I. INTRODUCTION

The concern for fairness in federal habeas review in capital cases will not be satisfied unless Congress again amends habeas corpus procedure to support a statutory right to counsel in state post-conviction review, or, until the Supreme Court revisits its position, expressed in Murray v. Giarratano, 1 to hold that, in capital cases, the Sixth, Eighth, or Fourteenth Amendments require States to provide counsel in State collateral review proceedings. Such a requirement would accommodate fairness in State post-conviction review of capital cases by extending to capital prisoners the “right to counsel” promise of Powell v. Alabama, 2 Gideon v. Wainwright, 3 and Douglas v. California. 4 In addition, such a requirement would also fulfill the “meaningful access to the courts” promise of Bounds v. Smith, 5 thereby completing a necessary defendant-counsel “chain of representation.”

1 J.D. Candidate, 1999, University of Pennsylvania; B.A., Dartmouth College. This Comment is dedicated to my mother, a Public Defender. She taught me that all defendants are entitled, regardless of indigence or disadvantage, to competent and dedicated defense counsel. Thanks to the Board of Editors and the Senior and Associate Editors at the Journal of Constitutional Law for their dedication and diligence in preparing this Comment for publication. Individual thanks are warranted for Noah Berlin, for the amount of time and work he personally dedicated to that effort. Thanks to the University of Pennsylvania Law School Public Interest Scholars Program for affording me the opportunity to work with defense organizations during my summers to explore the issues discussed in this Comment. Final thanks, for the inspiration, to the very competent and exceedingly dedicated defense lawyers I worked with during those summers. I look forward to working with them in the future.

287 U.S. 45 (1932).
430 U.S. 817, 828 (1977) (holding that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”) (footnote omitted).
Cf. Vivian Berger, Justice Delayed or Justice Denied?, 90 COL. L. REV. 1665, 1678 (1990) (describing the “gap between the constitutional right to a lawyer at trial, and direct appeal and the
Both Congress and the Supreme Court have addressed the right to counsel for indigent defendants to cover most stages of review in criminal proceedings. *Powell v. Alabama* held that the Fourteenth Amendment requires competent counsel to represent indigent defendants in all capital trials. *Gideon v. Wainwright* expanded this principle and held that the Sixth and Fourteenth Amendments require States to provide counsel for indigent defendants in all criminal felony trials. *Douglas v. California* furnished another link in the "chain of representation" by holding that the Fourteenth Amendment requires States to appoint counsel for indigent defendants on direct review in all criminal cases where direct review is provided as a matter of right by State law. The protection for indigent criminal defendants provided by the Constitution, the Supreme Court says, unfortunately ends there.

Congress has created some protection, through legislative fiat, by providing counsel for indigent capital defendants for those seeking to challenge their state capital convictions in federal court by writ of habeas corpus. Up to the moment, however, the Supreme Court has declined to extend this right to state post-conviction appeals. In *Giarratano* holding that "neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access' required States to appoint counsel for indigent prisoners seeking post-conviction relief," the Supreme Court broke the "chain of representation" for indigent prisoners sentenced to death. Because of *Giarratano*, the right to counsel—either statutory

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1. 287 U.S. 45 (1932).
   In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraph[ ] . . . (8).

6. See *Giarratano*, 492 U.S. at 12-13 (reversing the Fourth Circuit Court of Appeals decision, 847 F.2d 1118 (4th Cir. 1988) (en banc), aff'd 856 F.2d 1421 (4th Cir. 1988) (holding that the Constitution requires States to provide counsel on State collateral review of capital convictions)).
or constitutional, under the Sixth Amendment, or the Fourteenth Amendment—is extended to indigent defendants to cover all stages of capital proceedings, except during state post-conviction review.

On April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”), partly in response to growing pressure from the States to end the long process of federal habeas review in capital cases. As a simple matter, Congress, in the “Habeas Corpus Reform” Section of the AEDPA, attempted to accommodate the competing social interests of finality, fairness, and federalism in capital cases. As a more complicated matter, Congress ostensibly strove to accommodate competing interests: the States’ interest in carrying out capital sentences without the endless delay of federal habeas review, capital prisoners’ and society’s interest in assuring that death sentences are carried out only against those who have had the full protection of the Constitution, and the States’ interest in enforcing their own capital sentences without undue federal imposition. Giarratano was central to Congress’s balancing of these interests. In endeavoring to reform habeas corpus, Congress responded to the States’ frustration with the endless delays of federal habeas review of capital conviction. At the same time, Congress implicitly recognized that fairness in an expedited review process implicated some form of the right to counsel for indigent prisoners in collateral review of capital convictions. In light of this recognition, Congress understood

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14 See 135 CONG. REC. S13471, S13480 (daily ed. Oct. 16, 1989) (statement of Sen. Thurmond) (explaining that the model for the current habeas procedures “balances the need for finality in death penalty cases with the requirement that a defendant have a fair examination of his claims”).


16 See Giarratano, 847 F.2d at 1122 (“Both society and affected individuals have a compelling interest in assuring that death sentences have been constitutionally imposed.”); 136 CONG. REC. E1396 (daily ed. May 7, 1990) (statement of Rep. Kastenmeier) (“No civilized society would want to impose a death sentence without knowing that it was fairly and fully considered and imposed.”); Stephen B. Bright, Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights, 54 WASH. & LEE L. REV. 1, 23 (1997) (“Fairness is important to achieving just results that command the respect of the community. The lack of fairness in the state court systems seriously undermines the reliability of the results reached in many cases in those courts.”).

17 Giarratano was an important factor in the report issued by the Powell Committee, which served as the foundation for the habeas reform provisions found in the AEDPA. For detailed discussion of this report, see infra sections III-IV.

18 See 142 CONG. REC. S3454, S3470 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (“We currently have the death penalty applied and then there are delays of up to 17 years while the cases languish in the Federal courts.”); id. at S3472 (statement of Sen. Specter) (“We have seen [the death penalty’s] deterrent sapped by the delays attributable to the defects in the habeas corpus system.”).

19 See supra note 10 and accompanying text.
that while it had authority to require counsel in federal collateral proceedings, federalism and the Court's decision in Giarratano prevented Congress from reaching the same result—requiring counsel—in State post-conviction proceedings.

This Comment examines the AEDPA's amendments to federal habeas corpus procedures in capital cases in order to determine how effectively Congress has balanced fairness, finality and federalism. Specifically, this Comment examines the operation of the unprecedented one-year statute of limitations placed on the filing of a petition for a writ of habeas corpus, in conjunction with the new "Special Procedures in Capital Cases," or the "opt-in" provisions. In the Act, the statute of limitations and the deferential standard of review found in §2254(d) clearly demonstrate Congress's accommodation of finality and federalism in federal review of state capital convictions. The opt-in provisions, because they implicate a form of the right to counsel, appear to be representative of Congress's attempts to accommodate fairness in the process.

This Comment argues that the opt-in provisions, as they currently operate, when weighed against the accommodations made to federalism and the States' interests in capital punishment finality, fail to adequately accommodate both society's and condemned inmates' concerns about fairness and "meaningful access to the courts" in capital cases. Further, this Comment argues that in reforming federal habeas procedures in general, Congress changed the general or "default" rules that provided the background for the reform of habeas corpus in capital cases. As a result, Congress, perhaps inadver-

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20 See 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."); see also Marshall J. Hartman & Jeanette Nyden, Habeas Corpus And The New Federalism After The Anti-Terrorism And Effective Death Penalty Act Of 1996, 30 J. MARSHALL L. REV. 337, 353 (1997) ("Prior to the enactment of AEDPA, there was no limitation on when a prisoner could file an original action for habeas corpus relief in federal court.").

21 28 U.S.C. §§ 2261-2266. The opt-in provisions provide incentives for States to provide post-conviction counsel to indigent death row inmates in state collateral proceedings by creating a stricter standard of review for federal courts reviewing state capital convictions. The standard is designed to increase finality. For detailed discussion, see infra sections II, IV.

22 See, e.g., Sawyer v. Whitley, 505 U.S. 333, 341 (1992) ("Since our decision in Furman v. Georgia, our Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence.") (citation omitted); Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); Furman v. Georgia, 408 U.S. 228, 255-57 (1972) (Douglas, J., concurring) (arguing that the death penalty should not be related to the ability to purchase competent legal services).

23 Congress created a new Chapter which applies to capital cases if the States chose to opt-in to the new provisions, so there are now two bodies of rules that may be applicable: the "opt-in rules," and the "default" rules, those that apply regardless of whether the States opt-in to the provisions or not. See Death Row Prisoners v. Ridge, 948 F. Supp. 1258, 1273 (E.D. Pa. 1996) ("Congress essentially created two federal habeas schemes: one that applies to death row pris-
tently, has provided the States with more incentive when reforming habeas corpus to ignore rather than opt-in to the new provisions. Rather than advancing fairness by encouraging States to provide counsel to capital prisoners during State post-conviction review, the opt-in provisions in particular, and the AEDPA habeas corpus reforms in general, have had the effect of defeating fairness by removing the already existing incentives for States to provide counsel during State post-conviction review.

States, as a consequence of the AEDPA, in calculating that their interests in death penalty finality are sufficiently addressed by Congress's reform of the "default" habeas corpus procedures, have not affirmatively responded to the counsel preconditions of the opt-in provisions, despite the "benefits" offered. Thus, the interests of the States in death penalty finality are more than adequately accommodated without their having to respond affirmatively to the opt-in provisions by providing counsel to indigent capital prisoners. The result has been to freeze the development of State post-conviction defender systems once a State has been found not to qualify for the opt-in provisions.

In Section II, this Comment will examine the opt-in provisions and how they operate. In Section III, the Comment will analyze the effectiveness of the counsel preconditions to the opt-in provisions by surveying recent district and appellate courts' construction of the statute and their determinations of the States' eligibility for these provisions. In Section IV, this Comment will examine the Powell Report—the context from which the opt-in provisions emerged—to understand the rationale underlying the opt-in provisions and to identify how Congress' reform of habeas corpus failed to fully incorporate that rationale into the habeas reform amendments. In Section V, this Comment will provide some possible explanations as to why fairness was sacrificed in favor of finality and federalism by examining congressional debate about federal habeas corpus reform in general, and, in particular, congressional debate about the AEDPA Conference Report. In Section VI, and in conclusion, this Comment argues that the concern for fairness—if it truly is a concern—in federal habeas review in capital cases, reflected in the opt-in provisions, will not be realized unless Congress elects to revisit, and consequently amend habeas corpus procedure to support a statutory right to counsel in state post-conviction review; or, alternatively, until the Supreme Court revisits its position, expressed in Giarratano to hold that, at least in capital cases, the Sixth, Eighth, or Fourteenth Amendments do require counsel in state collateral review to ensure "meaningful access"

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24 "Counsel preconditions to the opt-in provisions" is the shorthand phraseology I use to reference the conditions enumerated in § 2261 of the opt-in provisions.
to the judicial process. Such a posture would accommodate fairness in state post-conviction review of capital cases by extending to capital prisoners the "right to counsel" promise of *Gideon v. Wainwright*, *Douglas v. California*, and *Powell v. Alabama* and the "meaningful access to the courts" promise of *Bounds v. Smith*, thereby completing the "chain of representation."[28] for indigent capital prisoners.

