

# Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases

---

Bryan A. Stevenson\*

Mass incarceration has fundamentally changed the administration of criminal justice in the United States. There is growing evidence that the dramatic rise in the number of people being sent to prison has also resulted in an extraordinary increase in the number of wrongful convictions, illegal sentences, and unjust imprisonments. Rather than expand and facilitate increased review of larger numbers of prisoner appeals, lawmakers and state and federal courts have sought to dismantle collateral appeal mechanisms, bar substantive remedies for constitutional violations, and restrict review of federal habeas corpus applications.

Many of the new procedural rules employed to bar review of prisoner complaints have no legitimate policy justification. Procedural rules in collateral review operate as traps applied against under-resourced pro se litigants contending with severe institutional constraints within overcrowded prisons.<sup>1</sup> Authorities use political and judicial rhetoric about “delay” to justify the current restrictive regime in a manner that is uninformed and often wildly misguided. While politicians focus on lengthy appeals in a few death penalty cases to support laws that constrain prisoner access to courts, the issues in those cases are inapplicable to the overwhelming majority of collateral post-conviction litigation. The Antiterrorism and Effective Death Penalty Act has exacerbated an already perilous area of the law, and insidious demands for “finality” have resulted in frightening proposals to further restrict or eliminate collateral remedies for prisoners, such as Congress’s recent Streamlined Procedures Act proposal.

Recently, exonerations of innocent prisoners through DNA and the harrowing stories of innocent people on death row have dramatized the

---

\* Director, Equal Justice Initiative, Montgomery, Ala.; Professor of Clinical Law, New York University School of Law; J.D., Harvard Law School, 1985; M.P.P., Harvard University, 1985. The author would like to thank Aaryn Urell, Charlotte Morrison, and Rebecca Kiley, attorneys at the Equal Justice Initiative, for helpful research assistance. Some portions of this Essay originally appeared in a statement before the United States Judiciary Committee in July 2005. *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Bryan Stevenson, Esq.), available at [http://judiciary.senate.gov/testimony.cfm?id=1569&wit\\_id=4458](http://judiciary.senate.gov/testimony.cfm?id=1569&wit_id=4458).

<sup>1</sup> For an excellent description of these problems by an imprisoned person forced to challenge a conviction pro se, see Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006).

plight of the wrongly convicted.<sup>2</sup> However, unless there are modifications to existing federal habeas corpus rules and state post-conviction procedures, many innocent prisoners will be denied desperately needed relief as a result of unjustifiable procedural defaults.

In this Essay, I contend that remedial efforts must be made to restore credibility and fairness to collateral post-conviction review in the United States. In Part I, I argue that mass incarceration has created serious obstacles to the reliable administration of criminal justice and overwhelmed post-conviction review mechanisms. In Part II, I identify some of the unjustifiable procedural obstacles that bar prisoner appeals in America and the consequences of these rules. Finally, in Part III, I offer an initial set of recommendations that I believe require serious consideration as America's new underclass of imprisoned people grows to record levels.

## I. THE EMERGING LEGACY AND COLLATERAL CONSEQUENCES OF MASS INCARCERATION

### A. *Mass Imprisonment in America*

In the last thirty-five years, the number of United States residents in prison has increased dramatically—from 330,000 people in jails and prisons in 1972 to almost 2.3 million imprisoned people today.<sup>3</sup> The United States now has the highest rate of incarceration in the world.<sup>4</sup> Almost five million people are on probation and parole in this country.<sup>5</sup> The consequences of increased incarceration and penal control strategies have been dramatic and costly. Corrections spending by state and federal governments has risen from \$6.9 billion in 1980 to \$57 billion in 2001.<sup>6</sup> During the ten

---

<sup>2</sup> See, e.g., Maria Glod, *DNA Tests Clear Ex-Va. Inmate, Lawyers Say*, WASH. POST, Apr. 6, 2004, at B1; Alex Leary, *Exonerations Stir Bids to Expand DNA Testing*, ST. PETERSBURG TIMES, Jan. 30, 2006, at 1B; Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at 14; Brooke A. Masters, *Death Row to Freedom: A Journey Ends*, WASH. POST, Feb. 13, 2001, at A14; Jonathan Saltzman, *Inmate's Exoneration Renews Calls for an "Innocence" Panel*, BOSTON GLOBE, Mar. 9, 2004, at A1; Henry Weinstein, *DNA Tests Finally Clear Louisiana Man of Murder*, L.A. TIMES, Aug. 10, 2004, at A12.

<sup>3</sup> RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1 (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>; Press Release, U.S. Dep't of Justice, Bureau of Justice Statistics, *The Nation's Prison Population Continues its Slow Growth* (Oct. 23, 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/press/p04pr.htm>.

<sup>4</sup> MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 2 (2003), available at <http://www.sentencingproject.org/pdfs/pub9036.pdf>.

<sup>5</sup> LAUREN E. GLAZE & SERI PALLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2004 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf>.

<sup>6</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (31st ed. 2003) [hereinafter BUREAU OF JUSTICE STATISTICS, SOURCEBOOK], available at <http://www.albany.edu/sourcebook>.

year period between 1985 and 1995, prisons were constructed at a pace of one new prison opening each week.<sup>7</sup>

Socio-political consequences have accompanied the economic toll of expansive imprisonment policies. The poor and people of color have felt the greatest impact of mass incarceration, and felon disenfranchisement laws have diluted the already minimal political power of these communities.<sup>8</sup> The widespread incarceration of men in low-income communities has had a profound negative impact on social and cultural norms relating to family and opportunity. Extraordinary increases in the imprisonment of poor and minority women with children have caused rising numbers of displaced children and dependents.<sup>9</sup> In a growing number of poor rural and urban communities, a dispiriting culture of hopelessness and despair has festered into cycles of violence, criminality, and failure.<sup>10</sup> For too many poor

---

<sup>7</sup> See MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 9 (1999) (“More than half of the prisons in use today have been constructed in the last twenty years.”); see also Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, in PRISONS 1, 12 (Michael Tonry & Joan Petersilia eds., 1999).

<sup>8</sup> One-third of black males born today likely will spend at least some part of their lives behind bars; nearly one-tenth of black males in their twenties already live in prison; and almost one out of three black males in their twenties currently remains in jail, prison, on probation or parole, or otherwise under criminal justice control. See MaryBeth Lipp, *A New Perspective on the “War on Drugs”: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 1022 (2004). The annual arrest rate among African Americans is more than two and a half times the white rate. See D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 454 (2003). Some scholars have argued that mass imprisonment presents an institutional impediment to progress and equality for African Americans that has historical antecedents in slavery and American racial apartheid laws. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the US*, 13 NEW LEFT REV. 41 (2002). Many states strip people who have been convicted of felonies of voting rights even while they are on probation or parole. Fourteen states permanently bar voting rights for some or all ex-felony offenders unless they are pardoned. MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES 1 (2005), available at <http://www.sentencingproject.org/pdfs/barredforlife.pdf>.

<sup>9</sup> The number of women serving sentences in state and federal prisons in the United States skyrocketed from 5635 in 1970 to 92,751 in 2003. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK, *supra* note 6. As of 1997, 65% of women incarcerated in state prisons and 59% of women in federal prisons had minor children. More than two-thirds of those mothers lived with their children prior to being incarcerated. In 1999, almost 1.5 million American children had a parent in prison; over half of these children were African American. CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN 2, 4 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

<sup>10</sup> Some have argued that mass incarceration has lowered crime rates and that reduced crime is a substantial upside worth some acknowledgment. See, e.g., Eli Lehrer, *The Left’s Prison Complex: The Case Against the Case Against Jail*, NAT’L REV., Oct. 9, 2000, at 41; James Q. Wilson, Remarks at the Independent Institute’s Independent Policy Forum (Jan. 19, 1995), available at <http://www.independent.org/events/transcript.asp?eventID=63#2>. However, even that alleged benefit is fiercely debated. While incarceration rates have risen and crime rates have decreased across the country, states where the growth of incarceration is below average have seen their violent crime rates decline at twice the rate of states with above-average increases in incarceration. See JENNI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S

citizens and people of color, arrest and imprisonment have become an inevitable and seemingly unavoidable part of the American experience.

With the criminal justice system playing such a dominant role in the lives of poor people and people of color, the integrity and credibility of the system has become a central issue. If the administration of criminal justice is perceived to be unfair, corrupt, biased, and error-plagued, it is not seen as a corrective or necessary component of public safety. Instead, it is viewed as an oppositional system of social, economic, and political control that marginalizes and exploits the problems of the poor in a highly stratified society.<sup>11</sup> Extreme variations in wealth and power in the United States<sup>12</sup> sit uncomfortably close to a criminal justice system that appears to prey on the powerless and protect the wealthy. Wrongful convictions, unjust or illegal imprisonment, and abuse of power by law enforcement officials provoke intense anger and angst in poor and minority communities.

The notion that the criminal justice system is unfair is not just an apocryphal lament by the besieged and disaffected. Courts *have* become much more tolerant of error in the administration of criminal justice. Many of the current problems result from the sheer volume of criminal cases that systems must now manage. Other systemic problems reflect policy choices about how we respond to post-conviction complaints about illegal, incorrect, and unjust convictions and sentences. These policy choices must be reexamined.

#### *B. Underfunded Indigent Defense Systems and the Inevitable Increase in Wrongful Convictions*

The huge increase in the number of people prosecuted, convicted, and sent to prison has had an enormous impact on courts and other institutional

---

4 (2000), available at <http://www.sentencingproject.org/pdfs/9039.pdf>. The overwhelming increase in the number of imprisoned people is primarily due to the incarceration of drug offenders and people convicted of non-violent crimes; while the number of incarcerated violent offenders almost doubled between 1980 and 1998, the number of nonviolent offenders tripled and the number of drug offenders increased 1040%. See Vincent Shiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT'G REP. 332 (2002). The impact of increased incarceration in these crime categories has so far demonstrated little societal benefit or reduction in crime. Quite to the contrary, as Congress recognized in passing the Prison Rape Elimination Act of 2003, violence in prison makes "brutalized inmates" more likely to commit crimes upon release. See 42 U.S.C. § 15601(8) (2000 & Supp. III 2004). The evidence also suggests that prison overcrowding, which has increased with the rising incarceration rates, results in higher rates of recidivism. See David P. Farrington & Christopher P. Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 230 (1980).

