential education and mental health issues, many pro se prisoners are simply unable to obtain federal habeas review of constitutional violations.¹⁹⁶

Recall the person I described in the introduction who accepted a plea based on his attorney's explicit assertion that he would be released from prison after serving a certain number of years, only to learn too late that, under the plea, he would never be eligible for release from prison. Or imagine a person being told to take a plea by his attorney because, according to the attorney, the defense the person wished to pursue was not allowed under state law, when in fact it was an allowable defense and was supported by competent medical evidence. A person should not be prevented from obtaining federal habeas review of claims such as these simply because he was one of the prisoners detailed earlier and could not afford to hire an attorney to pursue post-conviction claims. Unfortunately, in the *real system* of pro se litigation, this is not uncommon.

The sad fact of the matter is that I am an indigent prisoner with such claims who is time-barred by AEDPA.¹⁹⁷ And I am not alone. There are many of us in this situation.¹⁹⁸

On June 10, 1995, I was arrested and charged with, among other things, robbery while armed with a firearm and attempted first degree murder of a law enforcement officer.¹⁹⁹ The charged crimes also occurred on June 10, 1995. I do not deny committing the acts for which I was arrested. I was se-

¹⁹⁶ See generally Part IV, *supra*.

¹⁹⁷ O'Bryant v. Sapp, No. 3:03-cv-803-J-20MCR (M.D. Fla. Jan. 27, 2005).

¹⁹⁸ Interview with Inmate Victoria, Holmes Correctional Institution, Bonifay, Fla. (June 10, 2005) (discussing Florida v. Victoria, No. 1986-6167 (9th Fla. Cir. Ct. Apr. 3, 1987)); Interview with Inmate Hall, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Hall, No. 87-4472-CC (7th Fla. Cir. Ct. originally sentenced to death on March 22, 1989; resentenced to life without parole on May 10, 1991), regarding alleged misinformation from defense counsel that a particular expert witness would not be able to testify during the guilt/innocence phase of trial, but rather only at penalty phase); Interview with Inmate Walters, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Walters, No. CRC 01-15818CFANO-K (6th Fla. Cir. Ct., date unavailable), regarding alleged misinformation concerning the elements of the charged crime); Interview with Inmate Durbin, Holmes Correctional Institution, Bonifay, Fla. (Oct. 18, 2005) (discussing Florida v. Durbin, No. 2001-CF 001173A (1st Fla. Cir. Ct. Mar. 18, 2001), regarding defense counsel's assurance to the defendant that he would receive a suspended sentence of five to nine years if he plead guilty since it was his first offense; instead, he received fifteen years in prison).

¹⁹⁹ See O'Bryant v. State, 765 So. 2d 745, 746 (Fla. Cir. Ct. 2000).

verely intoxicated on drugs and alcohol at the time the events happened. I do not wish to have my voluntary intoxication excuse my conduct. My entire defense concerning my intoxication was that I lacked the “specific intent”²⁰⁰ required under Florida law for these offenses²⁰¹ and that I should have been charged instead with grand theft and attempted second degree murder.²⁰² The attorney who was appointed to represent me misinformed me that voluntary intoxication could not be used as a defense in Florida and told me that if this was the defense I was claiming, I should plead guilty.²⁰³

I pled guilty to robbery while armed with a firearm and attempted first degree murder of a law enforcement officer based on my court-appointed counsel’s advice. The agreed-upon sentence, as explained to me by my counsel, was that I would be sentenced to life in prison for each offense—to be served concurrently—and that I would be released on parole after serving, at the most, twenty-five years. This, however, was not true. According to the Florida Parole Commission, I “will serve the remainder of [my] natural life in prison unless [I am] granted clemency.”²⁰⁴

Later, my defense counsel admitted:

I specifically advised the defendant, Thomas C. O’Bryant, that he could expect to be eligible for release under the sentences . . . after 25 years I am certain that the possibility of being eligible for release, after 25 years, was a major factor in the defendants [sic] plea It has now been explained to me concurrent life sentences imposed upon Count II, for Armed Robbery, is being construed to prohibit any possibility of parole. The defen-

²⁰⁰ In Florida, crimes are divided into two categories: “specific intent” crimes and “general intent” crimes. Specific intent crimes require the offender to have the mental capacity to form an intent to commit an offense. *See* FLORIDA CRIMINAL PRACTICE AND PROCEDURE §11.15 (2005).

²⁰¹ *See* *Penn v. State*, 825 So. 2d 456, 457 (Fla. 2002) (noting first-degree murder is a “specific intent crime”); *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983) (holding that if specific intent is required for a crime, it is also required for a charge of attempting to commit that crime); *Parrish v. State*, 892 So. 2d 1199, 1200 (Fla. Dist. Ct. App. 2005) (noting that armed robbery is a specific intent crime).

²⁰² *See* *Brown v. State*, 790 So. 2d 389, 391 (Fla. 2000) (“[T]he crime of attempted second-degree murder is a general intent crime.”). At the time of the offenses in my case, I had been awake for four days and was heavily consuming drugs. I was snorting and smoking cocaine, smoking marijuana, taking LSD, and consuming large amounts of alcohol. Because of this, I lacked the “specific intent” to commit the charged offenses. I did have the “general intent” necessary to charge me with the lesser offenses. Therefore, I should have been charged with the lesser offenses. In fact, in 1995, grand theft was also a “specific intent” crime in Florida. *See* *Linehan v. State*, 442 So. 2d 244, 251 (Fla. Dist. Ct. App. 1983). Therefore, I should have been charged with an even lesser offense than grand theft.

²⁰³ *See* *Lineham v. State*, 476 So. 2d 1262, 1264 (Fla. 1985) (“[T]his court has long recognized voluntary intoxication as a defense to specific intent crimes.”). *But see* FLA. STAT. §775.051 (2005) (prohibiting voluntary intoxication as a defense to specific intent crimes as of October 1999, three years after my trial).