II. THE OPT-IN PROVISIONS[26] — A POLITICAL GESTURE OF FAIRNESS

The opt-in provisions, which emerged in the newly-drafted Chapter 154 of the AEDPA, entitled "Special Habeas Procedures in Capital Cases," now codified at 28 U.S.C. §§ 2261-2266, were some of the least controversial portions of the AEDPA, judging from the relative dearth of debate in both Houses of Congress.[27] These new provisions, conditioned upon states providing counsel for indigent capital prisoners during all state collateral proceedings, incorporate the restricted standard of review from the amended § 2245(d)(1),[29] furnish limitations on federal courts' power to grant stays of execution,[30] provide a six-month statute of limitation on the filing of a petition for a


[26] The provisions of 28 U.S.C. §§ 2261-2266 have been referred to as "opt-in" provisions, although this name is not reflected in the Act. The term was used in the earliest cases construing these provisions, and the name has caught on. See *Ashmus v. Calderon*, 123 F.3d 1199, 1202 (9th Cir. 1997); *Mackall v. Murray*, 109 F.3d 957, 960 (4th Cir. 1996); *Ashmus v. Calderon*, 935 F. Supp. 1048, 1055 (N.D. Cal. 1996).

[27] Examining the debates on the AEDPA Conference Report, Senator Arlen Specter appears to be the only member of Congress to have expressed an opinion regarding the effect of the "opt-in" provisions. See 142 CONG. REC. S3454, S3470-73 (daily ed. Apr. 17, 1996). There are some explanations for the lack of discussion of the opt-in provisions. The most obvious is that there was little disagreement in Congress about the undesirability of the delay that characterized federal habeas review of state capital convictions. By shortening the statute of limitations, creating a deferential standard of review, and providing for expedited procedures for capital cases in the district courts and courts of appeals, the concerns about delay were sufficiently addressed.


A stay of execution granted pursuant to subsection (a) shall expire if—(1) a State prisoner fails to file a habeas application under section 2254 within the time required in section 2263; (2) . . . a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or (3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a federal right or is denied relief in the district court or at any subsequent stage of review.

*Id.*; see also 28 U.S.C. § 2263(c) ("If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay or execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b)."").
writ of habeas corpus, grant greater deference to the ruling of state courts on federal law, and mandate a strict timeline for district and appellate courts to follow when entertaining habeas corpus petitions in capital cases.

To qualify for the opt-in provisions states must meet the requirements set forth in subsections (b) and (c) of § 2261. Section 2261 provides:

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.
(b) This chapter is applicable if a State established by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for

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50 See 28 U.S.C. §2263(a) ("Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after the final State court affirmance of the conviction and sentence on direct review or the expiration of time for seeking such review.").
51 See 28 U.S.C. § 2264(a); see also U.S.C. § 2264(b) ("Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it."). Section 2264(a) states in applicable part:
Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
(1) the result of State action in violation of the Constitution or laws of the United States; (2) the result of the Supreme Court’s recognition of a new Federal right made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

53 See 28 U.S.C. § 2266(a) ("Any application . . . subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."); 28 U.S.C. § 2266(b)(1)(A) ("A district court shall render a final determination and enter final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application was filed."); 28 U.S.C. § 2266(c)(1)(A), stating:
A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

Id.
State law purposes. The rule of court or statute must provide standards for competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable to competently decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.\(^3\)

The rationale underlying the opt-in provisions is characterized as a "quid pro quo".\(^4\) if States provide counsel to capital prisoners in state collateral proceedings, there will be increased reliability in convictions and sentences. If this is the case, States, in exchange for increased reliability, and thus fairness, in post-conviction review of capital cases, may avail themselves of the "benefits" that are intended to lend a greater measure of finality to state capital convictions. Understanding this rationale, and examining the opt-in provisions as a whole—the shortened, six-month statute of limitations, the deferential standard of review, the expedited procedures for the district and appellate courts—the counsel preconditions of the opt-in provisions appear to be the singular accommodations made for fairness.

A crucial characteristic of the opt-in provisions is that these accommodations are conditioned upon the States' acceptance of the idea that fairness requires that counsel should be provided to indigent capital prisoners for post-conviction review of their sentences. Consequently, these accommodations for fairness, which are designed at least in part to benefit society and indigent capital prisoners through the increased measure of reliability they will bring to capital convictions, will be motivated by the States' interest in death penalty finality, as envisioned by the drafters of the provisions. The States'
interests in death penalty finality, however, are furthered by the standard of review in § 2254(d) and the one-year statute of limitations in § 2244(d)(1) found outside of the opt-in provisions. These provisions, which apply regardless of whether the States satisfy the counsel preconditions of the opt-in provisions or not, serve to undermine the persuasive power of the "benefits" offered to the States in exchange for providing counsel. The provisions found in the general reform of habeas corpus, as will be demonstrated, promote the States' interest in death penalty finality without regard to any of the fairness concerns embodied in the counsel preconditions to the opt-in provisions. Fairness, thus, has been sacrificed for finality, as the cases below demonstrate.

III. FAILED INCENTIVES

The opt-in provisions have been codified in the United States Code for two years and ten months as of this writing. Among the States who carry the five largest death rows in the United States, none qualifies under the opt-in provisions. This state of affairs provides empirical evidence that Congress' expectation that States would respond to the opt-in provisions was, at best, naive. At worst, this information reflects how readily fairness was sacrificed in Congress in favor of federalism arguments. The cases demonstrate clearly that the opt-in provision incentives lack the persuasive force that Congress expected they would have for States that continue to carry out the death penalty.

A. Ashmus v. Calderon: California Fails The Test

The District Court for the Northern District of California had the first opportunity to construe the opt-in provisions in Ashmus v. Calderon, a case in which Troy Ashmus, as a named prisoner of a provisionally named class of California capital prisoners, challenged the application of the opt-in provisions to his habeas corpus petition. In

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55 See infra Section III.C.
56 935 F. Supp. 1048 (N.D. Cal. 1996), aff'd 123 F.3d 1199 (9th Cir. 1997), rev'd on other grounds, U.S. --, 118 S. Ct. 1694 (1998). Ashmus was decided on June 14, 1996, only two months after the opt-in provisions were passed. There are no other cases construing a state's eligibility for these provisions at an earlier date. Ashmus was reversed in part by the Supreme Court because of Article III justiciability concerns for the remaining members of the class. See Calderon v. Ashmus, -- U.S. --, 118 S. Ct. 1694 (1998). The Calderon Court held that rather than challenge the applicability of the opt-in provisions through a broad § 1983 injunctive and declaratory class action suit (as had done Troy Ashmus), a prisoner must challenge the applicability of the opt-in provisions to his petition during his individual habeas proceeding. The Court did leave the district court findings regarding the California post-conviction defender system intact. Following Calderon, therefore, the applicability of the opt-in provisions is determined on a case by case basis. See id. at 1699-1700.
57 See Ashmus, 935 F. Supp. at 1054.
the first judicial construction of the provisions in an adversarial proceeding, the court characterized the benefits of the statute as including the six-month statute of limitations on the limiting of a habeas corpus petition, "limitations on amendments to petitions and their factual development," and limitations on "federal courts' power to review the merits of constitutional claims and order appropriate relief." Further, the court noted that as a result of the provisions for qualifying states, "capital habeas matters must be reviewed under strict, statutorily prescribed time limits, and must be given priority by the district court and by the court of appeals over all noncapital matters."

The court, taking notice of an article reporting that in California "128 men and six women on death row are waiting for counsel," found that “[m]ore than a quarter of the proposed class members are without counsel and are likely to remain so for some time.” Further, the court found that there were 145 members of the proposed class who had habeas corpus proceedings pending, and that the class was growing at two to three individuals a month. In light of these facts, however, California "maintained consistently and vigorously" that it qualified for the benefits of the opt-in provisions, asserting that "every inmate who is awaiting appointment of counsel has been ‘offered’ counsel and the offer has been accepted; what is pending is the appointment itself.” In ultimately enjoining California from threatening the application of the opt-in provisions the court found numerous deficiencies in the California system.

Analyzing California’s compliance with § 2265(b), the court found that California did not have a satisfactory "mechanism for the appointment, compensation, and payment of reasonable litigation expenses" because the California procedure “expressly preclude[d] compensation for raising certain collateral issues.” The problem

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58 Id. at 1055 n.4 (citing 28 U.S.C. §§ 2263-2264 and 2266(a)).
59 Id.
60 Id.
62 Id. at 1055.
63 See id.
64 Id. at 1056. California claimed that it was eligible for the opt-in provisions under 28 U.S.C. § 2265, which allows for States that have a unitary appeal procedure—a "procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack," 28 U.S.C. § 2265(a)—to opt-in to the new provisions under similar conditions as those States that have provided for separate collateral proceedings. See 28 U.S.C. § 2265.
65 Ashmus, 935 F. Supp. at 1055.
66 28 U.S.C. § 2265(b) contains the “unitary review” counterpart to § 2261(b), which applies to States that provide separate direct and collateral review procedures. See supra notes 33 & 44 and accompanying text.
67 Ashmus, 935 F. Supp. at 1070.
68 Id.
with California’s system, the court found, was that appointed counsel under California procedure were not authorized to pursue potentially valid claims only discoverable outside of the record. This limitation was unsatisfactory under the statute because effective collateral attacks must raise all possible claims found within and outside of the record. The danger of this limitation, the court explained, was that “the meaningful assistance of counsel in collateral proceedings is important precisely because it is necessary to enable prisoners to ‘assert all possible violations of his [sic] constitutional rights’ and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation.” California’s procedures, thus, clearly handicap capital prisoners by preventing appointed counsel from presenting all meaningful claims in state collateral proceedings.

Another deficiency found in the California procedure was the absence of a “comprehensive scheme” created by a “rule of court of last resort or statute,” for the provision of counsel, or which provided standards of competency for appointed counsel, in accordance with § 2265(a). California’s contention that it satisfied the conditions for the opt-in provisions was based on the proposition, rejected by the court, that “nothing in the language of the 1996 Act [suggests] that Congress expected or much cared whether the several tasks are accomplished by a single passage of printed words or a multitude of such passages.” Countering this proposition, the court found that Congress “undoubtedly did intend to require that a state affirmatively create a system, not come forth with a post hoc rationalization,” and that Congress did not intend for states to rely on collections of old, and perhaps un-enforced, statutes—such as the 1985 statutes relied on by California—to qualify for the benefits of the opt-in provisions. Since California did not afford appointed counsel any latitude in investigating claims outside of the record, did not create a comprehensive mechanism for the appointment and compensation of counsel, and did not create standards of competency that were mandatory, the court found that California’s procedures fell far short of the ex-

47 See id. at 1071.
48 Id. (citing Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991), cert. denied, 508 U.S. 1011 (1992)).
49 28 U.S.C. § 2265(a) (“This chapter shall apply... if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court of last resort or statute must provide standards of competency for the appointment of... counsel.”).
50 Ashmus, 935 F. Supp. at 1071.
51 Id. at 1072 (citing 1991 Analysis, 137 CONG REC. at S3220 (“At a minimum, the immediate benefits to defendants would include the requirement that states... focus on articulate standards of competence...”) (alterations in quoted text)).
52 Id.
53 Id. at 1073.
pectations expressed textually and in the legislative history of the statute.56 That legislative history, the court explained, “demonstrate[d] that Congress deemed the provision of competent counsel at all stages of proceedings as essential to the quid pro quo trade-off.”57

As the court noted, in California 128 out of a total of 145 prisoners were awaiting habeas corpus review without counsel. California’s assertion that the opt-in provisions apply to its capital prisoners, however, is wholly indicative of Congress’s misguided expectation that States would affirmatively respond to the opt-in provisions.58 Yet, this type of assertion has been characteristic of the States’ response to the opt-in provisions.59 It could be argued in fairness to California and other states that they did not have a chance to establish procedures before the proceeding started. Since Ashmus, however, the courts have held California’s procedures to be inadequate.60 The argument, thus, is non-responsive to the fundamental fairness concerns that are implicated by the threat by California that it qualifies for the benefits of the provisions. This bold assertion of California, juxtaposed to the number of death row prisoners still awaiting counsel, demonstrates how little the States, with whom Congress vested discretion to provide counsel to indigent death row prisoners, value the fairness concerns embodied in the counsel preconditions of the opt-in provisions. California is by no means unique, however, as further cases demonstrate.