<sup>11</sup> See DAVID GARLAND, *THE CULTURE OF CONTROL* 196–97 (2001).

<sup>12</sup> See WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT* 26 (2003) ("In a study of fifteen prosperous nations, children in the United States had the highest percentage of poverty, the second lowest standard of living, and the highest gap between rich and poor than any of the nations.").

actors responsible for ensuring reliability and fairness. Under *Gideon v. Wainwright*,<sup>13</sup> state and local governments are constitutionally obligated to provide effective legal assistance to every person who cannot afford legal representation. Even before mass incarceration accelerated in the 1980s, overburdened systems of indigent defense struggled to meet this constitutional mandate.<sup>14</sup> The growing number of criminal prosecutions and incarcerated people facing long-term imprisonment or death sentences has overwhelmed many state criminal justice systems.<sup>15</sup> States are unable to fund adequate indigent defense systems or provide sufficient resources for oversight, training, and management of cases.<sup>16</sup>

In my state of Alabama, we have no statewide public defender system. Most indigent defendants in Alabama receive appointed lawyers from the private bar.<sup>17</sup> Of the 190 people currently on Alabama's death row, nearly two-thirds were represented by appointed lawyers whose compensation for preparing the case for trial was capped by state statute at \$1,000.<sup>18</sup> Indigent Alabama defendants facing sentences of up to life imprisonment without parole are represented by lawyers whose *total* compensation is limited by statute to \$1,500 to \$3,500 per case.<sup>19</sup> Alabama is not alone in its failure to adequately provide competent legal assistance to indigent defendants.<sup>20</sup>

---

<sup>13</sup> 372 U.S. 335 (1963).

<sup>14</sup> See Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 482–83 (1982) (“[T]here is evidence that public defender’s offices are chronically underfunded . . . . [A]lmost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds.”).

<sup>15</sup> The rise in incarcerated people does not precisely mirror a rise in the number of indictments and prosecutions, as much of this increase is a result of longer sentences. However, harsher sentencing schemes and mandatory sentences eliminate the incentive for defendants to plea bargain, for there is less room to reward cooperation. This increases the likelihood of a trial, straining defense and prosecutorial resources and resulting in more imprisoned people—and more post-conviction appeals.

<sup>16</sup> See, e.g., AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

<sup>17</sup> Friedman & Stevenson, *supra* note 14, at 3–4.

<sup>18</sup> See ALA. CODE § 15-12-21(d) (1996). On June 10, 1999, compensation for appointed attorneys was increased to \$50 per hour for in-court work and \$30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases, but fees for out-of-court work remained capped at \$1,000. Effective October 1, 2000, compensation for appointed attorneys increased to \$60 per hour for in-court work and \$40 per hour for out-of-court work, and the \$1,000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d) (2002).

<sup>19</sup> See ALA. CODE §§ 15-12-21(d)(1-6) (1975).

<sup>20</sup> Hundreds of people on death row in Texas were defended by attorneys whose investigative and expert expenses were capped at \$500. *Lackey v. State*, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982) (discussing TEX. CODE CRIM. PROC. ANN. art. 26.05 (Vernon 1980)); see also TEX. DEFENDER SERV., *A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY*, 77–98 (2000), available at <http://www.texasdefender.org/state%20of%20denial/Chap6.pdf>. In some rural areas in Texas, lawyers have received no more than \$800 to handle a capital case. See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV.

Across the country, there is evidence of underfunded and inadequate indigent defense systems.<sup>21</sup>

The predictable result is deeply flawed representation and corresponding doubts about the reliability and fairness of verdicts and sentences. Although some remedial efforts have been undertaken,<sup>22</sup> thousands of people have likely been wrongly convicted and imprisoned as a result of unreliable and underfunded legal assistance. Cases in which a death sentence has been imposed receive the greatest attention and scrutiny, but examples abound of capital defendants represented by sleeping attorneys,<sup>23</sup> drunk attorneys,<sup>24</sup> attorneys largely unfamiliar with death penalty law and pro-

---

AM. L. 783, 819 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34). A study in Virginia found that, after taking into account an attorney's overhead expenses, the hourly rate paid to counsel representing a capital defendant was \$13. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993). In non-capital cases the compensation is worse. In Virginia, state law authorizes compensation only up to \$1,235 for offenses punishable by 20 years or more and \$445 for any other felony. See VA. CODE ANN. § 19.2-163 (2001).

<sup>21</sup> For example, until 2003, counsel appointed to represent an indigent defendant in Mississippi faced a \$1,000 cap on compensation; in a capital case, two attorneys could be appointed for total compensation not to exceed \$2,000. MISS. CODE ANN. § 99-15-17 (2003). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a \$2,500 cap on compensation. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994) (citing *The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations*, reprinted in Ky. Dep't of Pub. Advoc., ADVOCATE, Dec. 1993, at 11). In Pennsylvania there are death row prisoners who were sentenced to death in the 1980s and 1990s when eighty percent of the cases were handled by appointed lawyers who received a flat fee of \$1,700, plus \$400 for each day in court. See Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at 6. Philadelphia represents less than thirteen percent of Pennsylvania's population but over half of the state's death row population. See John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty*, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that Philadelphia is responsible for fifty-five percent (126/230) of the state's death row population; eighty-eight percent (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).

<sup>22</sup> The American Bar Association has recently promulgated new standards for representation of capital defendants that have been expressly adopted by the United States Supreme Court. See *Rompilla v. Beard*, 125 S. Ct. 2456, 2466 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); see also *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Some states, such as Illinois, have set up commissions to enact legislative recommendations aimed at improving the reliability of criminal case verdicts. See Ill. Exec. Order No. 4, *Creating the Comm'n on Capital Punishment* (May 4, 2000), available at [http://www.idoc.state.il.us/ccp/ccp/executive\\_order.html](http://www.idoc.state.il.us/ccp/ccp/executive_order.html). Not all indigent defense problems are directly related to compensation alone. Attorneys managing caseloads that are too high to provide adequate assistance are a common problem in many jurisdictions. Inadequate attorney training and the inability to obtain adequate expert assistance, investigative assistance, or independent forensic analysis is also common.

<sup>23</sup> See, e.g., *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (upholding death sentence when lead attorney slept through major portions of trial); *Ex parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (denying death row prisoner's application for post-conviction relief when lead trial attorney slept during trial).

<sup>24</sup> See, e.g., *Guy v. Cockrell*, No. 01-10425, 2002 WL 32785533, at \*4 (5th Cir. July 23, 2002) (trial counsel conceded using drugs throughout capital trial); *Haney v. State*, 603

cedure,<sup>25</sup> and attorneys who otherwise could not provide the assurance of reliability or fairness that criminal proceedings require.

Nor is this the end—unreliable evidence, police and prosecutorial misconduct, and insufficient access to expert assistance are just a few of the additional factors that exacerbate inadequate indigent defense counsel and contribute to wrongful convictions. There has also been a visible shift in the American conscience about crime and criminality that has created a presumption of guilt that poor and minority defendants must overcome to avoid conviction once arrested.<sup>26</sup> The confluence of these factors makes the risk of wrongful conviction fearfully high and has fueled real doubts about many cases.

## II. FINALITY WITHOUT FAIRNESS CREATES INJUSTICE

DNA technology has shed new light on the frequency of wrongful convictions in cases where forensic evidence can be tested by new technology.<sup>27</sup> Congress reacted to the growing number of DNA exonerations by passing the Innocence Protection Act (“IPA”) in 2004.<sup>28</sup> However, to create remedies for those who might be exonerated under the IPA, Congress has been forced to suspend a web of procedural obstacles to judicial review for prisoner claims of innocence. The IPA functions separately from

---

So. 2d 368, 377–78 (Ala. Crim. App. 1991) (affirming death sentence even though trial had to be suspended for a day because lawyer appointed to represent defendant was too drunk to go forward); *see also* TEX. DEFENDER SERV., *LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS* 38–39 (2002), available at <http://www.texasdefender.org/chapters.pdf>.

<sup>25</sup> James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102–08 nn.175–90 (2000) (discussing numerous examples of incompetent lawyers appointed to handle capital cases and studies documenting the inexperience and incompetence of attorneys appointed to represent capital defendants in most death penalty states); TEX. DEFENDER SERV., *supra* note 20, at 83–98 (highlighting examples of incompetent, unqualified, or unethical attorneys appointed to represent capital defendants).

<sup>26</sup> In the author’s opinion, even with adequate legal assistance, with a disproportionately high percentage of young African American men falling to criminal convictions and prison sentences, jurors, judges, police, prosecutors, and many defense attorneys start with a presumption that the accused is probably guilty. The less familiar, proximate, or aware criminal justice decisionmakers are with people of color, the poor, or the disfavored accused’s group members, the more likely it is that the presumption of guilt will contribute to a wrongful conviction. In different communities across this country, the presumptively guilty accused takes on different features. He or she may be an immigrant, Latino, low-status white, Native American, Muslim, or disadvantaged by some other social or cultural identity. The presumptively guilty are almost always poor, because wealth and celebrity frequently neutralize or overcome illegal presumptions of guilt.

<sup>27</sup> Steve Mills, *Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, at C8 (Virginia state crime lab touted as best in country repeatedly failed to catch botched DNA testing in case of Virginia death row inmate Earl Washington, Jr., who spent seventeen years in prison before being exonerated); *see also* JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

<sup>28</sup> 18 U.S.C. §§ 3600, 3600A (2004); 42 U.S.C. §§ 14163, 14163a-e (2004).

any other post-conviction or federal habeas corpus laws.<sup>29</sup> It modifies the statute of limitations that frequently bars prisoners challenging wrongful convictions. The IPA creates a rebuttable presumption that a petition for relief is timely if made within *three years* of conviction. The IPA also permits an applicant to rebut the presumption against timeliness for motions made more than three years after conviction upon, among other possibilities, a showing of “good cause.”<sup>30</sup> In contrast, a federal habeas corpus petitioner without a DNA-related claim generally faces a rigid time limit of one year from the date his conviction becomes final or from the date the factual predicate of the claim could have been discovered with due diligence.<sup>31</sup>

At least in cases with DNA evidence, there is a growing recognition that fairness requires a remedy or review of possible wrongful convictions. But innocent or wrongly convicted people who can be exonerated through DNA are not the only innocent people in prison. The death penalty exonerations have established that DNA identifies only a small subset of people who never should have been convicted of any crime or sentenced to death. But a mere 12% of the 123 death penalty exonerations identified by the Death Penalty Information Center were based on DNA evidence.<sup>32</sup> If Congress has recognized that protecting the innocent who can be exonerated through DNA requires suspending a host of procedural rules to facilitate review, why is there no similar concern for people who have been wrongly convicted due to illegal suppression of exculpatory evidence by police or prosecutors? Innocent people who have been convicted because of unreliable, fabricated, and manipulated informant testimony or by false or incompetent forensic evidence are just as entitled to relief as those who may be exonerated by DNA.