²⁰⁴ Affidavit of David E. Roberts, Florida Parole Commission (June 13, 2003), *O’Bryant v. Sapp*, No. 3:03-cv-803-J-20MCR (M.D. Fla. 2005) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

dant was never advised in this plea that the negotiated sentence would prohibit parole.²⁰⁵

When I raised this matter as a claim of ineffective assistance of counsel and as an involuntary plea (without a full understanding of the consequences), the trial court denied the claim and the appellate court affirmed the denial without comment.²⁰⁶

The Supreme Court has long held that since a guilty plea necessarily entails a defendant foregoing numerous constitutional protections—the right against self-incrimination, the right to a jury trial, the right to confront one’s accuser—the guilty plea may only be upheld if it was voluntarily, knowingly, and intelligently made.²⁰⁷ A critical component of the plea being “knowing” is that the defendant must have a full understanding of the consequences of the plea.²⁰⁸ When a defendant enters into a plea based upon incorrect or incomplete information from his defense counsel, the prosecution, or the judge, how can the plea have been made “knowingly”? When the state courts refuse to abide by this federal constitutional doctrine, a federal court should not be divested of its authority to review the case because of an unreasonable time limitation, such as the one created by AEDPA.

My case is *not* an isolated incident. As a “jailhouse lawyer,” I have encountered many prisoners who are time-barred by AEDPA despite having valid claims of substantial constitutional violations. This includes prisoners who were willing to accept responsibility for their unlawful conduct and entered a plea to a certain charge or sentence, but learned after being incarcerated that the sentence imposed was *not* the sentence they agreed to. It also includes prisoners who remain incarcerated for crimes to which others have confessed, defendants being prohibited from cross-examining prosecution witnesses concerning their motives to fabricate testimony,²⁰⁹ fabricated “confessions” of the defendant being presented to the jury,²¹⁰

²⁰⁵ Affidavit of Donald K. Rudser (Oct. 15, 1997), *Florida v. O’Bryant*, No. 95-92 (Fla. Cir. Ct. May 5, 1998) (document on file with the author and the Harvard Civil Rights-Civil Liberties Law Review).

²⁰⁶ *Florida v. O’Bryant*, No. 95-92 (Fla. Cir. Ct. May 5, 1998) (order denying grounds one through six and ground eight of motion for post-conviction relief); *Florida v. O’Bryant*, No. 95-92 (Fla. Cir. Ct. June 29, 1998) (order denying ground seven); *O’Bryant v. Florida*, 765 So. 2d 745 (Fla. Dist. Ct. App. 2000) (remanding for evidentiary hearing on ground three (voluntary intoxication defense) and ground six (penalty authorized by statute) and affirming denial on grounds of the misinformation of parole eligibility and the influence of psychotropic drugs on plea). On remand, the trial court denied relief even though defense counsel acknowledged he told me I could not use a defense of voluntary intoxication (which was allowed and applicable). Transcript of Proceedings at 49-55, *Florida v. O’Bryant*, No. 95-92 (Fla. Cir. Ct. Dec. 3, 2000), *reh’g denied*, 826 So. 2d 289 (Fla. Dist. Ct. App. 2002) (decision without published opinion).

²⁰⁷ *Brady v. United States*, 397 U.S. 742, 748 (1970).

²⁰⁸ *See id.*

²⁰⁹ *See, e.g.*, *Wood v. Hamilton*, No. 4:05-cv-00254-MP-AK (N.D. Fla. Sept. 22, 2005).

²¹⁰ *See, e.g.*, *Rock v. Crist*, No. 05-20899 (S.D. Fla. Nov. 14, 2005).

etc. In all of these situations, the individuals had to proceed pro se because they could not afford to hire post-conviction counsel, and because of AEDPA, they were unable to obtain federal review.

VI. CONCLUSION

Congress should repeal AEDPA's habeas corpus provisions. Even without AEDPA, the entire system seems to prevent indigent prisoners from obtaining meaningful review of constitutional violations: undereducated prisoners, prisoners with mental disorders, unreliable memories of trial court proceedings, under-trained and under-educated law clerks, "psych inmates" working as law clerks, law libraries with meager resources, restricted access to these law libraries, law clerks, and jailhouse lawyers—the list goes on. Combine these problems with an unreasonable and unnecessary time limitation and a prohibition against successive habeas petitions, and the writ of habeas corpus has truly evolved into the "Great Unobtainable Writ."²¹¹ Surely this is not what the Founding Fathers envisioned the writ of habeas corpus to be when they proclaimed that it obviated the need for the Bill of Rights.²¹²

When obtaining a conviction against or imposing a sentence upon a defendant for his unlawful conduct, it is of the utmost importance that the law and constitutional safeguards be followed. Because of AEDPA, many of us in prison are not able to obtain the federal review necessary to ensure that this basic principle is followed. A Congressional review and reconsideration of the habeas provisions of AEDPA is justified, warranted, and necessary.

²¹¹ Prior to AEDPA, in 1995, 58.7% of the habeas corpus petitions filed in U.S. district courts by state prisoners were dismissed, while only 1.2% resulted in judgments for the inmate. SCALIA, *supra* note 26, at 6. Considering the reality of pro se litigation, it is no wonder the foregoing percentages are so dismal. I have been unable to learn the exact percentages post-AEDPA, but based on years of personal experience with prisoner litigation, I believe the number of dismissals has increased and the grants of relief decreased. After all, the reality of indigent pro se litigation from a prison setting has remained unchanged, and indigent prisoners are now provided even less time to file their pro se motions.

²¹² See THE FEDERALIST NO. 84, *supra* note 11.