56 See id.
57 Id.
59 See, e.g., Mackall v. Murray, 109 F.3d 957, 960 (4th Cir. 1996) (asserting that in Virginia the opt-in provisions applied to a capital prisoner’s case, even though the system was established after the conviction became final) (“To rule in Mackall’s case that... [Virginia] satisfies the ‘opt-in’ conditions would deny Mackall the very protection that Congress intended the ‘opt-in’ provisions to ensure – representation by properly appointed counsel in at least one habeas proceeding on the merits.”); Hill v. Butterworth, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) (“The present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made the requisite meaningful offer of counsel.”).
60 See, e.g., Ashmus v. Calderon, 123 F.3d 1199, 1208 (9th Cir. 1997). On August 19, 1997, the Ninth Circuit held:

California may not take advantage of the six-month limitations period when it takes years to appoint counsel. In sum, we hold that California does not qualify at this time for the benefits of Chapter 154. This holding does not preclude California from adopting policies to qualify under Chapter 154. We conclude only that, to take advantage of the benefits under Chapter 154, California must fulfill its part of the bargain by timely appointing and compensating competent counsel to assist a condemned prisoner in his or her unitary review proceedings.

Id. Ashmus was overturned by the Supreme Court in Calderon v. Ashmus, – U.S. –, 118 S.Ct. 1694 (1998), but the findings regarding California’s post-conviction defender system were left undisturbed. See supra note 36.
B. Finality Before Fairness

Ashmus established the rigid standard for the counsel preconditions that States must meet in order to qualify for the benefits included in the opt-in provisions. This vigilance has since been duplicated in other district courts. The development of this strict standard has enabled courts to protect capital prisoners from the forfeiture of rights otherwise available to them under §§ 2241-2255. This protection by the courts counters the threat by a State that it qualifies for the "benefits" of the opt-in provisions. Such a threat has the effect of forcing capital prisoners to anticipate which statute of limitations is applicable. They may either wait, with the expectation

61 See Ashmus, 935 F. Supp. at 1072-74 (explaining California's procedure for identifying competent counsel for appointment) ("California does not comply with § 2265(a)'s requirement that 'the rule of court or statute must provide standards of competing for the appointment of such counsel.'").

62 See, e.g., Hamblin v. Anderson, 947 F. Supp. 1179, 1182 (N.D. Ohio 1996) (mem.). Hamblin held that a provision in the Ohio Public Defender Act, which made appointment of counsel contingent upon the discretion of the public defender, disqualified Ohio for the opt-in provisions—in violation of the requirement that appointment of counsel be made by "order of the court," 28 U.S.C. § 2261(c)—despite the argument that this discretion had never been exercised. The court's decision was "governed by the principle that Congress did not write [the opt-in provisions] in terms of substantial compliance." Id.

63 See Ashmus, 935 F. Supp. at 1056-57 (finding that the harm in the new habeas procedures for capital prisoners may be created by nothing more than a threat by the State that it qualifies for the opt-in provisions). This harm was enough in Ashmus to confer Article III standing and to invoke the equitable powers of the district court. See id. at 1059-60; see also Hill v. Butterworth, 941 F. Supp. 1129, 1138 (N.D. Fla. 1996) (holding that this harm is sufficient for constitutional standing); Death Row Prisoners v. Ridge, 948 F. Supp. 1258, 1274 (E.D. Pa. 1996) (finding that plaintiffs "correctly assert that they have been deprived of the equal protection of the law in that... [while other prisoners know the applicable statute of limitations for the filing of their habeas petitions, they] do not know whether the 180-day or one-year statute of limitations applies to them due to Defendant's refusal to declare Pennsylvania's status."). But see Booth v. Maryland, 112 F.3d 139, 140 (4th Cir. 1997) (reversing the district court's grant of injunctive relief from harm of State asserting eligibility under 28 U.S.C. §§ 2261-2266 on the basis of Eleventh Amendment immunity). The Supreme Court's decision in Calderon v. Ashmus resolved the circuit split by holding that the issue of whether a State qualifies for the opt-in provisions must be litigated in individual habeas corpus proceedings rather than through the broad injunctive actions brought in Ashmus, Death Row Prisoners, Hill, and Booth. See Calderon v. Ashmus, — U.S. —, 118 S. Ct. 1694 (1998); see also supra note 36.

64 See Death Row Prisoners, 948 F. Supp. at 1270-71 ("Defendants' refusal to acknowledge that Pennsylvania does not fulfill Chapter 154's counsel requirements similarly puts Plaintiffs in a 'dilemma': Either Plaintiffs have to assume that the 180-day limitations applies and give up the extra six months to which they would be entitled under Chapter 153 to prepare a federal habeas petition if Pennsylvania does not fulfill Chapter 154's opt-in requirements, or Plaintiffs have to assume that Pennsylvania does not meet the Chapter 154 requirements, take the full year to file a habeas petition, and risk a 'serious penalty,' i.e. dismissal of their petition for untimeliness."). Accord Hill v. Butterworth, 941 F. Supp. 1129, 1138 (N.D. Fla. 1996) ("[T]he uncertainty of whether Chapter 154 applies to [plaintiff's] cause will still force him to choose between either: (1) complying with that Chapter and sacrificing procedural rights he might otherwise have if the State of Florida has in fact not opted into Chapter 154; or (2) not complying with that Chapter, thereby sacrificing his procedural rights under the Chapter if the State of Florida has in fact opted into it.").
that the one-year statute of limitations is applicable, and run the risk of defaulting completely on the filing of a petition, or, they may anticipate the applicability of the six-month statute of limitations and file, prematurely and without the benefit of counsel, inadequate and incomplete petitions for fear of missing the deadline.\(^6\)

As a result of this uncertainty, capital prisoners threatened with the application of the new provisions are forced to default on valid and meritorious claims that, with the assistance of counsel, could be raised in both state and federal post-conviction review.\(^6\) The Ashmus court characterized as dangerous a situation in which the State "force[s] [condemned prisoners] to forfeit their rights . . . as a direct result of the uncertainty over [the opt-in provisions'] applicability created by [the State of California's] assertions."\(^6\)

The court's strict construction of the counsel preconditions has only marginally helped to accommodate the fairness concerns of indigent death row prisoners.\(^6\) The courts, however, have made it clear that, regardless of any deficiencies in the States' responses to the opt-in provisions, they take very seriously the Powell Commission's recommendation\(^6\) that although "it is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies [with the provisions] . . . [t]he final judgment as to the adequacy of any system for the appointment of counsel . . . rests ultimately with the federal judiciary."\(^7\) In short, by prohibiting States from threatening the use of the six-month statute of limitations,\(^7\) maintaining a deferential standard of review,\(^2\) and expediting district

\(^6\) See Death Row Prisoners, 948 F. Supp. at 1270-71.
\(^6\) See id.
\(^7\) See Ashmus, 935 F. Supp. at 1057.
\(^8\) See, e.g., Satcher v. Netherland, 944 F. Supp. 1222, 1242 (E.D. Va. 1996) (holding that AEDPA requires a "formal, institutionalized commitment to the payment of counsel and litigation expenses," and that the requirements can only be satisfied by strict, rather than substantial, compliance).
\(^9\) The Powell Commission was charged by Chief Justice Rehnquist to examine federal habeas corpus procedures in capital cases and to make recommendations. These recommendations, submitted in the "Powell Report," proposed a model from which the opt-in provisions are largely drawn. For a detailed discussion, see infra Section IV.
\(^10\) AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE REPORT (Sept. 27, 1989), reprinted in 45 CRIM. L. REP. 3239, 3242 (1989) [hereinafter POWELL REPORT]. It is notable that the district court in Ashmus relied specifically on this passage from the Powell Report before embarking upon its determination that California did not qualify for the benefits of the opt-in provisions. See Ashmus, 935 F. Supp. 1048, 1057 n.8.
\(^11\) See 28 U.S.C. §2263(a) ("Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmation of the conviction and sentence on direct review or the expiration of the time for seeking such review.").
\(^12\) See 28 U.S.C. § 2264(a) (providing for standard of review), stating:

Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
and court of appeal timelines, the courts may protect prisoners from the danger outlined above. However, beyond their power to clarify the States' eligibility for the opt-in provisions and ensure that States take the fairness concerns embodied in the counsel preconditions of the opt-in provisions seriously, the federal courts are powerless to shield against the less obvious, though equally serious threats to fairness.

Once a determination has been made by the courts that the State has not qualified for the opt-in provisions, its prisoners are still subject to the "default" habeas procedures that remain applicable in capital and non-capital cases alike. These "default" habeas rules—the deferential standard of review, the one-year statute of limitations, and the limitations on successive petitions—operate independently of the opt-in provisions and go a long way towards advancing the States' goal of finality in capital cases, often at the expense of indigent capital prisoners. Unlike the opt-in provisions, there are no pre-conditional counsel requirements for the application of the "default" habeas rules. As a result, States receive benefits that advance finality, without any corresponding accommodation for fairness to capital prisoners.

(1) the result of State action in violation of the Constitution or laws of the United States; (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

Id.

See 28 U.S.C. § 2264(b) ("Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it."); 28 U.S.C. § 2266(a) ("[A]ny application . . . subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters"); 28 U.S.C. § 2266(b)(1)(A) ("A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed."); 28 U.S.C. § 2266(c)(1)(A) ("A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.").

The problem created is as follows. Assuming that a State has been adjudged not to qualify for the benefits of the opt-in provisions, some capital prisoners will likely not be represented by counsel. While the six-month statute of limitations, the deferential standard of review, and the expedited district and court of appeal timelines may not apply, the prisoner is still subject to a one-year statute of limitations. The problem becomes starkly obvious: the prisoner must make sense of difficult and complex habeas corpus procedures, develop meaningful legal claims for his state collateral proceedings without the benefit of counsel, and be swift enough to complete these tasks before the one-year statute of limitations runs. Inexperience, under-education, indigence, mental retardation, and confinement

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76 In California, for example, 110 out of 138 prisoners with federal habeas proceedings pending did not have counsel. See Ashmus, 935 F. Supp. at 1055. There was a backlog of capital prisoners who did not have counsel in Florida as well. See Hill v. Butterworth, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996).

77 See Michael Millemann, Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles, 48 Md. L. Rev. 455, 499 (1989) ("An assertion that death-sentenced prisoners have the capacity to understand these complex procedural rules and apply them, often expeditiously, to the equally complex substantive law governing death penalty cases is virtually self-refuting.").

Millemann elaborates on this principle, arguing that:

Pro se death-sentenced prisoners are not capable of obtaining from law books even the first dimension of requisite knowledge of the applicable substantive law. Such law includes the texts and judicial interpretations of state and federal constitutions, statutes, and rules. The principles that a death-sentenced prisoner must extract from these disparate sources and plead in a post-conviction petition interact and assert dominance in the dynamic legal environment of federalism.

Id. at 487.

78 See Zuern v. Tate, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (acknowledging that Ohio's failure to appoint counsel might force a prisoner to "prepare his or her own... petition and hope for appointment thereafter, yet preparation of the petition itself is subject to important technical pleading requirements under Ohio case law"). Professor Millemann explains a significant difficulty that is presented by capital prisoners who are forced to raise their own claims without the benefit of counsel. He explains:

What is particularly troubling about the idea of forced pro se representation is that courts in many capital post-conviction cases (in which the petitioner had post-conviction counsel) have found trial counsel ineffective for failing to investigate and produce compelling evidence of mental illness or retardation. Such evidence is uniquely relevant in a capital sentencing proceeding. Assuming, arguendo, that any death-sentenced prisoner has pro se capacity, it is the capital post-conviction petitioners, who have the strongest claims that trial counsel was constitutionally ineffective for failing to produce evidence of mental illness, who will be least equipped to assert them pro se. A post-conviction court will not be able to discern from the then-existing record of the capital proceeding the critical nonrecord evidence of mental illness or retardation (nor any other nonrecord evidence of constitutional violations).