Moreover, the emphasis on complete factual innocence has too narrowly defined the community of those who are wrongly convicted, illegally imprisoned, and in critical need of remedies. If an accused commits a misdemeanor that carries a maximum sentence of one year but is convicted of a felony and sentenced to twenty years as a result of judicial or prosecutorial misconduct, that prisoner can legitimately claim to be wrongly convicted. It is appropriate for such a person to challenge his illegal twenty-year confinement and equally appropriate for a just system to correct this impermissible outcome. If a defendant commits a Class C felony with a maximum sentence of five years, but as a result of constitutionally ineffective assistance from defense counsel is convicted of a Class A felony with a fifty-year sentence, a remedy should be available to prevent the prisoner from illegally losing forty-five years of freedom. Obviously, wrong-

---

<sup>29</sup> 18 U.S.C. § 3600(h) (2004).

<sup>30</sup> 18 U.S.C. § 3600(a) (2004).

<sup>31</sup> 28 U.S.C. § 2244(d)(1) (1996).

<sup>32</sup> See DEATH PENALTY INFO. CTR., INNOCENCE: LIST OF THOSE FREED FROM DEATH Row, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Mar. 22, 2006).

ful convictions and sentences come in complex formulations. However, the legitimate emphasis on innocent imprisoned people who have committed no crime should not obscure the complex ways in which wrongful convictions and unjust or illegal sentences compromise American criminal justice.<sup>33</sup>

Judicial review should also be available when important constitutional protections are in jeopardy that do not directly relate to questions of innocence. In 2005, the United States Supreme Court found that a California defendant had made out a prima facie case that the State illegally excluded African Americans from jury service on the basis of their race.<sup>34</sup> Racial bias in jury selection has long been a serious problem in the administration of criminal justice. In Alabama death penalty cases alone, state prosecutors were found guilty of intentional racial discrimination in jury selection through the exercise of peremptory strikes in twenty-three cases in recent years.<sup>35</sup> Yet in dozens of other death penalty cases, courts refused to consider claims of racial bias against some of the same prosecutors, as the racial bias claim was procedurally defaulted.<sup>36</sup> Although a state prosecutor admitted that African Americans were illegally excluded during his trial, Robert Tarver was executed by Alabama officials in 2000 after the court ruled that his clearly meritorious racial bias claim was procedurally barred from review.<sup>37</sup>

Executing prisoners who likely have been convicted as a result of illegal racial discrimination by state prosecutors undermines and corrupts the state's ability to assert that the criminal justice system operates fairly and in a racially neutral manner. Failing to examine race discrimination claims

---

<sup>33</sup> See generally Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (1998).

<sup>34</sup> *Johnson v. California*, 125 S. Ct. 2410, 2419 (2005).

<sup>35</sup> See *Bui v. Haley*, 279 F.3d 1327 (11th Cir. 2002); *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995); *Morrison v. Jones*, 952 F. Supp. 729 (M.D. Ala. 1996); *Ex parte Bankhead*, 625 So. 2d 1146 (Ala. 1993); *Ex parte Floyd*, 571 So. 2d 1234 (Ala. 1990); *Ex parte Godbolt*, 546 So. 2d 991 (Ala. 1987); *Yancey v. State*, 813 So. 2d 1 (Ala. Crim. App. 2001); *Pace v. State*, 714 So. 2d 320 (Ala. Crim. App. 1996), *rev'd in part*, 714 So. 2d 332 (Ala. 1997) (plurality opinion), *remanded to* 714 So. 2d 340 (Ala. Crim. App. 1998); *Freeman v. State*, 651 So. 2d 576 (Ala. Crim. App. 1994); *Kynard v. State*, 631 So. 2d 257 (Ala. Crim. App. 1993); *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992); *Neal v. State*, 612 So. 2d 1347 (Ala. Crim. App. 1992); *Duncan v. State*, 612 So. 2d 1304 (Ala. Crim. App. 1992); *Walker v. State*, 611 So. 2d 1133 (Ala. Crim. App. 1992); *Guthrie v. State*, 598 So. 2d 1013 (Ala. Crim. App. 1991); *Powell v. State*, 548 So. 2d 590 (Ala. Crim. App. 1988); *Henderson v. State*, 549 So. 2d 105 (Ala. Crim. App. 1987); *Aces v. State*, 548 So. 2d 459 (Ala. Crim. App. 1987); *Madison v. State*, 545 So. 2d 94 (Ala. Crim. App. 1987); *Owens v. State*, 531 So. 2d 22 (Ala. Crim. App. 1987); *Turner v. State*, 521 So. 2d 93 (Ala. Crim. App. 1987); *Jackson v. State*, 516 So. 2d 774 (Ala. Crim. App. 1987); *Raines v. State*, 515 So. 2d 82 (Ala. Crim. App. 1987).

<sup>36</sup> See, e.g., *Boyd v. State*, 746 So. 2d 364 (Ala. Crim. App. 1999); *McArthur v. State*, 652 So. 2d 782 (Ala. Crim. App. 1994).

<sup>37</sup> *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999); *Tarver v. State*, 769 So. 2d 338, 340 (Ala. Crim. App. 2000); see also Bryan A. Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in *DEBATING THE DEATH PENALTY* 76 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

raises serious doubts about the fairness and reliability of criminal justice administration.

### III. BARRICADES TO THE COURTHOUSE DOOR AND THE INSIDIOUS PROCEDURAL MATRIX

Appellate and collateral court review of criminal convictions and the federal writ of habeas corpus are the traditional mechanisms by which wrongful convictions and illegal conduct by police, prosecutors, judges, jurors, and defense attorneys are exposed.<sup>38</sup> Mass incarceration and expanded use of the death penalty have affected this review system. The political dynamics that surround death penalty appeals have also generated many reform efforts that have had negative consequences for all prisoners and for federal habeas corpus review.<sup>39</sup>

Mass imprisonment has resulted in a predictable increase in post-conviction appeals and federal habeas corpus filings, primarily by pro se litigants.<sup>40</sup> People who have been wrongly convicted or illegally sentenced have an understandable desire to seek remedies and win their freedom. At the same time, imprisoned people who are unrepresented by counsel may believe that their rights have been violated when the conduct they challenge is not illegal or forms no basis for a new trial or sentence. State and federal post-conviction review historically required courts to address these issues and grant relief for recognizable constitutional violations while denying relief to prisoners who did not present claims that established violations of legal rights. But in the last two decades courts and Congress have responded to the inevitable increase in litigation caused by mass incarceration by simply blocking post-conviction review. Similar efforts have been made to limit prisoner litigation challenging the conditions of confinement, denial of medical care, and other mistreatment in prison.<sup>41</sup> As a result,

---

<sup>38</sup> All fifty states allow for the possibility of executive clemency or pardon. Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 430 (1999). However, the ability of the clemency and pardon processes to address wrongful convictions and illegal conduct by law enforcement is limited. In the capital context, notwithstanding the commutations by Illinois Governor George Ryan, grants of clemency are increasingly rare. In the period between 1960 and 1970, 261 executions were carried out in the United States and 204 death row inmates were granted clemency; between 1985 and 1995, 281 executions were carried out and 20 death row inmates were granted clemency. Michael A. G. Korengold, Todd A. Noteboom & Sara Gurwitch, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 350 (1996).

<sup>39</sup> See Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus*, 77 N.Y.U. L. REV. 699 (2002).

<sup>40</sup> Between 1996 and 2001, federal habeas petitions, predominantly by pro se litigants, increased by more than fifty percent. ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF HUMAN RES. & STATISTICS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 2001 11 (2001), available at <http://www.uscourts.gov/recenttrends2001/20015yr.pdf>.

<sup>41</sup> See Prison Litigation Reform Act ("PLRA") of 1995, Pub. L. No. 104-134, §§ 101,

substantive review of constitutional violations in thousands of cases involving wrongly convicted prisoners is now nearly impossible.

*A. The AEDPA and New Procedural Barriers*

Today, someone who has been wrongly convicted and sentenced and is in prison must overcome an extremely complex set of time-sensitive procedural requirements to get a state or federal court to review claims or evidence of innocence. The typical prisoner must face these constantly changing and extraordinarily demanding litigation rules with limited education, without counsel or legal aid, and with virtually no resources. A federal habeas corpus petition must be filed within twelve months after a petition for writ of certiorari to the United States Supreme Court is denied.<sup>42</sup> Because there is no right to counsel for filing a certiorari petition to the Supreme Court on direct appeal, most prisoners do not file a certiorari petition, consequently shortening the time for filing a federal habeas corpus petition. Alleged violations of constitutional rights cannot be reviewed in federal habeas corpus proceedings unless they have first been reviewed in state court.<sup>43</sup> Therefore, prisoners typically must first file state collateral pleadings, which have different—and usually shorter—limitations periods. State court procedural requirements can be meaningless and lack any legitimate justification. Nonetheless, failure to comply with them permanently bars a prisoner from later review *in federal court*.<sup>44</sup>

Some of the restrictions on post-conviction collateral review come from legislative bodies, although most are judicially created rules and procedures. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which radically constrains federal habeas court review of state court convictions. The AEDPA imposed a statute of limitations in federal habeas corpus cases for the first time. This new rule has barred thousands of prisoners from review of their constitutional claims

---

801–810, 110 Stat. 1321, 1321–77 (1996) (codified at 18 U.S.C. § 3624 (2000); 28 U.S.C. §§ 1346, 1915, 1915A (2000); 42 U.S.C. §§ 1997–1997h (2000)).

<sup>42</sup> 28 U.S.C. § 2244(d)(1) (1996).

<sup>43</sup> See 28 U.S.C. §§ 2254(b)(1), 2254(c) (1996); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Rose v. Lundy*, 455 U.S. 509 (1982).