Millemann, supra note 77, at 486-87 (1989).

79 See POWELL REPORT, supra note 70, at 3240 ("Capital inmates almost uniformly are indigent, and often illiterate or uneducated. Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum.").

80 See id.
ment under sentence of death will surely conspire to increase the likelihood that valid and meritorious claims will be defaulted upon. Sadly, it is less likely that a proper record—the foundation for both state and federal collateral review—will be properly developed. Moreover, the exhaustion requirement obligates the prisoner to raise all of his claims in state court before petitioning for a writ of federal habeas corpus. The failure to raise claims and properly develop a record in state collateral proceedings will render meaningless any subsequent federal review for which counsel is provided.

If one stops to think of the implications of this oversight by Con-

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81 For accounts of mentally retarded prisoners who have been executed, see Randall Coyne & Lyn Entzeroth, Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling For a Moratorium on Executions, 4 GEO. J. ON FIGHTING POVERTY 3, 40-46 (1996) (explaining the reasons supporting the ABA’s decision to call for a moratorium on the death penalty, citing the States’ failure to provide adequate counsel as a reason for this resolution).

82 See Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting) (“[E]vidence gives rise to a fair inference that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims.” (quoting Murray v. Giarratano, 668 F. Supp. 511, 513 (E.D. Va. 1986))).


84 See id. at 26 (Stevens, J., dissenting) (“If an asserted claim is tested in an evidentiary hearing, the state postconviction court’s factual findings may control the scope of a federal court’s review of a subsequent petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.”).

85 See Rose v. Lundy, 455 U.S. 509, 527 (1982) (holding that in order to comply with the exhaustion provision of § 2254(c), claims that have not been presented to the state courts should be dismissed by federal courts); Picard v. Connor, 404 U.S. 270, 275-76 (1971) (“The federal claim must be fairly presented to the state courts .... Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.”).

86 The problems created by a prisoner attempting to litigate his own claim in state collateral proceedings are indistinguishable, if not more worthy of concern, than the problems created by incompetent counsel performing the task. As the ABA Task Force explains:

An incompetent lawyer may fail to conduct the investigation that is necessary to raise relevant issues .... Many lawyers appointed to cases on post-conviction review are totally ignorant of habeas corpus law and procedure and make little or no attempt to learn. They thus make serious mistakes that will either complicate or delay post-conviction review or deprive their clients of meaningful review.

The more fully and effectively litigated the prior stages in the process have been, therefore, the more efficient post-conviction review (including federal habeas corpus review) will be. By helping to build a clear and complete state court record, for example, competent counsel in the state courts can go a long way toward assuring that the federal courts can move quickly and directly to the substantive merits of the claims raised in the habeas corpus petition.

gress, as death penalty States surely have, it becomes fatally obvious that, as a result of this inconsistency between the capital and non-capital habeas corpus procedures, the incentives provided in §§ 2261-2266 are far outweighed by the benefits afforded to States for “free.” Rather than appointing counsel, and opting-in to §§ 2261-2266, States who wish their capital sentences to achieve finality, merely have to wait six extra months under the generally applicable statute of limitations while maintaining “consistently and vigorously” that all prisoners have been offered counsel which never materializes. Meanwhile, the States’ already-condemned pro se inmates attempt to prepare inadequate petitions that are surely doomed to fail. Moreover, based on these pro se petitions, condemned inmates will still be subjected to the deferential standard of review found in § 2254(d), the restricted standard for evidentiary hearings in § 2254(e), and the limitations on second or successive petitions found in § 2244. In sum, the amended §§ 2241-2255 provide too much incentive for States to opt-for the status quo, thereby serving their own finality interests in carrying out the death penalty.

Serious concerns about fairness are thereby raised by the operation of the reforms of habeas corpus. This becomes more evident upon examination of the States that carry out the death penalty with regularity.

C. Death Belt States Fail the Test

Although California, with approximately 519 inmates, houses the largest death row in the United States, it has not qualified for the opt-in provisions. Examination of the responses to the opt-in provisions of the “death belt” states—Texas, Louisiana, Mississippi, Georgia, Alabama, and Florida—which are most notorious for the utilization of the death penalty, is a better litmus test for judging the efficacy of the opt-in provisions. The examination demonstrated that the incen-

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88 See supra notes 76-83 and accompanying text.
89 See Eric Pooley, et al., Death or Life? McVeigh Could Be the Best Argument for Executions, TIME, June 16, 1997, at 30 (“[T]he ‘Death Belt’ states of Texas, Virginia, Florida, Missouri, Louisiana, Georgia, Arkansas and Alabama . . . together account for 78% of the executions America has seen since the Supreme Court reinstated the death penalty in 1976.”); see also Dave Kindred, Rising Tide of Executions Exhaust Death Penalty Foe, ATLANTA J.-CONST., Oct. 23, 1996, at C3 (“Florida, Georgia, Louisiana and Texas have accounted for two-thirds of all executions in the last 20 years.”); Marcia Coyle, Trial and Error in the Nation’s Death Belt, NAT’L L. J., June 11, 1990, at 30 (referring to the “death belt” at various periods as including Alabama, Georgia, Florida, Louisiana, Mississippi and Texas). Behind California (519), Texas (441) and Florida (390) have the second and third largest death row populations. Alabama (173) has the 7th largest death row. Georgia (123) has the 11th largest death row. Louisiana (82) has the 15th largest. Mississippi (62) has the 16th largest. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A., (1999), information provided at Death Row Inmates by State, Death Penalty Information Center (last modified Mar. 15, 1999) <http://www.essential.org/dpic/dpics.html>.
tives provided in the opt-in provision are not strong compelling to encourage states to furnish post-conviction counsel to capital prisoners. Those States which have historically invested such energy into the preservation and infliction of the death penalty would be expected, more than other States, to respond quickly and affirmatively to the incentives contained in the opt-in provisions, in order to become the first qualifying States.

In *Lockett v. Puckett*, a district court found that “Mississippi has not established any mechanism for the appointment of counsel in state post-conviction proceedings, and therefore may not take advantage of the 'special rules favorable to' the States set forth in the opt-in provisions.” This result is not surprising. Many death penalty States have not found it necessary to expend the resources to create statewide public defender system to accommodate the requirements of *Gideon v. Wainwright*. In *Williams v. Cain*, a court held that the opt-in provisions did not apply to Louisiana “because the triggering condition of § 28 U.S.C. § 2261(b) has not been satisfied . . . . At the least, the State had not established standards of competency for the appointment of counsel in post-conviction proceedings at the time Williams' state claims were denied.” In *Felker v. Turpin*, the Eleventh Circuit noted that “[t]here is no contention, yet, that the State of Georgia has shown—or even had an opportunity to show—that it qualifies to benefit from the special procedures established by [the opt-in provisions]. Whether it does is a question for another day.”

The court noted later in *Cargill v. Turpin* that “[Georgia] has not asserted that the provisions of . . . § 28 U.S.C. §§ 2261-66 [] apply to this

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90 Since the opt-in provisions were enacted on April 24, 1996, the "death belt" States have accounted for 144 of the 198 executions that have taken place: Texas has led all American States with 62 executions. Virginia has executed 29. Missouri has executed 15. South Carolina has executed 15. Arkansas has executed 7. Florida has executed 7. Alabama has executed 4. Georgia has executed 3. Louisiana has executed 1. See *NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A.*, (1999), information provided at *Executions in 1996-1999, Death Penalty Information Center* (last modified Mar. 15, 1998)

<http://www.essential.org/dpic/dpicexec96.html>,

<http://www.essential.org/dpic/dpicexec597>,

<http://www.essential.org/dpic/dpicexec98>,

<http://www.essential.org/dpic/dpicexec99>,

<http://www.essential.org/dpic/dpicreg.html>,

91 Data was gathered from the death belt states of Texas, Florida, Georgia, Alabama and Mississippi in order to provide baseline information for the reform of habeas corpus procedure in capital cases. See *Powell Report, supra* note 70, at 3239.


93 Id. at 210 n.11 (citation omitted).

94 See *Stephen B. Bright, Counsel For the Poor: The Death Sentence Not For The Worst Crimz, But For The Worst Lawyer*, 103 *Yale L.J.* 1835, 1849 & n.79 (1994) (“Only 11 of the 36 states which have the death penalty have statewide public defender programs.”) (citing THE SPANGENBURG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS (1993), at 122, 125.).


96 Id. at 1092.

97 88 F.3d 1305 (11th Cir. 1996).

98 Id. at 1305 n.1.

99 120 F.3d 1366 (11th Cir. 1997).
case.\textsuperscript{100} Notoriously absent from this list is Alabama, which appears to have taken a practical approach to the provisions. Rather than asserting the applicability of the opt-in provisions like California, Alabama has been silent in the federal courts in its response to the opt-in provisions. Perhaps this silence reflects its somewhat astute recognition that the unqualified benefits already conferred on the States by the reform of “general” habeas corpus will sufficiently promote its interest in death penalty finality.

The Fifth Circuit held in \textit{Mata v. Johnson}\textsuperscript{101} that Texas, a State with arguably the most significant interest in the death penalty, was not entitled to avail itself of the opt-in provisions.\textsuperscript{102} Noting that “Texas had established a statewide mechanism for the appointment of counsel to represent its burgeoning death row population in post-conviction proceedings,”\textsuperscript{103} the court was not persuaded that this was sufficient to satisfy the requirements of the opt-in provisions. The court also noted that Texas procedure limited attorneys’ compensation to \$7,500,\textsuperscript{104} but concluded that the petitioner had failed to establish that the compensation limit was inadequate in his case.\textsuperscript{105} Texas contended that its system, which allowed for counsel to be appointed “at the earliest practicable time,”\textsuperscript{106} provided a “flexible mechanism”\textsuperscript{107} under which counsel seeking appointment in a capital case completed an application and questionnaire for evaluation by the Court of Criminal Appeals.\textsuperscript{108} Under Texas law, the Court of Criminal Appeals has the task of adopting standards of competency for appointed counsel in state post-conviction proceedings.\textsuperscript{109} The Fifth Circuit found, however, that “the Texas Court of Criminal Appeals ha[ ] failed to fulfill its delegated task.”\textsuperscript{110} Citing \textit{Ashmus}, the court concluded that Texas was ineligible to take advantage of the

\textsuperscript{100} \textit{Id.} at 1369 n.1.
\textsuperscript{101} \textit{99 F.3d} 1261 (5th Cir. 1996).
\textsuperscript{102} \textit{See id.} at 1266-67.
\textsuperscript{103} \textit{Id.} at 1266.
\textsuperscript{104} \textit{See id.}
\textsuperscript{105} \textit{Id.} at 1267 n.12.
\textsuperscript{106} \textit{Id.} at 1267.
\textsuperscript{107} \textit{See id.} Though not addressed by the court, this procedure suggests that there was no mandatory requirement that Texas appoint counsel, and thus does not satisfy \textsection{} 2261 (c)’s mandatory requirement that requires counsel be appointed automatically by order of “a court of record.” \textit{See 28 U.S.C. \textsection{} 2261 (c). Cf. Hamblin v. Anderson, 947 F. Supp. 1179, 1182 (N.D. Ohio 1996) (mem.) (holding that a provision in the Ohio Public Defender Act which made appointment of counsel contingent upon the discretion of the public defender disqualified Ohio for the opt-in provisions because it violated the requirement that appointment of counsel be made pursuant to “an order by a court of record,” \textsection{} 2261 (c), despite the fact that this discretion had never been exercised).}
\textsuperscript{108} \textit{Id.} at 1267.
\textsuperscript{109} \textit{See id.} (West 1998).
\textsuperscript{110} \textit{Mata, 99 F.3d} at 1267.
provisions afforded opt-in States.\textsuperscript{111} Though not commonly associated with the "death belt," Virginia shares Texas' fervor for the death penalty.\textsuperscript{112} Virginia's attempts to qualify for the opt-in provisions demonstrate that the "post hoc rationalization" attempted by California was by no means atypical.\textsuperscript{113} The Fourth Circuit\textsuperscript{114} held that the opt-in provisions were not available to Virginia. In Bennett \textit{v. Angelone}\textsuperscript{115} and Mackall \textit{v. Murray},\textsuperscript{116} the court rejected Virginia's argument that two prisoners should be subject to the expedited procedures because it had established a system that it claimed satisfied the opt-in requirements after prisoners Mackall and Bennett's convictions became final.\textsuperscript{117} Fortuitously for Mackall, the court recognized that "[t]o rule in Mackall's case that...[Virginia] satisfies the 'opt-in' conditions would deny Mackall the very protection that Congress intended the 'opt-in' provisions to ensure—representation by properly appointed counsel in at least one habeas corpus proceeding on the merits."\textsuperscript{118} Since Mackall and Bennett did not benefit from the system that Virginia had established, the court declined in their cases to scrutinize Virginia's post-

\textsuperscript{111} See id. \textit{Mata} was decided on October 31, 1996. That holding has been affirmed in subsequent cases. See \textit{Carter v. Johnson}, 110 F.3d 1098 (5th Cir. 1997) (decided Apr. 9, 1997); Giochica \textit{v. Johnson}, 118 F.3d 440 (5th Cir. 1997) (decided Aug. 4, 1997).

\textsuperscript{112} While Virginia has the 21st largest death row (36), it is second behind only Texas in the number of executions (29) carried out since the passage of the AEDPA. Virginia appears poised to maintain the runner-up position in the near future. See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., \textit{DEATH ROW, U.S.A.}, (1999), information provided at Facts About the Death Penalty, Death Penalty Information Center (last modified Mar. 15, 1999) <http://www.essential.org/dpic/dpicexec99.html> (reporting upcoming executions).

\textsuperscript{113} Compare \textit{Ashmus v. Calderon}, 935 F. Supp. 1048, 1072 (N.D. Cal. 1996) (explaining that Congress "undoubtedly did intend to require that the state affirmatively create a system, not come forth with a post hoc rationalization"), with \textit{Wright v. Angelone}, 944 F. Supp. 460, 465 (E.D. Va. 1996) ("Respondent's piecemeal attempt to pull together the various provisions and argue that this collection satisfies the 'mechanism' required by Congress...is unpersuasive.").

\textsuperscript{114} The Fourth Circuit has, since the enactment of the opt-in provisions, promulgated a rule of court establishing an expedited review procedure that is effective regardless of the State's compliance with the opt-in provisions:

\begin{quote}
Once a petition is filed, it becomes subject to Fourth Circuit Judicial Council expedited review policy that encompasses all death penalty cases, even those which are not subject to expedited treatment pursuant to 28 U.S.C. § 2261, et seq. The policy declares that all cases should be decided in the proscribed time period as if the State had adopted and implemented mechanisms with respect to attorney qualifications and appointments mandated by Congress for expedited proceedings. Council Order No. 113.
\end{quote}


\textsuperscript{115} See \textit{Bennett}, 92 F.3d at 1342 ("Virginia's disposition of Bennett's petition should not receive the added deference afforded by the Act, because, by the time it denied his position, Virginia had not yet set up the appointment procedures the Act requires as the price of deference."); \textit{Mackall}, 109 F.3d at 960 (citing Bennett, 92 F.3d at 1342) ("This dispute is irrelevant because, whatever the merits of the Virginia system, it was not set up until after... [Mackall's] habeas petition had been finally denied by the Virginia Supreme Court.").

\textsuperscript{116} \textit{Mackall}, 109 F.3d at 960.
conviction representation system in light of the opt-in conditions. The court in *Satcher v. Netherland* followed, holding the system Virginia claimed satisfied the opt-in conditions deficient. Specifically, the court held that Virginia did not have a mechanism for appointment, compensation, and reimbursement of counsel as contemplated by § 2261 (b), did not establish standards of competency for the appointment of post-conviction counsel as required by § 2261 (b), and failed to affirmatively offer competent post-conviction counsel to all prisoners sentenced to death.

In *Hill v. Butterworth* a district court considered Florida's eligibility for the new opt-in provisions. In a case similar to *Ashmus*, Clarence Hill sought to enjoin the State of Florida from invoking or asserting the new procedures. The court “[p]reliminarily... agree[d]... that the State of Florida ha[d] established a comprehensive statutory framework for appointment of counsel in post-conviction proceedings brought by all capital prisoners.”

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120 See *Satcher*, 944 F. Supp. at 1241 (“[A]lthough... [Virginia] sets aside funds for a general category of state court expenditures, it does not establish ‘a mechanism for the... compensation and payment of reasonable litigation expenses’ as required by Section 2261 (b).”). Accord *Benneu*, 92 F.3d at 1342 n.2 (“[T]he Virginia statutes and regulations do not specifically provide for compensation or payment of litigation expenses of appointed counsel...”).
121 See *Wright v. Angelone*, 944 F. Supp. 460, 466 (E.D. Va. 1996) (“There is absolutely no indication how many of the delineated criteria MUST be met, if any. The statute itself states that the Public Defender Commission must consider the listed criteria, but only ‘to the extent practicable.’ This is insufficient...”).
122 See id. at 467. The court examined Virginia procedures as they existed in 1995, when Wright had to request counsel before counsel was appointed to him. See id. Even though “[n]either party contend[ed] that Virginia fails to appoint counsel” in post-conviction proceedings, the system was invalid because counsel was not automatically appointed, as required by § 2261 (b). See id. at 464. The court reasoned: “Section 2261 (b) contemplates a ‘mechanism’ by which the state is required to appoint counsel in all cases involving indigent capital defendants, not only in those cases where the petitioner has the acumen to request court-appointed counsel.” Id. Accord *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (noting Ohio's concession that the failure of the State to appoint counsel automatically might force a prisoner to "prepare his or her own... petition and hope for appointment thereafter, yet preparation of the petition itself is subject to important technical pleading requirements under Ohio case law").
124 Unlike California, however, Florida does not have a “unitary appeal” procedure, rather, it has separate procedures for direct and collateral review of state capital convictions. See *Hill*, 941 F. Supp. at 1135. Thus, for purposes of qualification, Florida asserted that it met the requirements of 28 U.S.C. § 2261, rather than, as California asserted, under 28 U.S.C. § 2265. Compare id., with *Ashmus*, 955 F. Supp. at 1068-69. For purposes of analysis, however, the district courts engaged in very similar inquiries, asking whether the state has created a “mechanism,” by “rule of its court of last resort or by statute,” for the appointment of counsel, compensation of reasonable litigation expenses, etc. Just as the Supreme Court's ruling in *Calderon v. Ashmus*, – U.S. –, 118 S. Ct. 1694 (1998), did not affect the district court's evaluation of the California post-conviction representation system in *Ashmus*, the district court's evaluation of Florida's post-conviction representation system is left undisturbed by that ruling. See supra notes 36 & 60.
125 *Hill*, 941 F. Supp. at 1132 (“Plaintiff moves to enjoin Defendants from invoking... that the State has complied with the so-called ‘opt-in’ provisions...”).
126 Id. at 1141. The court also noted that the Florida legislature made several changes to con-
Florida established the office of Capital Collateral Representative ("CCR") to represent indigent capital prisoners.\textsuperscript{127} Despite the existence of the CCR, however, the court found the Florida system infected with the same deficiencies found in the California system in \textit{Ashmus}.\textsuperscript{128} Specifically, the court noted that Florida did not require specialized experience in habeas corpus practice,\textsuperscript{129} and did not provide any competency standards for counsel when CCR is conflicted out of a case.\textsuperscript{130} Applying \textit{Ashmus}, the court found that "since the State of Florida does not have a statute or rule with a mechanism for ensuring 'competent counsel in State post-conviction proceedings' is appointed . . . it cannot qualify as an 'opt-in' state under [§§ 2261-2266]."\textsuperscript{131}

In addition to the absence of competent counsel standards, the court concurred with the plaintiff's assessment that, similar to the state of affairs in California, there was a "large number of indigent capital prisoners who have accepted Florida's offer of counsel, but have not yet been provided counsel . . . ."\textsuperscript{132} The court summarized the difficulties encountered by the CCR, noting its "several" confrontations with the Florida Supreme Court and the Florida Legislature over its inability to fulfill its mission because of inadequate funding and resources.\textsuperscript{133} As a result, the inability of CCR to meet its respon-

\textsuperscript{127} See id. at 1144.
\textsuperscript{128} See id. at 1146 (noting the \textit{Ashmus} court's conclusion that a system is inadequate if it fails to appoint counsel immediately).
\textsuperscript{129} See id. at 1142. The Florida qualifications for appointment of counsel to represent capital prisoners in collateral proceedings only required that the attorneys be "members in good standing of the Florida bar with not less than 2 years experience in the practice of criminal law." \textit{Id.} (citing FLA. STAT. ch. § 27.704(1) (1996)).
\textsuperscript{130} See id. at 1142. When a conflict arises, the CCR is obligated to find substitute counsel for that conflicted case. \textit{See FLA. STAT. ch. § 27.704(1) (explaining the procedure to be followed by CCR in case of conflict).}
\textsuperscript{131} \textit{Hill}, 941 F. Supp. at 1143.
\textsuperscript{132} Id. at 1144.
\textsuperscript{133} See id. The court noted that the frustrations of CCR led it to file a writ of mandamus or prohibition with the Florida Supreme Court to stay all capital proceedings until additional funds were allocated to CCR. \textit{See id.} at 1144. The head of the Florida Collateral Representative, Michael Minerva, stopped designating counsel to represent inmates whose one-year state statute of limitation had started running. This prompted the Attorney General of Florida, Robert Shevin, to conduct a study of the CCR's resources. \textit{See id.} at 1144. The court used the Shevin Report to evaluate Florida's post-conviction defender system. \textit{See id.} at 1144. Factors limiting the ability of the CCR to represent all of the death row inmates in Florida include the loss of the assistance provided by the Florida Volunteer Lawyers' Resource Center ("VLRC"), a federally-funded Post-Conviction Defender Organization, which represented 41 capital prisoners seeking post-conviction relief; the doubling of the number of death row prisoners in Florida who sought post-conviction relief in 1996; and the lack of funding to establish CCR branch offices. \textit{See id.} at 1144-45. The Shevin Report reported that for the 20 CCR attorneys, there were 228 post-conviction cases at various stages of collateral proceedings. \textit{See id.} at 1155. Of these, 138 were already assigned to CCR. There remained, however, 41 cases which were transferred from the defunct VLRC which required but had not been assigned counsel, 40 cases that were "undesignated," and 5 "unrepresented conflict cases." \textit{Id.}
sibility of providing counsel to all capital prisoners seeking collateral review in state courts rendered Florida ineligible to avail itself of the benefits of the opt-in provisions. In conclusion, the court held that "[t]he present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made a requisite meaningful offer of counsel."