<sup>44</sup> A state court petition can be permanently barred because it does not use a prescribed form, the pleading is not signed in accordance with obscure requirements, or the petition is filed too late or too early. See, e.g., *Burgess v. State*, No. CC-93-1270.60 (Morgan County Cir. Ct. Dec. 17, 2002) (order applying Alabama Rule of Criminal Procedure 32.6(a)). Petitions over one hundred pages long frequently are dismissed as insufficiently specific. Petitions are barred because the incarcerated prisoner has not conducted an investigation identifying new witnesses and evidence. A whole body of law has emerged around barring post-conviction review based on meaningless noncompliance with timing rules that bar an appeal because of how it is mailed or served. See e.g., *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004) (barring all subsequent appeals when death row prisoner filed notice of appeal in Court of Criminal Appeals rather than circuit court); *Ex parte Maples*, 885 So. 2d 845 (Ala. Crim. App. 2004) (barring filing of appeal when death row prisoner’s primary attorneys did not receive notice of final order in the mail).

because, without counsel, they could not timely file their pleadings. The AEDPA also dramatically altered the standard for habeas corpus review, requiring greater deference to state court rulings on legal issues and mixed questions of fact and law; modified the procedures for treatment of unexhausted claims in various ways that benefit the state and disfavor the petitioner; created new, additional hurdles for petitioners seeking appellate review of a federal district court's denial or dismissal of a petition; and significantly curtailed the opportunities for federal habeas petitioners to file a second or "successive" petition in cases in which a claim could not be filed or fully adjudicated at the time of the first petition.<sup>45</sup>

The United States Supreme Court also has issued an ever-expanding set of procedural rulings in habeas corpus cases that limit opportunities for post-conviction review of criminal convictions.<sup>46</sup>

The consequence is that most prisoners' complaints about wrongful convictions, illegal sentences, and other errors for which there is a constitutional remedy are never addressed on the merits. Even in death penalty cases, the great majority of substantive claims alleging constitutional violations, illegal state misconduct, and other serious errors are procedurally barred. For example, in the United States Court of Appeals for the Eleventh Circuit, which reviews cases out of Florida, Georgia, and Alabama, twenty-four Alabama death penalty cases were brought to the court on first-time applications for writs of habeas corpus in the last eight years.<sup>47</sup> The

---

<sup>45</sup> See 28 U.S.C. §§ 2244(d)(1), 2253(c)(3), 2254(b)(2) (1996); see also RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (5th ed. 2005). For a discussion of the circumstances that created the AEDPA and the many myths that supported it, see Stevenson, *supra* note 39.

<sup>46</sup> See, e.g., *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (to satisfy exhaustion requirement, state prisoners must exhaust one complete round of state's established appellate review process, even when such review is discretionary); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (when failure to develop evidence in state court proceedings is attributable to petitioner, federal evidentiary hearing will only be held if petitioner can show "cause and prejudice" or that "a fundamental miscarriage of justice will result"); *McCleskey v. Zant*, 499 U.S. 467 (1991) (petitioner's ignorance of critical witness establishing *Massiah* claim was insufficient to establish "cause and prejudice" for failing to raise issue in his first federal habeas petition, when other evidence could have supported claim originally); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (barring federal court review of claim that state courts have denied on procedural grounds, unless petitioner can show "cause" for default and resulting "prejudice").

<sup>47</sup> See *Jones v. Campbell*, 2006 WL 146604 (11th Cir. Jan. 20, 2006); *Callahan v. Campbell*, 427 F.3d 897 (11th Cir. 2005); *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005); *Peoples v. Campbell*, 377 F.3d 1208 (11th Cir. 2004); *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004); *Henderson v. Campbell*, 353 F.3d 880 (11th Cir. 2003); *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003); *Hubbard v. Haley*, 317 F.3d 1245 (11th Cir. 2003); *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002); *Fortenberry v. Haley*, 297 F.3d 1213 (11th Cir. 2002); *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002); *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001); *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001); *Thompson v. Haley*, 255 F.3d 1292 (11th Cir. 2001); *Brown v. Jones*, 255 F.3d 1273 (11th Cir. 2001); *Cade v. Haley*, 222 F.3d 1298 (11th Cir. 2000); *Bradley v. Nagle*, 212 F.3d 559 (11th Cir. 2000); *Holladay v. Haley*, 209 F.3d 1243 (11th Cir. 2000); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999); *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999); *Duren v. Hopper*, 161 F.3d 655 (11th Cir. 1999); *Kennedy v. Hopper*, 156 F.3d 1143 (11th Cir. 1998); *Baldwin v. Johnson*,

Eleventh Circuit denied substantive relief to death row prisoners in twenty-two of the twenty-four cases.<sup>48</sup> In all of the cases where relief was denied, convictions and death sentences were affirmed because many of the constitutional violations raised by condemned prisoners were deemed procedurally barred. This outcome may bolster finality, but the absence of federal judicial review on the merits means less assurance about the reliability or propriety of Alabama convictions and death sentences.

Historically, the rules applied by courts to bar review of criminal convictions were rooted in policy concerns about the fair resolution of criminal cases. Most states required trial lawyers to make a contemporaneous objection to any constitutional violation at trial for fear that savvy defense attorneys might later “sandbag” the court by allowing the trial to proceed while assuring the defendant of a new trial based on reversible error should he or she lose. Serious doubts exist about the legitimacy of the “sandbagging problem” in criminal litigation.<sup>49</sup> Nonetheless, a state may reasonably bar review of trial errors that are not plain or fundamental when the defendant is represented by skilled and effective defense counsel. However, most prisoners who file habeas corpus applications or collateral appeals are unrepresented by counsel, and “sandbagging” is not an issue.

The new rules barring collateral review of criminal cases cannot be justified by any demonstrated problem or any policy that promotes fairness and reliability.<sup>50</sup> State post-conviction rules and many federal habeas corpus provisions have become tools to preclude substantive review of criminal convictions in every conceivable way. These rules have operated as traps to bar pro se or death-sentenced prisoners from receiving review of improper criminal convictions and illegal sentences. Courts aggressively apply these procedural rules in a rigid and often perverse manner to shield claims of constitutional error from review.<sup>51</sup> The result has left the criminal justice system incapable of offering any meaningful assurance that it operates fairly or dependably in a wide range of cases.

The Streamlined Procedures Act (“SPA”) and other congressional proposals, including provisions in the recently enacted USA PATRIOT Act,

---

152 F.3d 1304 (11th Cir. 1998); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998).

<sup>48</sup> The court granted relief only in *Bui*, 321 F.3d 1304, and *Brownlee*, 306 F.3d 1043.

<sup>49</sup> First, the model assumes that prosecutors and judges are incapable of recognizing clear constitutional violations and that only the defense attorney can monitor constitutional errors that warrant new trials. Second, a review of indigent defense systems suggests that most criminal defendants are represented by attorneys who are overburdened, underpaid, and not well positioned to stay up on constitutional developments and procedure in a manner that advantage them over judges and prosecutors with regard to constitutional requirements. This point is reinforced by hundreds of cases in which claims of ineffective assistance of counsel have detailed defense counsel’s unknowing failure to make an objection to a clear constitutional violation. *See generally* Bright, *supra* note 21.

<sup>50</sup> *See generally* Stevenson, *supra* note 39, at 731–71.

<sup>51</sup> *Johnson v. McBride*, 381 F.3d 587 (7th Cir. 2004) (habeas petition in death penalty case properly dismissed as time-barred where it was filed one day late); *see also* *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc).

suggest that many legislators are prepared to exacerbate rather than correct these problems. The SPA would effectively eliminate federal habeas corpus review for thousands of prisoners by further restricting the power of federal courts to review application for writs of habeas corpus. The SPA would eliminate federal jurisdiction to consider claims that a state court refused to hear because of an alleged procedural default; bar prisoners from amending their petitions after the one-year statute of limitations expires; eliminate federal review of constitutional errors relating to sentencing deemed harmless by the states; and remove equitable provisions for facilitating review of some cases in extraordinary circumstances.<sup>52</sup> Proponents justify the SPA on the grounds that it will remedy delay and lack of “finality,” but neither concept is applicable to the great majority of habeas filings. Between 1995 and 2004, ninety-nine percent of all federal habeas filings were made by prisoners not under a sentence of death. Accordingly, filing a habeas petition neither delays nor avoids a petitioner’s sentence.<sup>53</sup> Almost every habeas petitioner has a compelling incentive to achieve efficient and timely review of his claims because he contends that his detention or imprisonment is wrongful.<sup>54</sup> Whether the punishment is five years of incarceration or fifty years, it is being fully implemented during the pendency of any collateral litigation.

At the time of this writing, the SPA is pending before the Senate Judiciary Committee. One of the components of the proposed legislation gives the U.S. Attorney General authority to certify that a state’s system for providing counsel to death-row inmates in state post-conviction qualifies the state to receive the benefit of special procedures and standards that further restrict access to habeas corpus relief. This component has already been enacted as an amendment to the USA PATRIOT Act adopted by Congress in March of 2006.<sup>55</sup> The SPA has been widely condemned by the Ameri-

---

<sup>52</sup> Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1088>.

<sup>53</sup> ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-2A, *available at* <http://www.uscourts.gov/judbus2004/appendices/c2a.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, 1999 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-2A, *available at* <http://www.uscourts.gov/judbus1999/c02asep99.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, 1997 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-2A, *available at* [http://www.uscourts.gov/judicial\\_business/c2asep97.pdf](http://www.uscourts.gov/judicial_business/c2asep97.pdf).

<sup>54</sup> In every federal habeas corpus filing, the petitioner is in some detention or incarceration setting and is currently being “punished.” Federal case law does not permit federal habeas corpus review if the person is not currently in “custody.” *See* 28 U.S.C. § 2254(a) (1994 & Supp. 2001) (petition must be filed “in behalf of a person in custody pursuant to the judgment of a State court”); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (when defendant was “incarcerated by reason of the parole revocation” at time habeas petition was filed, “in custody” requirement was satisfied); *see also* RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* §§ 8.1, 8.2 (4th ed. 2001).

<sup>55</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 507 (2006).

can Bar Association, judicial conferences, and the press.<sup>56</sup> It nonetheless reflects a policy perspective on problems created by mass incarceration and the plight of wrongly convicted prisoners that must be challenged.