Thus, from the cases above, a tour through the "death belt" reveals that the opt-in provisions, at least since Congress's reform of habeas corpus, have not held the persuasive force that Congress anticipated would induce those States to affirmatively create systems that satisfy the counsel preconditions. The preexisting systems in those States that already provide some measure of representation have been found to be inadequate, leaving capital prisoners without counsel and subject to the deadly consequences of the default habeas procedures. Or, those systems, while they provide appointed counsel to capital prisoners for post-conviction review, fail to adequately compensate appointed counsel for reasonable litigation expenses, fail to provide standards of competence for appointed counsel, and handicap appointed counsel with limitations on the types of claims that may be presented. Such shortcomings when viewed in light of Congress's reform of habeas corpus and the consequences of those reforms for capital prisoners, strongly suggest that fairness has not been adequately accommodated.

D. Beyond the Death Belt — Maintaining the Status Quo

Beyond the "death belt," additional States which have procedures in place for the appointment of counsel for capital prisoners seeking post-conviction relief have also failed to qualify for the opt-in provisions. In *Zuern v. Tate*, the district court held that Ohio, with 191 death row inmates, did not qualify because the Ohio Public Defender Act did not provide that the public defender take post-conviction representations on a mandatory basis, and did not provide for the compensation of reasonable litigation expenses. The court noted that despite the Ohio Public Defender's "enormous efforts" to

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154 *Id.* at 1147. By nature of the existence of the CCR, Florida maintained, like California, that it had created a "mechanism" that satisfied the requirements of the statute. As further support for its conclusion, the court countered that "[a]t a minimum, the immediate benefits to defendants would include the requirement that states electing these procedures actually appoint counsel for the collateral proceedings. Indeed, to hold otherwise would render the statutory provisions for compensation and appointment of counsel meaningless." *Id.* at 1146-47.


157 *See Zuern,* 938 F. Supp. at 471 (noting that the public defender can reject cases it deems to be without merit).
provide representation for capital defendants, "most Ohio counties have extremely low caps on the amounts to be spent on representation in such cases." Like Florida, in addition to deficiencies in the standards for counsel who are appointed in post-conviction representation of capital prisoners, and the absence of provisions for the appointment of different counsel after direct appeal, appointed counsel did not represent capital prisoners by an "order of a court of record." This lack of representation, Ohio conceded, might force a prisoner to "prepare his or her own ... petition and hope for appointment thereafter, yet preparation of the petition itself is subject to important technical pleading requirements under Ohio case law.

The cases begin to look alike. For substantially the same reasons stated by the courts in the above cases, Austin v. Bell held that Tennessee does not qualify for the opt-in provisions. Death Row Prisoners v. Ridge enjoined Pennsylvania’s threatened use of the opt-in provisions. Booth v. Maryland found Maryland’s procedures inadequate. Ward v. French held that North Carolina does not qualify for the benefits of the opt-in provisions. Dawson v. Snyder found that Delaware does not satisfy the provisions of 28 U.S.C. §§ 2261 or 2265. Ryan v. Hopkins found Nebraska’s procedures inadequate. Thomas v. Gramley acknowledged Illinois’ concession that it does not comply with the opt-in provisions. Leavitt v. Arave acknowledged that no argument was made by Idaho that it qualified for the opt-in provisions. All of these cases, which cover twenty of the thirty-seven states that inflict the death penalty, illustrate a problem that is endemic to

128 Id.
129 See id.
130 See id. & n. 4. 28 U.S.C. § 2261(d) requires that different counsel be appointed at the beginning of the collateral review process. This requirement is founded on the belief that new counsel, with a fresh perspective on the case, will more vigorously pursue claims on collateral appeal. For more practical reasons, new counsel would be more effective in raising ineffective assistance of trial or appellate counsel claims. See POWELL REPORT, supra note 70, at 3242 ("It would be unrealistic to expect a capital defendant’s trial or appellate counsel to raise a vigorous challenge to his own ineffectiveness.").
141 See Zuern, 988 F. Supp. at 471.
142 Id.
145 112 F.3d 139, 140 (4th Cir. 1997).
147 988 F. Supp. 783, 802-03 (D. Del 1997).
149 951 F. Supp. 1330, 1341 n.3 (N.D. Ill. 1996).
151 The States that currently have authorized the infliction of the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee...
The dedication of the Florida Collateral Capital Representative and the Ohio Public Defender demonstrate that the representation of capital prisoners in state collateral proceedings is not an insurmountable task. These examples illustrate that the principal difficulty that public defenders and collateral representatives encounter in representing their clients is not found in the work itself, but rather, the difficulty lies with the state legislatures and state courts with whom public defenders and collateral representatives must fight for resources in order to represent their clients competently and effectively. The above cases convey the irony that the state courts' and legislatures' previous rejections of public defenders' request for increased funding and resources, predicated on the belief that such expenditures will further delay executions, are now coming back to frustrate the States' objective of death penalty finality. That irony becomes tragic when one considers the effect of the reform of habeas corpus for those capital prisoners who, because of the inadequate post-conviction representation systems in these States, are left without counsel and run the serious risk of defaulting upon or forfeiting their constitutional rights.

Significantly, the above sample of cases demonstrates that rather than affirmatively responding to the opt-in provisions by creating or improving existing post-conviction defender systems, the States have instead failed to tangibly respond to the opt-in provisions and have expected that the federal courts will serve as rubber stamps to ratify previously established and inadequate systems. While only Zuern, Hill and Ashmus clearly show the inadequacies of State procedures to compensate the litigation expenses of appointed counsel, all of the cases show that States have not taken the necessary steps to establish enforceable standards that ensure that prisoners are represented by competent counsel. The requirement that appointed counsel be competent is obviously and logically the keystone of the counsel pre-
conditions of the opt-in provisions.\textsuperscript{155} The cases clearly demonstrate that the principle of establishing standards for counsel has not been taken seriously by the States.

That the States have some procedures is insignificant. Both Florida and California, for example, rely on statutes dating back to 1985.\textsuperscript{156} Virginia’s statutes date from 1992;\textsuperscript{157} Ohio’s from 1984.\textsuperscript{158} Statutes that were in place at the time of the drafting of the model for the opt-in provisions clearly do not suffice. As the court in \textit{Hamblin v. Anderson}\textsuperscript{159} explains, “Congress did not write [the opt-in provisions] in terms of substantial compliance.”\textsuperscript{160} It appears, however, that the States have heretofore expected that “substantial compliance,” or “good faith compliance,”\textsuperscript{161} will be sufficient to accommodate the

\begin{footnotes}
\item[155] See Wright v. Angelone, 944 F. Supp. 460, 467 (E.D. Va. 1996) ("The importance of [the counsel standard] requirement is painstakingly obvious in § 2261(e), which prohibits the ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings from being grounds for relief in a proceeding arising under § 2254."). The ABA Task Force explains:

An incompetent lawyer may fail to conduct the investigation that is necessary to raise relevant issues . . . . Many lawyers appointed to cases on post-conviction review are totally ignorant of habeas corpus law and procedure and make little or no attempt to learn. They thus make serious mistakes that will either complicate or delay post-conviction review or deprive their clients of meaningful review.

The more fully and effectively litigated the prior stages in the process have been, therefore, the more efficient post-conviction review (including federal habeas corpus review) will be. By helping to build a clear and complete state court record, for example, competent counsel in the state courts can go a long way toward assuring that the federal courts can move quickly and directly to the substantive merits of the claims raised in the habeas corpus petition.

\textit{ABA Task Force Report, supra note 86, at 71-72 (1990)} (footnotes omitted). The importance of standards to ensure that competent counsel represent indigent capital prisoners is also effectively conveyed by analogy:

\begin{quote}
We are told that some states just do not have the money to attract qualified lawyers and that in some places, particularly rural areas, there is simply no one qualified available. These considerations should not excuse lack of adequate legal representation in capital cases. There are many small communities that do not have surgeons. But this does not mean we allow chiropractors do to brain surgery in those communities.
\end{quote}

\textit{Id. at} 219 (1990) (Minority Report of Stephen B. Bright).


\item[157] \textit{See} Angelone, 944 F. Supp. at 463.


\item[159] 947 F. Supp. 1179 (N.D. Ohio) (mem.) (explaining that courts had previously held that Ohio does not qualify for the opt-in provisions).

\item[160] \textit{Id. at} 1182.

\item[161] Discussing Nebraska’s system, the court in \textit{Ryan v. Hopkins} rejected the "good faith compliance" argument as follows:

While respondent apparently concedes that Nebraska’s system does not currently meet the requirements of section 2261, he nevertheless contends that chapter 154 is applicable to petitioner’s case. Specifically, respondent argues that Nebraska is in "good faith compliance" with the requirements of subsections (b) and (c) because petitioner was appointed counsel dur-
fairness concerns reflected in the counsel preconditions of the opt-in provisions.

This examination of the post-conviction defender systems engaged in by the courts serves not only to determine the applicability of the opt-in provisions to the States, but also reflects objective evaluations—notwithstanding the counsel preconditions to the opt-in provisions—of the level of post-conviction representation that the States are or are not providing for their capital prisoners. As a guide, the opt-in provisions are useful because they reflect both fundamental and normative understandings of what is required to ensure fairness in post-conviction review of death sentences. Given that the States do not qualify for the opt-in provisions because of inadequate funding and standards for post-conviction counsel, the level of representation afforded to capital prisoners is unsatisfactory under the statute and should be unacceptable to society.

The States have not affirmatively responded to the opt-in provisions since the 1996 amendments. A very plausible explanation for this inaction is that the States have calculated that the benefits offered by the opt-in provisions, when weighed against the costs, are not worth the trouble. In other words, the States have concluded that the finality benefits offered in the opt-in provisions, when weighed against the finality benefits unqualifiedly offered in the general reform of habeas corpus, are not compelling compared to the costs. The opt-in provisions require a significant expenditure of effort and resources from the States as a precondition to improve, create, and regulate the competency standards of post-conviction defender systems. This expenditure, when compared with the ease and economy of maintaining the status quo, serves as a disincentive that outweighs the persuasive force of the finality benefits offered. With


162 See infra note 165 and accompanying text.

163 Ironically, this is exactly the type of argument that was used in Congress to reject the inclusion of counsel standards within the opt-in provisions. Representative McCollum argued against a Schumer Amendment that included counsel standards, noting:

What [Rep. Schumer] wants to do and what he does [by including counsel standards in the opt-in provisions]... is to add a series of things that people have to go through, a roster has to be formed, a State has to pass a counsel authority in one of three or four forms and you have to comply with all of these procedures and in the end the expense and the problems and the difficulty of going through this in my judgment and many others' who have looked at this will mean that most States will choose not to do this. They will simply choose not to opt-in. Therefore, we will not have an effective bill... The underlying bill will indeed fail if this indeed occurs.

this understanding, the above cases represent no more than a "testing of the waters" by the States of the courts' interpretation of the counsel preconditions to the opt-in provisions. States, equipped with the knowledge that they do not currently qualify for the opt-in provisions, are content to reap, gratis, the benefits of general habeas reform, while indigent capital prisoners are left to make their way without counsel. As it stands, no State that enforces the death penalty currently qualifies for the opt-in provisions. In this "quid pro quo," States receive the "quid," while capital prisoners and society at large are denied the "quo." The current state of affairs demonstrates the inadequacy of Congress' purported balancing of fairness with finality in the opt-in provisions.

A summary examination of the development of habeas reform for capital cases and the culmination of that development with the passing of the AEDPA provides some potential explanations for the inadequacies.

IV. FAILED UNDERSTANDINGS — THE POWELL REPORT

Previous to the 1996 amendments, habeas reform had been on the Congressional agenda for a long time. While the Supreme

164 See Bright, supra note 16, at 27 ("The failure of some states to provide lawyers during post-conviction review and legislation narrowing post-conviction review suggests that it is more important to hide constitutional error than to expose and correct it"); see also supra notes 76-85 and accompanying text.