*B. The Collateral Post-conviction Counsel Problem*

The Supreme Court has not yet recognized a federally protected right to counsel for any of the thousands of American prisoners who believe that their convictions or sentences have been illegally imposed.<sup>57</sup> Gaining access to the courts with skilled legal representation is virtually impossible for most prisoners, almost all of whom are indigent.<sup>58</sup>

Even in death penalty cases, legal representation for collateral review remains a serious challenge in many states. Despite the fact that Alabama now has the fastest-growing death row population in the United States,<sup>59</sup> it does nothing at all to provide its condemned inmates with timely legal assistance in preparing and presenting post-conviction claims. It appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It furnishes no paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts not included in the trial record.<sup>60</sup> It main-

---

<sup>56</sup> The bill is opposed by a broad array of judges, prosecutors, and defense attorneys from across the political spectrum; a dozen retired judges, forty-eight out of fifty members of the Conference of Chief Justices, over sixty former prosecutors, and a number of leading conservatives have urged Congress to study the appeals process further before radically changing the current system. *See ABA Opposes Senate Judiciary Committee Provisions on Habeas Corpus*, YOURABA (Am. Bar Ass'n), Oct. 2005, <http://www.abanet.org/media/youraba/200510/article10.html> (opposing SPA because it would dismiss all federal claims "with prejudice" if claimant has not exhausted state court remedies, including claims involving government misconduct; create "virtually unattainable procedural and other requirements to establish innocence"; strip federal courts of their remaining, limited jurisdiction to review claims states have refused to consider on state procedural grounds, "leaving state courts at liberty to make erroneous or arbitrary decisions without oversight or possibility of correction"; and invite years of litigation and chaos).

<sup>57</sup> The Court "decline[d]" to hold that "prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions" in *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). In a death penalty case, *Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989), a four-justice plurality announced its view of *Finley* as having held that there is "no right to post-conviction counsel." Federal law does permit the appointment of counsel in some federal habeas cases but almost always after the pro se prisoner has avoided the traps of the procedural matrix. *See* 21 U.S.C. § 848(q) (1996).

<sup>58</sup> According to a 1996 Bureau of Justice Statistics Report, seventy-six percent of inmates in state correctional facilities were serving time on cases in which they had been represented by court-appointed attorneys (including public defenders). Fifty-four percent of inmates in federal prisons had appointed counsel. STEVEN K. SMITH & CAROL J. DEFANCES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 3 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/id.pdf>.

<sup>59</sup> The death sentencing rate in Alabama is three to ten times greater than that in other Southern states. *See* Jay Reeves, *Per Capita, Alabama's Death Row Tops South*, HUNTSVILLE TIMES, July 6, 1999, at A1.

<sup>60</sup> *See Ex parte Jenkins*, No. 1031313, 2005 WL 796809, at \*5 (Ala. Apr. 8, 2005). The

tains no central agency to monitor the progress of capital post-conviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support.

The failure to provide any legal assistance to prisoners forces those inmates who cannot find volunteer lawyers to file state post-conviction petitions *pro se*.<sup>61</sup> Proceeding *pro se* is particularly dangerous because state post-conviction procedures are generally marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly skilled counsel.<sup>62</sup> State and local prosecutors routinely move to dismiss

---

Alabama Supreme Court has recognized that the appointment of post-conviction counsel:

[O]ccurs only after a petition has been filed. Therefore, inmates who are unable to find counsel to represent them before the limitations period for filing a Rule 32 petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their Rule 32 petition and prepare and file a petition in the proper form with the proper claims in the proper court . . . . [A]n incarcerated inmate who does not have legal counsel is obviously hampered in his or her ability to interview witnesses, to gather records, to investigate factual questions, and to conduct legal research.

*Id.*

<sup>61</sup> Finding volunteer counsel for all death-row prisoners in Alabama always has been difficult. With the rapid growth of the death-row population and AEDPA's 1996 enactment of a one-year statute of limitations for filing federal habeas petitions, it has become impossible. Access to courts for prisoners who are not on death row is even worse because the shortage of resources precludes extending many of the volunteer and recruitment efforts made on behalf of condemned prisoners to others. As a result, in Alabama and many other states there is no effective way for prisoners to comply with the maze of meaningless procedural rules.

<sup>62</sup> In the last few years, at least seven Alabama death-row prisoners have had to navigate state post-conviction proceedings without the assistance of volunteer counsel. All of these prisoners either have had their cases dismissed or have been otherwise precluded from state court review as a result of their inability to obtain adequate legal assistance. *See* *Barbour v. Haley*, 145 F. Supp. 2d 1280, 1284 (M.D. Ala. 2001) (asserting that failure to file notice of appeal from denial of Barbour's Rule 32 petition may bar review of his claims); *Ex parte Dallas*, No. 1961457, 2002 WL 31739768, at \*1 (Ala. Sept. 9, 2002) (setting execution date when deadline for appealing denial of Rule 32 petition was missed); *Ex parte Hutcherson*, No. 1010421, 2002 WL 960044, at \*1 (Ala. May 10, 2002) (in holding that a dismissal order is not the proper subject of mandamus review, court notes that "[w]hen the Rule 32 petition was filed, Hutcherson's counsel admitted that it was filed outside the two-year limitations period of Rule 32.2(c), ALA. R. CRIM. P., because he misunderstood the rule"); *Arthur v. State*, 820 So. 2d 886 (Ala. Crim. App. 2001) (time-barring review of Arthur's claims even though counsel was not provided prior to expiration of the statute of limitations); *Henderson v. State*, 733 So. 2d 484, 485 (Ala. Crim. App. 1998) (affirming dismissal of Rule 32 petition after volunteer counsel withdrew); *Flowers v. State*, No. CC-97-20.60 (Montgomery County Cir. Ct. Jan. 28, 2003) (Order Dismissing The Rule 32 Petition As Untimely Filed) (dismissing petition filed *pro se*); *Smith v. State*, No. CC-98-2064.60 (Mobile County Cir. Ct. Oct. 9, 2002) (Order Dismissing The Rule 32 Petition As Untimely Filed) (dismissing petition filed *pro se*). Many of these prisoners may be barred from federal collateral review and several would have been executed but for the last-gasp assistance of volunteer counsel. *See* *Arthur v. Haley*, 248 F.3d 1302 (11th Cir. 2001) (denying State's motion to vacate stay of execution); *Dallas v. Haley*, 228 F. Supp. 2d 1317 (M.D. Ala. 2002) (granting stay of execution); *Barbour*, 145 F. Supp. 2d at 1284 (granting stay of execution).

For example, Christopher Barbour was forced to file a Rule 32 petition *pro se* on March 4,

claims in petitions filed by pro se prisoners on procedural grounds such as lack of specificity, failure to state a claim upon which relief may be granted, and other rules aimed at procedural preclusion. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing—let alone the legal training to understand what form of allegations will make a pleading “sufficiently specific” to satisfy the requirement of “a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds”—prisoners are at risk of summary dismissal.<sup>63</sup>

Moreover, prisoners cannot obtain independent judicial fact-finding or decision-making in state proceedings without the assiduous efforts of competent and dedicated counsel.<sup>64</sup> Alabama circuit judges routinely adopt batteries of factual findings and sign orders denying relief that have been prepared by the State’s lawyers.<sup>65</sup> Unrepresented prisoners’ legal claims, instead of being reviewed by a neutral and impartial judge, are picked over

---

1997. The judge then appointed counsel, who represented Mr. Barbour at an evidentiary hearing on March 18, 1998. Appointed counsel did not file a post-hearing brief or proposed order and never filed a notice of appeal after Mr. Barbour’s petition was denied on April 21, 1998. The State did not provide counsel for an appeal, and Mr. Barbour therefore lost his state post-conviction claims by default. The Alabama Supreme Court ordered his execution on May 25, 2001. *Barbour*, 145 F. Supp. 2d at 1282. Just two days before this date, volunteer counsel obtained a stay from the United States District Court for the Middle District of Alabama. *Id.*

<sup>63</sup> See, e.g., the case of Alabama death row prisoner Joseph Smith discussed *infra*, notes 68–81 and accompanying text.

<sup>64</sup> One example is the case of Jerry Henderson. After volunteer counsel filed Mr. Henderson’s Rule 32 petition, the lawyer withdrew from the case. The circuit court then appointed as counsel a lawyer who subsequently became the Talladega County District Attorney. See ALABAMA LEGAL DIRECTORY 446 (2003). Appointed counsel facilitated the circuit court’s dismissal of Mr. Henderson’s Rule 32 petition, effectively foreclosing Mr. Henderson’s opportunity for review. The state appellate courts upheld the dismissal of Mr. Henderson’s petition. *Henderson v. State*, 733 So. 2d 484, 485 (Ala. Crim. App. 1998), *cert. quashed, Ex parte Henderson*, No. 1980085 (Ala. Apr. 23, 1999). Federal review of the case was also subsequently barred as a result of this state court conduct. *Henderson v. Campbell*, 353 F.3d 880 (11th Cir. 2003). On June 2, 2005, Mr. Henderson was executed by the Alabama officials. See Garry Mitchell, *State Carries out Henderson Execution*, DECATUR DAILY, June 3, 2005, <http://www.decaturdaily.com/decaturdaily/news/050603/execute.shtml>.

<sup>65</sup> The Attorney General’s Office typically submits a computer disk containing the proposed order, with instructions for the judge on how to adapt it to produce a document that will be upheld on appeal. For example, in *Borden v. State*, No. CC-93-2280.60 (Lawrence County Cir. Ct.), the Attorney General filed a motion to dismiss the Rule 32 petition and submitted a proposed order for the court’s signature with a letter to the circuit judge stating that “[t]he State has enclosed a disk containing the proposed orders in Microsoft Word format” and that:

Should the Court adopt the State’s proposed order dismissing the Rule 32 petition in substantially the same form as it was submitted, the State respectfully requests that the Court add a paragraph at the conclusion of the order that establishes that the Court adopted the proposed order only after reviewing the record, the supporting affidavits and finding that the State’s proposed order correctly represents the findings and conclusions of the Court.

Letter from Assistant Att’y Gen. David Clark to Hon. Philip Reich (Jan. 17, 2002), at 1.

and dispatched by the State Attorney General's Office, which de facto composes all of the factual findings and rulings of law that control the litigation process.<sup>66</sup> State court judgments primarily dispose of claims on grounds that will create a procedural bar to consideration of their merits in subsequent federal habeas corpus proceedings. Finally, the constitutional claims of prisoners are consequently barred from federal review because they were not adequately litigated in state post-conviction proceedings.<sup>67</sup>

#### IV. THE PROCEDURAL MATRIX APPLIED

The case of an Alabama death row prisoner illustrates the absurdity of the current state of the law. Joseph Smith was convicted of capital murder in Mobile County in 1998. He alleged that his conviction was wrongful because his appointed lawyer was constitutionally ineffective. Under Alabama law, Mr. Smith's appointed defense lawyer at trial could receive only \$1,000 for his case preparation.<sup>68</sup> Mr. Smith contended that the lawyer consequently did not investigate a great deal of evidence and mitigation that would have changed the outcome of the proceedings.<sup>69</sup> Mr. Smith also claimed that the State illegally withheld evidence that would have established his innocence.<sup>70</sup>

On direct appeal, Mr. Smith's counsel could be paid only \$2,000 total for the appeals to the Court of Criminal Appeals and the Alabama Supreme Court.<sup>71</sup> No compensation or counsel was provided to Mr. Smith for additional appeals. When Mr. Smith's conviction was affirmed on appeal, he had no money, no lawyer, and no ability to pursue his appeals. State law at the time gave him twenty-four months to find volunteer counsel to investigate and prepare a petition for state post-conviction review (a prerequisite for federal litigation).<sup>72</sup> After fifteen months, Mr. Smith still had no counsel. A month later the Alabama Supreme Court shortened the statute of limitations for filing post-conviction petitions from twenty-four months to twelve months. Before the original twenty-four-month deadline expired, Mr. Smith filed a petition pro se and asked the trial judge to appoint him

---

<sup>66</sup> If a prisoner can get a timely petition filed, a judge has the discretion to appoint an attorney. However, the lawyer can only be compensated up to \$1,000 for the entire defense effort. ALA. CODE § 15-12-23 (1999). Lawyers generally do not want, and frequently will not accept, appointments at that compensation level, and in most cases even if appointment is accepted only a limited effort will be possible.

<sup>67</sup> See, e.g., *Baldwin v. Johnson*, 152 F.3d 1304, 1318–19 (11th Cir. 1998); *Waldrop v. Jones*, 77 F.3d 1308, 1314–16 (11th Cir. 1996); *Weeks v. Jones*, 26 F.3d 1030, 1042–46 (11th Cir. 1994).

<sup>68</sup> ALA. CODE § 15-12-21(d) (1996).

<sup>69</sup> Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Smith v. State*, No. CC-98-2064.60 (Mobile Cir. Ct. Sept. 27, 2002).

<sup>70</sup> *Id.*

<sup>71</sup> ALA. CODE § 15-12-21(d) (1996) (amended in 1999 to increase cap to \$2,000 per appellate court).

<sup>72</sup> ALA. R. CRIM. P. 32.2(c).

counsel.<sup>73</sup> The State of Alabama argued that the new twelve-month statute of limitations applied retroactively to Mr. Smith; as his petition was untimely, the State argued, he would not need counsel.<sup>74</sup> Without appointing counsel to Mr. Smith, the circuit court agreed with the State and barred Mr. Smith's petition. This action eliminated any chance for future post-conviction review in state or federal court.<sup>75</sup>

Because Mr. Smith is on death row and we monitor many of these cases, my office intervened and appealed the ruling barring his petition. On appeal, the Alabama Court of Criminal Appeals denied relief and affirmed the lower court ruling.<sup>76</sup> We further appealed to the Alabama Supreme Court, which overturned the lower court judgment and reinstated Mr. Smith's appeal in the trial court.<sup>77</sup> Fortunately, Mr. Smith then obtained volunteer counsel to represent him in his reinstated state post-conviction proceedings.

However, at the first hearing on Mr. Smith's case, the court appeared to agree with the State's argument that the petition was insufficient and had no merit. The court announced that it would issue findings of fact and conclusions of law, and the State prepared a lengthy order, which the judge signed.<sup>78</sup> Mr. Smith then filed a timely appeal within the forty-two-day limitations period.<sup>79</sup> The State did not contest the timeliness of Mr. Smith's notice of appeal. Nonetheless, the Court of Criminal Appeals *sua sponte* asserted that the limitations period ran from the date of the hearing, not from the date of the trial court's order, and dismissed Mr. Smith's appeal as untimely.<sup>80</sup> The Alabama Supreme Court denied Mr. Smith's petition for certiorari.<sup>81</sup>

---

<sup>73</sup> Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Smith v. State*, No. CC-98-2064.60 (Mobile Cir. Ct. Sept. 27, 2002).

<sup>74</sup> The State moved to dismiss Mr. Smith's petition and sent a letter to the circuit judge asserting that it was unnecessary to appoint counsel for Mr. Smith:

Typically, the State would not file a motion to dismiss a Rule 32 petition when the petitioner is on death row until an attorney has been appointed. This case, however, is different because the statute of limitations has expired. While the State has no objection to the appointment of counsel for Smith, the appointment of counsel would not change to [sic] fact that Smith filed an untimely Rule 32 petition that is due to be summarily dismissed.

State's Letter to Hon. James C. Wood, *Smith v. State*, No. CC-98-2064 (Mobile County Cir. Ct. Oct. 7, 2002).

<sup>75</sup> The circuit judge signed the State's proposed order dismissing Mr. Smith's *pro se* Rule 32 petition as untimely. *Smith v. State*, No. CC-98-2064 (Mobile County Cir. Ct. Oct. 9, 2002) (order dismissing Rule 32 petition).

<sup>76</sup> *Smith v. State*, 897 So. 2d 1246 (Ala. Crim. App. 2003).

<sup>77</sup> *Ex parte Smith*, 891 So. 2d 286 (Ala. 2004).

<sup>78</sup> *Smith v. State*, No. CC-98-2064.40 (Mobile County Cir. Ct. Mar. 18, 2005) (order).

<sup>79</sup> *Smith v. State*, No. CR-04-1491, at \*1 (Ala. Crim. App. June 1, 2005) (order).

<sup>80</sup> *Id.*

<sup>81</sup> *Ex parte Smith*, No. 1041432 (Ala. Aug. 12, 2005) (order denying writ). Mr. Smith has sought reinstatement of his appeal through another procedural mechanism, and the case is pending at the time of this writing.

It is unclear whether Mr. Smith will have his constitutional claims reviewed on the merits before he is scheduled for execution. His story is unfortunately not unique. In many death penalty cases, similar tales of procedural chaos can be told in which a condemned prisoner never received consideration of compelling constitutional claims. In non-capital cases, the likelihood of procedural default or preclusion blocking substantive review is even greater. Reform is absolutely critical if meaningful remedies are going to reduce the number of innocent and wrongly convicted people currently in prison.

#### V. RECOMMENDATIONS FOR RESTORING FAIRNESS AND EFFECTIVE FEDERAL HABEAS CORPUS AND POST-CONVICTION REVIEW

Very straightforward solutions would permit courts to correct wrongful convictions and illegal sentences more effectively in state post-conviction and federal habeas corpus proceedings. In this Part, I propose six solutions to advance a desperately needed discussion and effort to restore fairness and reliability to the administration of criminal justice for people currently imprisoned.

##### A. *Legal Representation for Prisoners with Terminal Sentences*

Mandating the appointment of skilled counsel to every condemned prisoner under sentence of death who seeks collateral review of his conviction or sentence does not seem radical or unreasonable. There are approximately 3500 people on death row in America.<sup>82</sup> Most states systematically provide counsel for condemned prisoners, but many do not. Regardless of whether they are provided counsel, all prisoners are subject to stringent filing requirements, statutes of limitations, and other procedural restrictions. The appointment of counsel at the beginning of the state post-conviction review process is crucial to achieve any semblance of fairness and reliability. The United States Supreme Court has not recognized a constitutional right to counsel in post-conviction proceedings.<sup>83</sup> Therefore, it is up to any state that seeks to execute people to ensure that all death-sentenced prisoners have skilled, adequately trained counsel.

Through the AEDPA, Congress has recognized the legitimacy of this basic requirement by enticing states with heightened restrictions in federal habeas corpus review if they provide collateral post-conviction coun-

---

<sup>82</sup> DEBORAH FINS, NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A. (2005), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Fall\\_2005.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2005.pdf).

<sup>83</sup> This issue remains the subject of continuing litigation. In some death penalty cases, prisoners are arguing that the constitutional right of access to courts cannot be protected without counsel. See *Barbour v. Haley*, 410 F. Supp. 2d 1120 (M.D. Ala. 2006), *appeal docketed*, No. 05-16110-C (11th Cir. Nov. 7, 2005).

sel.<sup>84</sup> The availability of counsel should not be discretionary or dependent on volunteer and pro bono efforts when a death sentence has been imposed. Collateral post-conviction counsel should be available to every death-row prisoner in America.

Prisoners sentenced to life without parole or life imprisonment should also have legal representation available to them if they have a basis for challenging their conviction or sentence. Given the enormous number of people currently in prison, it is hard to imagine governments extending a right to counsel to all imprisoned people. However, innocent and illegally convicted people who have been sentenced to die in prison face the most severe punishment. The smaller number of these prisoners makes the appointment of counsel feasible and reasonable to prevent a gross miscarriage of justice and to protect the integrity of the criminal justice system.

*B. Repeal the AEDPA or Suspend It in States that Fail To Meet Basic Requirements*

The absence of uniformity among states in the quality of indigent defense at trial, and in the availability of corrective review on direct appeal or in state post-conviction proceedings, makes blanket restrictions on federal habeas corpus difficult to justify. There are huge disparities in what states do to provide counsel or to ensure fair and reliable review in state court cases. Many states have opted to continue administering criminal justice with grossly underfunded and inadequate indigent defense systems, a choice that increases the number of federal habeas corpus filings necessary to enforce constitutional protections. Many states impose ridiculously low caps on compensation for work in indigent cases at the trial level, thus increasing the risk of wrongful convictions and sentences. In some states, judicial selection procedures make state court judges vulnerable to political pressures that compromise the protection of legal rights for disfavored and unpopular criminal defendants.<sup>85</sup> Partisan judicial elections, in which candidates promise to resist protecting the rights of criminal defen-

---

<sup>84</sup> 28 U.S.C. § 2265 (1996); *see also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 507 (2006).

<sup>85</sup> *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 312–26 (1997); *see also* Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) (“The ‘higher authority’ to whom present-day capital judges may be ‘too responsive’ is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty . . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.”); John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 12 ST. JOHN’S J. LEGAL COMMENT. 21, 31 (1996) (“[M]aking the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be.”).

dants and prisoners, cast doubt on the fairness, independence, and reliability of state post-conviction appeals.