166 See 135 CONG. REc. S13471, S13472 (daily ed. Oct. 16, 1989) (Statement of Sen. Biden) ("The Powell Committee studied the issue that we have debated for many, many years here in the Senate. It has been the issue of debate . . . at least for the 17 years that I have been a Senator . . ."); Oversight Hearing: Habeas Corpus, Before the Subcommit. On Civil and Constitutional Rights
Court had steadily taken measures to curtail the delay in, and abuse of, habeas corpus by convicted state and federal prisoners, the recent statutory amendments to federal habeas corpus procedure reflect the culmination of many years of Congressional attempts to arrive at the most effective means of accommodating fairness, finality and federalism in habeas corpus reform.

The starting point of this most recent round of habeas reform debate can fairly be said to have begun in June 1988, with the commissioning of a study by Chief Justice William Rehnquist to "inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases in which the prisoner had or had been offered counsel." The committee, composed of court of appeals judges from the Fifth and Eleventh circuits, and chaired by retired Associate Justice Lewis F. Powell, proposed a number of changes to federal habeas corpus procedures in capital cases. This proposal became the starting point from which the contemporary congressional debate on habeas reform emerged. An examination of the Powell Report and Congress's use of the recommendations in the Powell Report as a model helps explain why the States have not affirmatively responded to the opt-in provisions.

A. Findings & Rationale

The Powell Report contained three major findings in its study of federal habeas corpus review of state capital convictions. The first

of the House Comm. on the Judiciary, Feb. 24, 1994, 1994 WL 214447 (F.D.C.H.) [hereinafter Oversight Hearing] (statement of four former United States Attorney Generals on behalf of the Emergency Committee to Save Habeas Corpus) ("Though Congress has considered habeas corpus reform many times . . . no legislation has been enacted in decades. In recent years, however, the Supreme Court has become active in imposing limitations of its own, and has severely shackled the ability of habeas corpus to protect fundamental freedoms.").

See, e.g., Herrera v. Collins, 506 U.S. 390, 400 (1993) (restricting habeas relief for claims of factual innocence to claims that assert constitutional error); Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992) (restricting the ability of a habeas corpus petitioner to hold an evidentiary hearing by applying the Wainright v. Sykes, 433 U.S. 72 (1977) restrictive "cause and prejudice" standard); McCleskey v. Zant, 499 U.S. 467, 486-87 (1991) (limiting successive or "abusive" petitions to the "cause and prejudice" standard); Teague v. Lane, 489 U.S. 288, 310 (1989) (restricting the scope of federal review to the law as it stood at the time the conviction became final, barring from habeas corpus review claims based on 'new' law.).

POWELL REPORT, supra note 70, at 9239.

finding was that "unnecessary delay and repetition" were serious problems that needed to be addressed within the system of collateral review of death sentences. This finding, derived from an analysis of capital cases from Alabama, Florida, Georgia, Mississippi, and Texas, was based on information indicating that "80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings." The Report concluded that this delay in the federal courts "operate[d] to frustrate the law of 37 States." The second finding in the Powell Report, entitled "The Need for Counsel," stated:

A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. As the Supreme Court recently reaffirmed in Murray v. Giarratano, provision of counsel for criminal defendants is constitutionally required only for trial and direct appellate review. Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems. . . .

. . . [T]he Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

The third major finding in the Powell Report, entitled "Last Minute Litigation," stated that the "[t]he merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review. But once this review has occurred, absent extraordinary circumstances there should be no further last-minute litigation." Explaining the rationale of the opt-in provisions, the Report stated that:

[t]he proposal allows a State to bring capital litigation by its prisoners within the new statute by providing competent counsel for inmates on state collateral review. Participation in the proposal is thus optional with the States. Because it is optional, the proposal

170 Powell Report, supra note 70, at 3239.
171 Id. at 3240.
172 Id.
173 Id.
174 Id.
should cause minimal intrusion on state prerogatives. But for States that are concerned with delay in capital litigation, it is hoped that the procedural mechanisms we recommend will furnish an incentive to provide the counsel that are needed for fairness.\footnote{Id.}

The Report expresses concern for the interests of finality communicated by the States in their frustration with the long process of federal habeas review of capital convictions.\footnote{See id. ("The relatively small number of executions, as well as the delay in cases where an execution has occurred, makes clear that the present system of collateral review operates to frustrate the law of 37 States.").} Considerations of federalism are clearly included in the proposal, as the Report explains that its design is to cause "minimal intrusion on state prerogatives."\footnote{Id.} At the same time, the Report appears to recognize that the lack of counsel for capital prisoners in state collateral review of death sentences accounts for much of the complained-of delay.\footnote{See id. (arguing that the one serious problem is a "need for qualified counsel to represent inmates").} However, with wholesale acceptance of the proposals made by the Powell Commission, Congress failed to understand that the appointment of counsel was "crucial" to habeas reform, and that the incentive rationale of opt-in provisions would be undermined if the reform of general habeas corpus for non-capital cases was not adjusted to conform with that rationale.

\subsection*{B. Undermining the Persuasive Potential of the Incentive Rationale}

Under § 2244(d) (1) of the amended statute, Congress placed a one-year statute of limitations on the filing of a petition for a writ of habeas corpus. No cross-reference is made to the opt-in provisions.\footnote{See 28 U.S.C. § 2244(d) (1) (A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").} Similarly, § 2263(a), which defines the six-month statute of limitations for States that choose to opt-in, lacks a cross reference to § 2244(d) (1).\footnote{See 28 U.S.C. § 2263(a) ("Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.").} Unlike the recommendations made by the ABA Task Force, there are no exceptions made for the tolling of the statute of limitations for capital prisoners whose convictions and sentences have become final and who have do not have access to counsel.\footnote{See ABA Task Force Report, supra note 86, at 44 (commenting on ABA proposal that the statute of limitations be tolled until the condemned prisoner is appointed counsel for state collateral proceedings). For further discussion of this proposal, see infra section V.A.}
forming general habeas procedure in the way it did, Congress failed to recognize that, just as the six-month statute of limitations was determined to be a reasonable amount of time to prepare an effective and reliable petition if a prisoner was appointed counsel for state post-conviction review, by the same token a one-year statute of limitations is an unreasonable amount of time for a prisoner who is required to prepare an effective petition without counsel.182

It is clear upon a careful reading of the Powell Report that the provision of counsel to condemned prisoners in state post-conviction is the cornerstone of the proposal.183 At the outset of the Report, the committee clearly stated that “[i]n response to the problems described above, the Committee proposes new statutory procedures for federal habeas corpus review of capital sentences where counsel has been provided.”184 The importance of counsel in the provisions is further reflected in Chief Justice Rehnquist’s charge to the Committee to “inquire into ‘the necessity and desirability of legislation directed toward avoiding delay and the lack of finality’ in capital cases in which the “prisoner had or had been offered counsel.”185 Underlying the Committee’s recommendations for counsel was the recognition that despite the constitutional mandates of Gideon, Powell, and Douglas, the provision of counsel in state collateral proceedings was “crucial” because harmful errors are bound to occur, notwithstanding the existence of Sixth, Eighth, and Fourteenth Amendment protections. Moreover, the importance of state collateral review in death penalty cases, the Powell Committee found, becomes amplified because of the very “finality”—death—that is sought after: “[A] practical matter,” the Powell Committee conceded, “the focus of review in capital case often shifts to collateral proceedings[].”186

182 See Hill v. Butterworth, 941 F. Supp. 1129, 1143 (N.D. Fla. 1996) (commenting on the complexity of habeas corpus law, and noting that “[i]t is axiomatic that the complexity of habeas proceedings ‘makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.” (citation omitted) (quoting Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring))).

183 See ABA Task Force Report, supra note 86, at 61. The importance of counsel was echoed by the ABA in its report: [I]t was also clear to the Task Force that representation of the accused at trial by competent counsel was necessarily the Keystone of any reform of the death penalty litigation process. . . . So many of the procedures involved in the trial and review of death penalty cases turn on the effectiveness or ineffectiveness of trial counsel that the Task Force spent considerable time confronting issues associated with the provision of competent counsel.

184 Id.

185 Id. at 3240 (emphasis supplied).

186 Id. at 3239 (emphasis supplied).

187 Id. This view was shared by most members of the Court that decided Murray v. Giarratano. See Giarratano, 492 U.S. at 14 (“It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.”) (Kennedy, J., concurring) (joined by O’Connor, J.); id. at 24 (“[A] high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate
Congress ignored the rationale of the Powell Committee's recommendations when it reformed the default general habeas corpus rules in a manner that excessively accommodates finality without any regard to fairness. The default, or general habeas procedures, provide the applicable rules when States choose not to opt-in to the new procedures. When the Powell Commission submitted its report, habeas corpus was limited in many instances by the Supreme Court's procedural default and retroactivity doctrines. However, when the Powell Committee made its report habeas corpus was in another respect unlimited relative to the habeas landscape currently confronting capital prisoners, in that no statute of limitations attached to the filing of a petition. Recognition of the importance of the default rules that the Powell Committee anticipated would apply if the States chose not to opt-in to the new provisions is vital to understanding the rationale of the opt-in provisions, and to understanding the persuasive potential of the opt-in provisions for the States.

Supreme Court decisions since 1989, the year the Powell Report was issued, illustrate how the default rules changed between the Report's submission and the enactment of the AEDPA seven years later. In 1991, the Court decided McClesky v. Zant, which limited successive habeas petitions. In 1992, Keeney v. Tamayo-Reyes extended the Wainwright v. Sykes "cause and prejudice" standard to evidentiary hearings. In 1993, the Court in Herrera v. Collins further restricted habeas corpus petitions allowing factual innocence claims only where a constitutional violation also was alleged.

process.

See, e.g., Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (holding that in order to obtain habeas relief, the petitioner must show "cause" as to why he did not raise a constitutional claim properly in the state court, and must also be able to show "prejudice" resulting from the alleged constitutional violation upon which the claim is based); Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that decisions of the United States Supreme Court announcing new law that may be retroactively applied to cases on direct review may not be applied to habeas corpus cases on collateral review).

The restrictive nature of habeas corpus procedure as it existed prior to the Powell Committee's recommendations was problematic for Donald P. Lay, retired Chief Justice of the Eighth Circuit Court of Appeals:

The fact that reasonable people may differ about legislative reform on habeas corpus in capital cases seems to forestall any definitive legislation. Those of us who opposed the Powell Committee Report did so primarily because we felt it did not live up to its billing of fundamental fairness. We deemed it an attempt to rush many capital cases on a fast track to execution without needed quality controls on fundamental fairness. Much of our concern lay in the existing case law surrounding habeas corpus. Viewed with the requirements of procedural bypass, exhaustion, new rules, successive petitions, and abusive petitions, most of the measures of the Powell Committee seemed extremely unfair.


These cases, all decided prior to the 1996 amendments, purported to further the interests of federalism and finality. At the same time, though, they significantly limited the access of capital prisoners to federal habeas review.

In light of this restrictive backdrop, it is important to note that the Powell Committee stated in its “Statutory Proposal” that the “general provisions” governing habeas corpus for non-capital prisoners would remain unchanged. The post-1989 reforms to general habeas procedure are incongruous with the incentive-driven approach proposed by the Powell Committee. By “tacking on” the Powell Committee incentive-driven approach to the general reform of habeas corpus, without importing any of the fairness concerns embodied in the counsel preconditions to the opt-in provisions of the AEDPA, Congress diminished, rather than enhanced the persuasive power of the finality benefits offered in the opt-in provisions.

Fairness concerns, principally those embodied in the counsel preconditions, are necessarily linked to the persuasive power of the opt-in provisions. The sample of cases in the previous Section demonstrate that the States have not responded to the opt-in provisions. Thus, the effect of the AEDPA’s habeas corpus reform has been a diminution of fairness in post-conviction review for capital prisoners.