Procedural rules restricting federal habeas corpus review should be suspended when state court judges summarily adopt findings and legal rulings prepared by state prosecutors in state post-conviction.<sup>86</sup> If states have unreasonable statutes of limitations that do not address whether prisoners have counsel, or fail to provide access to adequate legal assistance in some other form, prisoners should not be precluded from federal court review. Denying prisoners the tools to investigate and develop evidence in state collateral proceedings while foreclosing federal court review because claims were not fully presented in state court is unfair and unworkable.

Many states have effectively opted not to provide the kind of review that the AEDPA assumes when it requires federal judges to defer to state court rulings and findings or otherwise protects state court judgments.<sup>87</sup> Only by allowing the petitioner to show that deficiencies in the state court review process warrant no such deference can any meaningful hope of reform be created.<sup>88</sup> The current incentives to improve indigent defense and upgrade state post-conviction review have been ineffective. Repeal or suspension of the AEDPA is now required to improve the quality and reliability of criminal justice in the United States.

Suspension of the AEDPA would simplify the review process in many habeas corpus cases. The most casual review of federal habeas corpus decisions reveals a jurisprudence overwhelmed with very complex procedural requirements that make litigation in this area ill-advised for all but the most highly skilled and specially trained attorney.<sup>89</sup> Procedural requirements

---

<sup>86</sup> It has been said that judicial orders that are simply adoptions of the extensive fact-finders and legal arguments of one side in a case are not "worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting J. Skelly Wright, *The Nonjury Trial—Preparing Findings of Facts, Conclusions of Law and Opinions*, in SEMINARS FOR NEWLY-APPOINTED UNITED STATES DISTRICT JUDGES 166 (Fed. Judicial Ctr. 1963)). Alabama courts have expressly disapproved of this practice. *See, e.g.*, *Bell v. State*, 593 So. 2d 123, 126 (Ala. 1992) (trial court's practice of adopting the state's proposed findings and conclusions of law is subject to criticism); *Hubbard v. State*, 584 So. 2d 895, 900 (Ala. Crim. App. 1991) (citing *Anderson v. City of Bessemer City*, North Carolina, 470 U.S. 564 (1985)); *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989); *Morrison v. State*, 551 So. 2d 435, 436 (Ala. Crim. App. 1989). Nonetheless, a review in August 2003 of the last twenty death penalty cases affirmed or reversed by the Alabama Court of Criminal Appeals on appeal from the denial or dismissal of a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure revealed that in seventeen out of these twenty cases, or eighty-five percent, the trial judge adopted verbatim or almost verbatim an order denying or dismissing the Rule 32 petition that was written by the State.

<sup>87</sup> 28 U.S.C. § 2254(d)–(e) (1996).

<sup>88</sup> This was the practice prior to the enactment of the AEDPA. *See, e.g.*, *Townsend v. Sain*, 372 U.S. 293 (1963).

<sup>89</sup> Even some federal appellate court judges have acknowledged that habeas corpus litigation has become the "most complex area of the law" they address. Abner J. Mikva & John C. Godbold, *You Don't Have to Be a Bleeding Heart*, HUM. RTS., Winter 1987, at 24 (quoting John C. Godbold).

have resulted in years of litigation and time-consuming adjudication of technical issues often unrelated to constitutional protections. Statutes of limitations for non-capital petitioners simply have no justification; petitions should be permitted unless there is inexcusable or unreasonable delay. Constraints on evidentiary hearings when a federal judge believes that such a hearing is required further undermine reliability.<sup>90</sup> Thus, a multitude of procedural issues resulting from poorly drafted and unclear statutory language in the AEDPA could be eliminated with modifications that simplify habeas review.<sup>91</sup> Asking that federal judges first determine if constitutional rights have been violated in a particular case and then evaluate whether a remedy for that violation is warranted would simplify the process of habeas corpus review.

*C. Suspend the Application of the AEDPA and Other Procedural Rules Where Equitable Considerations So Require*

Concepts of equity long have been relevant in federal habeas corpus review and other post-conviction remedies. Adjudications of applications for writs of federal habeas corpus are actually civil,<sup>92</sup> rather than criminal, proceedings subject to the Federal Rules of Civil Procedure. These rules are employed as a “grand reservoir of equitable power to do justice in a particular case.”<sup>93</sup> While the AEDPA and court decisions acknowledge that equitable considerations are relevant,<sup>94</sup> case law before and after the AEDPA has rendered equitable considerations meaningless even in the most compelling cases. The large numbers of appeals created by mass incarceration, a political culture that is preoccupied by insidious finality concerns, and judicial fears about docket control have trumped the needs of prisoners desperately seeking review and remedy.

---

<sup>90</sup> See *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (habeas corpus petitioner’s failure to present evidence on a certain issue in state court constitutes a “procedural default” that precludes a federal evidentiary hearing on that issue unless the petitioner shows “cause” for and “prejudice,” which are narrowly defined). This standard is codified in the AEDPA. See 28 U.S.C. § 2254(e) (1996).

<sup>91</sup> See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“All we can say [about AEDPA] is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”).

<sup>92</sup> See, e.g., RULES GOVERNING § 2254 CASES IN THE UNITED STATES DISTRICT COURTS 11 (stating that Civil Rules apply in habeas corpus proceedings “to the extent that [the Rules] are not inconsistent with any statutory provisions or these [habeas] rules”); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O’Connor, J., dissenting) (“[O]ver the writ’s long history . . . one thing has remained constant: Habeas corpus is . . . an original civil action in a federal court.”).

<sup>93</sup> 12 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 60.48[1] (3d ed. 2001) (relating to Rule 60(b)(6) of the Federal Rules).

<sup>94</sup> 28 U.S.C. § 2244(d)(1)(B) (1996) (requiring that habeas petition be submitted one year from “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United State is removed, if applicant was prevented from filing by such State action”).

A much broader concept of equitable review must be introduced in collateral proceedings to facilitate fair and reliable outcomes. The literacy or mental health of a pro se prisoner seeking post-conviction review should alter the application of complex procedural rules.<sup>95</sup> When prisoners cannot obtain relevant legal materials in prison law libraries or face other institutional barriers that justify suspension of procedural rules, reviewing courts should facilitate merits review.<sup>96</sup>

Broadened application of equitable considerations to facilitate review would not seriously threaten the dockets of federal judges or subject courts to abusive litigation by frivolous litigants. As noted elsewhere,<sup>97</sup> federal judges retain great authority to dismiss summarily insufficient pleadings,<sup>98</sup> grant state motions for summary judgment,<sup>99</sup> and deny and even bar in forma pauperis filings from prisoners who abuse the process.<sup>100</sup>

*D. Suspend the AEDPA and Unnecessary Procedural Rules in Cases with Severe Sentences Where "Heightened Review" Is Required*

The United States Supreme Court has sanctioned the modern death penalty based on the promise that capital cases will be afforded heightened review and scrutiny.<sup>101</sup> Yet the AEDPA and many court decisions have created barriers to challenging alleged constitutional violations that increasingly restrict substantive review in death cases. Death row prisoners have been denied any opportunity for appellate review of their initial federal habeas corpus cases because neither the district court nor the court of appeals would grant a certificate of appealability required by the AEDPA to facilitate review.<sup>102</sup>

---

<sup>95</sup> O'Bryant, *supra* note 1, at 309–15.

<sup>96</sup> *See, e.g., Houston v. Lack*, 487 U.S. 266 (1988) (holding that a pro se prisoner's habeas petition is deemed filed at the moment he gives it to prison officials).

<sup>97</sup> *See Stevenson*, *supra* note 39.

<sup>98</sup> *See* RULES GOVERNING § 2254 CASES IN THE UNITED STATES DISTRICT COURTS 4 (“If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.”).

<sup>99</sup> *See* Advisory Committee Note, RULES GOVERNING § 2254 CASES IN THE UNITED STATES DISTRICT COURTS 8 (1976) (recognizing availability of “dismissal pursuant to a motion by the respondent”).

<sup>100</sup> *See, e.g., In re McDonald*, 489 U.S. 180, 180 (1989) (per curiam) (in response to multiple meritless filings, Court denied in forma pauperis status, “direct[ing] the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee required by Rule 45(a) and submits his petition in compliance with Rule 33.”).

<sup>101</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>102</sup> Under the AEDPA, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c) (1996). *See Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005) (denying certificate of appealability as to two claims of error involving restriction on cross-examination of prosecution witnesses, and failure to instruct the jury on second-degree

The severity of the sentence should be relevant in collateral review. State and federal courts should honor the commitment to heightened review made in *Woodson v. North Carolina*.<sup>103</sup> Procedural bar, preclusion, and default rules should not be applied when prisoners face death or other terminal prison sentences. Indeed, review of life in prison without parole and life imprisonment cases is even more difficult to obtain.

Recent evidence has emerged that may confirm that innocent people have been executed in the modern death penalty era.<sup>104</sup> Without question, there have been executions where serious doubts about guilt or the propriety of the sentence were left unresolved. Sentences of death, life imprisonment without parole, and life with parole require a higher standard of reliability. The expectation that we exercise our power responsibly and justly cannot be reconciled with the current status of collateral review. In too many cases, preclusion, procedural bar, and default have created doubts as to the achievement of just outcomes.

A presumption of merits review in cases with terminal sentences would reduce the risk of wrongful executions and imprisonment in the cases where the costs are greatest. The relatively small number of prisoners with these sentences would also limit to a manageable amount the number of cases entitled to merits review.

*E. Suspend Procedural Defaults and Preclusion Where Critical Constitutional Interests Are in Question*

The appeal and post-conviction review process should be a mechanism for ensuring that police, prosecutors, and other criminal justice players with great power and discretion act legally. Abuse of power by judges, lawyers, and law enforcement officials is not easily identified internally. The suppression of exculpatory evidence by state officials, misconduct by police and prosecutors, fabricated or unreliable forensic evidence, juror misconduct, and judicial misfeasance have frequently resulted in wrongful convictions of innocent people.<sup>105</sup> Many of the constitutional violations impli-

---

manslaughter); *Brown v. Dretke*, 419 F.3d 365 (5th Cir. 2005) (denying certificate of appealability to death-sentenced prisoner); *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (same).

<sup>103</sup> 428 U.S. 280 (1976).

<sup>104</sup> See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587 (2004); see also Steve Mills & Maurice Possley, *Case Review Disputes Executed Man's Guilt*, *HOUS. CHRON.*, Dec. 10, 2004, at A1; Betsy Taylor, *Prosecutors Reopen Executed Man's Case; New Evidence Implies Eyewitness Lied*, *GRAND RAPIDS PRESS*, July 14, 2005, at A14.

<sup>105</sup> For example, Ohio death row prisoner Derrick Jamison was exonerated in 2005. The prosecution had withheld critical eyewitness statements and other evidence from the defense resulting in the overturning of Jamison's conviction in 2002. Jamison was originally convicted and sentenced to death in 1985 based in part on the testimony of Charles Howell, a co-defendant who received a lesser sentence in exchange for his testimony against Jamison. The prosecution withheld statements that contradicted Howell's testimony and that would have undermined the prosecution's theory of how the victim died, and would

cated by this conduct cannot be brought to light without meaningful post-conviction review.

Prosecutors typically face no sanctions, reprimands, or other consequences for illegally suppressing evidence or violating laws prohibiting racial discrimination in jury selection.<sup>106</sup> Even fabricated evidence by forensic experts and incompetent testing goes uncorrected outside of a reversal in the case in which such misconduct is exposed.<sup>107</sup> Collateral post-conviction review therefore becomes the primary mechanism for identifying systemic problems that undermine fair administration of criminal justice and public safety.

Ensuring that these claims are reviewed on the merits in state and federal habeas corpus proceedings is important not only to innocent and wrongly sentenced prisoners, but also to larger society, which relies on those with power to exercise it lawfully and responsibly. States frequently attempt, and often succeed in their efforts, to shield illegal conduct by state officials in criminal cases from scrutiny because indigent prisoners cannot get around procedural or other preclusion rules. The AEDPA and gratuitous procedural restrictions should not be applied to claims where the public interest is threatened by illegal or unconstitutional state conduct.

Other issues that have long plagued and undermined the administration of criminal justice similarly should be accompanied by a presumption of reviewability. The importance of maintaining a just system requires merits review of some constitutional claims unless a prisoner has inexcusably failed to prosecute the claim or has knowingly violated important procedural rules. Racial bias claims constitute an important example of such an issue.

---

have pointed to other possible suspects for the murder. Howell recently testified that he could not remember anything about the crime, and state prosecutors decided not to proceed against Jamison. DEATH PENALTY INFO. CTR., CASES OF INNOCENCE 1973–PRESENT, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109> (last visited Mar. 22, 2006).

Walter McMillian, a black man, was convicted for the murder of a white woman after a trial that lasted only a day and a half. At trial, three witnesses testified against McMillian, and the jury ignored multiple alibi witnesses that testified McMillian was at a picnic. Although the jury recommended a life sentence, the judge imposed a sentence of death. Post-conviction investigation revealed prosecutorial suppression of exculpatory information and perjury by the state's three witnesses. McMillian's conviction was overturned by the Alabama Court of Criminal Appeals and prosecutors agreed that McMillian was innocent. *Id.*; see also PETE EARLEY, CIRCUMSTANTIAL EVIDENCE *passim* (1995); Stevenson, *supra* note 37, at 79–82.

<sup>106</sup> For discussions of the rarity of punishment for prosecutorial misconduct, see Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose: It Is How You Play the Game*, 38 CAL. W. L. REV. 283 (2001).

<sup>107</sup> Prosecutors even enjoy immunity in civil cases that are brought by innocent people who were wrongly convicted as a result of prosecutorial misconduct. See *Kalina v. Fletcher*, 522 U.S. 118 (1997) (discussing absolute immunity afforded to prosecutor's role as advocate). Police officers also are protected in civil litigation by qualified immunity for their misconduct in criminal cases. See *McMillian v. Monroe County*, 520 U.S. 781 (1997); *Pierson v. Ray*, 386 U.S. 547 (1967).

Habeas corpus litigation has been the mechanism by which the United States Supreme Court has done important work to allow racial minorities to participate in grand juries, in trial juries, and as grand jury forepersons.<sup>108</sup> Confronting racially discriminatory use of peremptory strikes by prosecutors during jury selection has required substantive review that is frequently blocked when states argue that the claim is procedurally barred.<sup>109</sup>

States use procedural defaults to facilitate discriminatory conduct in a willfully pernicious manner. After the Texas Attorney General conceded that the “prosecution’s introduction of race as a factor for determining ‘future dangerousness’ was a violation of a death row prisoner’s rights to equal protection and due process,”<sup>110</sup> the United States Supreme Court vacated Victor Saldano’s death sentence in 2000.<sup>111</sup> At trial, a Texas “expert” testified against Saldano and told the jury that one of the factors associated with a defendant’s future dangerousness is his race or ethnicity.<sup>112</sup> The alleged expert pointed to the overrepresentation of black and brown people in prison to support his conclusions about the correlation between race and dangerousness.<sup>113</sup> After the United States Supreme Court reversal, the Texas Court of Criminal Appeals reinstated the death sentence. The Texas court ruled that the issue was procedurally barred and that the Attorney General had no authority to confess error in a death penalty case appealed to a federal court.<sup>114</sup>

The long history of tolerating racially biased administration of criminal justice has created injuries that have in no way healed.<sup>115</sup> Failing to address clear evidence of racial bias in criminal cases by invoking procedural defaults or preclusion facilitates racially discriminatory conduct and

---

<sup>108</sup> *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977).

<sup>109</sup> *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004). James Cochran was convicted of capital murder and spent nineteen years on death row after a Birmingham prosecutor illegally excluded African Americans from jury service. Mr. Cochran’s claim of racial bias was deemed procedurally barred by Alabama state courts even though Mr. Cochran had objected to the state’s conduct. In federal habeas corpus litigation, the Eleventh Circuit ruled that Alabama’s invocation of a procedural default rule was unfounded and ordered a new trial. Mr. Cochran was tried by a fairly selected jury, found not guilty of murder, and released. *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995).

The prosecutor at Jesse Morrison’s capital trial used peremptory strikes to exclude twenty of the twenty-one black people qualified for jury service. Again, the state courts improperly asserted that Mr. Morrison’s claim of racial bias was procedurally barred and blocked state court review of his claims. Mr. Morrison received federal habeas corpus relief after nineteen years on death row and received a lesser sentence at his retrial. *Morrison v. Jones*, 952 F. Supp. 729 (M.D. Ala. 1996).

<sup>110</sup> *Saldano v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002).

<sup>111</sup> *Saldano v. Texas*, 530 U.S. 1212 (2000) (vacating judgment and remanding case to Court of Criminal Appeals of Texas for further consideration in light of state’s confession of error).

<sup>112</sup> *Id.* at 884–85.

<sup>113</sup> *Id.* at 885.

<sup>114</sup> *Id.* at 891.

<sup>115</sup> *See generally* DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

does great harm to the integrity of criminal justice review. The perception of unfairness is aggravated by a lack of racial diversity among judges and prosecutors, which itself exacerbates courts' tolerance of unremedied illegal discrimination.<sup>116</sup> These claims should be reviewed on the merits to protect the integrity of the system and to shield disadvantaged people at risk of wrongful conviction and imprisonment.

*F. Confront the Costs of Providing Fair, Reliable, and Adequate Post-conviction Review for the Two Million Imprisoned People in America*

Institutional structures must be expanded if we are going to persist in incarcerating such a large percentage of our population. Resources and administrative support for judges, prosecutors, and indigent defense providers are grossly inadequate to meet the challenge of such dramatic increases in the prison population. Increased funding of state indigent defense systems and improved reliability of trial proceedings must become a priority if states are going to decrease the incidence of wrongful convictions.

Currently, courts and collateral review institutions are not equipped to manage or address the legitimate complaints of the thousands of imprisoned people who need review at this time. The solution cannot be to scale back review opportunities for the imprisoned who have been wrongly convicted or sentenced. The cost of mass incarceration has to be confronted; we must equip, fund, and prepare the institutions responsible for ensuring that none of America's two million imprisoned people is innocent or wrongly convicted.

Many courts have added pro se law clerks and created staff positions to help process petitions for relief in recent years. However, these responses rarely result in evidentiary hearings, factual development of claims, or anything other than routinized application of the previously discussed procedural rules employed to bar and restrict review. Confronting the true cost of mass incarceration means that we must actually invest in careful, thoughtful review of collateral appeals when there is a credible risk that an innocent or wrongly convicted person is illegally imprisoned.

---

<sup>116</sup> See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95 & nn.2-3 (1997) ("Only 3.8% of all state court judges are African American. Among state trial court judges, only 4.1% are African American."); see also Roscoe C. Howard, Jr., *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WIDENER L. SYMP. J. 139, 167 (2000) ("The number of minorities working for the government in the criminal justice system are very low. Blacks make up only 4% of the attorneys in the criminal justice system, while only 3% are Hispanic.").

## CONCLUSION

There are compelling reasons to reduce the size of America's prison population that have nothing to do with the feasibility of providing adequate collateral review. I believe that our prison population needs to be drastically reduced. In the meantime, however, we do not have the option of pretending that fair treatment of condemned, incarcerated, and powerless people can be avoided by creating complex procedural devices that function as blinders to injustice. How we treat America's imprisoned is a measure of the character of our society and the quality of our legal system. It is precisely by the manner in which we respond to the cries and complaints of the incarcerated that we must gauge our commitment to justice and fairness.

If we continue to blind ourselves with procedural barricades to addressing the ways in which we dishonor constitutional requirements and violate legal rights in criminal proceedings, not only will the number of wrongly incarcerated in America grow intolerably, but we will all find ourselves guilty of undermining the "liberty and justice for all" that our courts are designed to protect.

Indifference to the plight of wrongly condemned and convicted prisoners in America ultimately breeds contempt for the rule of law. We have invested billions into "Corrections" while simultaneously embracing a bewildering resistance to correcting fundamental violations of clearly established constitutional rights. As a result, too many innocent and wrongly convicted men and women are now locked down in jails and prisons where they should not be. Restoring fairness in collateral appeals and remediating these wrongful convictions is the only corrective measure that can bring justice to thousands of prisoners. A generation of policymakers, legislators, lawyers, law students, and advocates will need to emerge and seriously challenge a legal and political landscape that has become an impediment to providing fair and just treatment for this country's most vulnerable and disempowered people. It is a challenge well worth undertaking if equal justice is going to be anything more than an idea about which we hear, but never see.