The States’ failure to respond to the opt-in provisions has resulted in a gross imbalance in the operation of the statute: The States receive the benefit of finality from the Court’s general habeas corpus reform, but death row prisoners, and implicitly society, do not receive the concomitant benefit of fairness in federal habeas review. This imbalance, which under ordinary circumstances may be excusable and repairable, is deadly for all capital prisoners, regardless of whether or not the States in which they were incarcerated opted-in.

Congressional debate about fairness in habeas corpus was critically confined to implementation of the Powell proposals. Underlying that debate was the assumption, now proved wrong, that States would opt-in to the new provisions. Some reasons for this oversight are provided below.

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191 See Powell Report, supra note 70, at 3241 (stating under “Subchapter A: General Provisions,” that “sections 2241-2255 would not be changed”).

192 See Bright, supra note 16, at 27 (“The provisions of the [AEDPA] ... represent a decision that results are more important than process, that finality is more important than fairness, and that proceeding with executions is more important than determining whether convictions and sentences were obtained fairly and reliably.”).

193 See Hartman & Nyden, supra note 20, at 387 (“Hardest hit by this Act will be the prisoners under sentence of death in our state and federal prisons. For them, accelerated filing procedures, restrictions on filing more than one writ, even if new evidence is discovered, and deference to state court findings of fact and law even without full and fair evidentiary proceedings present obstacles to obtaining justice in their cases.”).
V. THE POLITICS OF HABEAS CORPUS REFORM

A. Habeas Corpus Reform Deadlock

Since 1990, nearly every major crime bill proposal included, in some form or another, the recommendations submitted by the Powell Committee. The recommendations were first endorsed in legislative form in late 1989 by Senator Strom Thurmond, who stated that "since the Powell Committee spent a significant [sic] time formulating its recommendations and the Chief Justice has expressed a belief that the need for strong habeas reform is urgently needed, I believe there should be a Senate vehicle which fully embodies the Powell committee recommendations." Introducing the recommendations into the Congressional Record, Senator Thurmond noted that the objective of the Powell Committee proposal was that "[c]apital cases should be subject to one complete and fair course of collateral review in the State and Federal system, free from the time of impending execution, and with the assistance of competent counsel for the defendant." Senator Joseph Biden, then Chairman of the Senate Judiciary Committee, also invoked the Powell Committee's recommendations in addressing the need for habeas reform. Presenting his proposal, Senator Biden acknowledged that:

the Powell committee proposed that the one-bite-at-the apple rule would apply but only if the prisoner had been afforded court-appointed counsel at every step of the proceedings for them to be able to make this habeas corpus one-bite-at-the-apple procedure. If the State provides such counsel—that is, court-appointed counsel—to capital prisoners, the Powell Committee proposed they could limit those prisoners to a single round of litigation in Federal court.

The quid pro quo is the essence of the Powell plan. The bill I am introducing today adopts this quid

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196 The Powell Report is entered in the Congressional Record at 135 CONG. REC. S13471-04, S13472. See POWELL REPORT, supra note 70.

pro quo approach. It provides that State prisoners who are afforded qualified counsel at trial and throughout State death penalty proceedings shall have only a single opportunity to litigate their habeas corpus claim in Federal court.

In general, the competing bills for habeas reform were characterized either as full incorporation of the Powell recommendations, such as the bills introduced by Senators Thurmond and Hatch; or, on the other hand, bills introduced which adopted the quid pro quo approach, such as the bill introduced by Senator Biden, that stressed procedural protections to guarantee competent counsel.

As debate continued about the Powell Report, division deepened over the counsel provisions. The American Bar Association's Task Force on Death Penalty Habeas Corpus submitted a report that competed with the Powell proposal for Congress's attention. In that report, the ABA incorporated many of the Powell Committee's proposals, but made important changes to the opt-in counsel provisions. Notably, the ABA report included provisions paralleling those in the Anti-Drug Abuse Act of 1988, detailing a baseline competency requirement for post-conviction counsel in capital cases. In addition to the differences of opinion regarding pre-established counsel standards for the opt-in provisions, a notable difference in the ABA proposal with regard to the counsel provisions, was a provision for tolling of the statute of limitations until counsel has been appointed for state collateral proceedings.

The recommendations by the ABA Task Force garnered some support, with some shareholders expressing concerns about the composition of the Task Force, which was more balanced than the Powell Commission. It included experts with many different perspectives on the substance and process of capital litigation. In addition, the Task Force held three regional public hearings in which it "heard from more than eighty knowledgeable witnesses from all corners of the criminal justice process—including a state governor, a United States senator, state legislators, federal trial and appellate judges, state supreme court judges and justices, state attorneys general and their staff, prosecuting attorneys, state and federal public defenders, directors of death penalty resource centers, volunteer post-conviction counsel, representatives of victims' rights organizations, professors, and others." (footnotes omitted).

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See generally ABA Task Force Report, supra note 86. The composition of the Task Force was more balanced than the Powell Commission. It included experts with many different perspectives on the substance and process of capital litigation. In addition, the Task Force held three regional public hearings in which it "heard from more than eighty knowledgeable witnesses from all corners of the criminal justice process—including a state governor, a United States senator, state legislators, federal trial and appellate judges, state supreme court judges and justices, state attorneys general and their staff, prosecuting attorneys, state and federal public defenders, directors of death penalty resource centers, volunteer post-conviction counsel, representatives of victims' rights organizations, professors, and others." (footnotes omitted).
support in the Senate, finding their way into a Biden-Graham habeas corpus amendment to the Senate Violent Crime Control Act of 1991. Senator Hatch, who ultimately shepherded the present habeas proposals through the Senate Judiciary Committee, took up earlier versions of Senator Thurmond's incorporation of the Powell recommendations. In defending his proposed habeas reform amendment to the Senate Violent Crime and Control Law Enforcement Act of 1993 against the ABA-inspired alternative that Senator Biden promoted, Senator Hatch argued that the "Biden bill does not give the States the choice of opting in or out like the Dole-Hatch bill. Instead, it mandates that States adopt expansive and costly appointment of counsel provisions for capital cases—not just expansive and costly, but very, very deliberately difficult to fulfill." Hatch's argument illustrates the significant role the federalism concerns expressed by the Powell commission played in limiting the extent to which any habeas reform proposal mandated explicit standards for the appointment of counsel. Federalist arguments throughout the habeas reform process overshadowed the concern for fairness embodied in the counsel preconditions to the opt-in provisions.


206 See, e.g., Oversight Hearing, supra note 166, at 1994 WL 214463 (statement of Ronald S. Matthias, Deputy Attorney General of California) ("We... oppose the imposition of federally-mandated appointment of counsel standards ... as unduly costly and insufficiently respectful of federalism ...);

Before the Senate Comm. on the Judiciary, Mar. 28, 1995, 1995 WL 146423 (F.D.C.H.) (statement of Daniel E. Lungren, Attorney General of California) ("[W]e are strongly opposed to any amendments which would impose federally mandated appointment of counsel standards. Their implementation would generate additional litigation and consequently, result in greater delay — results which are in direct conflict with the principle objective of habeas corpus reform.");

Before the Senate Comm. on the Judiciary, Mar. 28, 1995, 1995 WL 143184 (F.D.C.H.) (statement of Gale A. Norton, Attorney General of Colorado) ("It is absolutely essential... that the states be given the power to determine the standards of competency for the appointment of collateral-review counsel .... It would be an unnecessary affront to the states to attempt to 'federalize' counsel standards such as has been proposed in the past.").

While many state attorneys general objected to the inclusion of counsel standards in the opt-in provisions on federalism grounds, see supra, former United States Attorney General Nicholas Katzenbach reminded Congress that notwithstanding federalist principles, States must still comply with the Fourteenth Amendment:

[Un]doubtedly the writ does raise problems of federalism, and efforts to avoid unnecessary intrusion into state responsibilities are understandable. But those problems, at bottom, stem from the Fourteenth Amendment and its requirement that states adhere to the standards of the federal Constitution. That requirement is not precatory, but absolute; the Fourteenth
Debate about habeas corpus reform in the House mirrored the course and terms of debate in the Senate. Advocating the Powell Committee recommendations on the one hand was Representative Hyde, who ultimately worked as Senator Hatch’s counterpart, shepherding the Powell recommendations through the House. Advocating added competent counsel standards that assured that counsel would be provided throughout the state trial, appellate, and collateral proceedings were, most notably, Representatives Schumer and Kastenmeier.

The competition between the ABA-inspired version and the Powell-inspired version, with variations of the two, created a habeas reform deadlock between 1989 and 1995. Habeas reform, for habeas defenders, was too important an issue to tamper with unless the solution actually made the system work better without sacrificing fairness. Reformers were concerned with delay and the effect of delay on the effectiveness of capital sentences. The mechanics and power of the deadlock are illustrated in a statement of Senator Biden. Debating with Senator Specter about Specter’s particular version of habeas corpus reform, Senator Biden explained that he had entered into a bipartisan agreement to set aside habeas reform until the next congressional session. Senator Biden urged Senator Specter to put aside habeas reform as well. In the course of the debate, Senator Biden indicated that habeas corpus reform until that moment had

Amendment does not talk about substantial compliance, or best efforts, or ‘reasonable’ (though incorrect) interpretations. It insures that both federal and state judges enforce its requirements in precisely the same manner.

Before the Senate Comm. on the Judiciary, Mar. 28, 1995, 1995 WL 143182 (F.D.C.H.) (statement of Nicholas B. Katzenbach); see also id. (‘We must expect states, and state attorneys general, to take offense at federal habeas corpus. Every habeas petition granted is essentially a constitutional rebuke to them. Their desire for less federal oversight and more ‘comity’ is natural and understandable.’).
been what he characterized as a "killer amendment":

[O]pponents of the Brady bill in the past have done what Democrats who opposed other legislation might do as well . . . They attempted to add to the Brady bill things that supporters of Brady could not swallow. We use the terminology in the Senate "killer amendments." You amend a bill which the majority of the body likes very much with an amendment that a plurality could not accept, thereby killing the underlying bill.

One of the reasons I withdrew the Biden habeas corpus provision was my concern . . . that the crime bill would be delayed and/or not passed if I did not withdraw my provision . . . [and] that the Brady bill would become mired in the habeas corpus debate . . . .

Senator Hatch demonstrated the nature of habeas corpus reform in more colorful terms in the same debate. Responding to Senator Specter, Senator Hatch stated, "I think we can agree . . . [b]ut the fact of the matter is that the House is not going to take [a habeas corpus amendment], or they would use it as a Christmas tree to hang all other things which would prevent the implementation of . . . this particular bill." By allying with Senator Biden for the postponement of consideration of habeas reform until the next session, Senator Hatch assured a more careful consideration of the issues surrounding habeas corpus reform. These two examples reflect the value defenders and reformers attached to getting habeas corpus reform "right." From 1989 to 1995, defenders and reformers were unwilling to change the status quo until they could make an adequate

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215 139 CONG. REC. S15809, S15813 (daily ed. Nov. 17, 1993) (statement of Sen. Hatch); see also 141 CONG. REC. H1400, H1400 (daily ed. Feb. 8, 1995) (statement of Rep. McCollum) ("Congress has been considering this reform for several years. Despite victories in the House and Senate going back as far as 1984, supporters of habeas corpus reform have not been able to overcome the well-positioned minority of Members who oppose reform.").
216 See id. The concern for careful review of habeas corpus reform was also voiced by representatives of state attorneys general:
Because habeas corpus is such a specialized areas of the law with such enormous ramifications on the criminal justice system and crime victims, it is appropriate for Congress to give it singular attention . . . . 'One option which should be seriously considered is that federal habeas corpus reform be eliminated as a part of any omnibus crime bill.'
These statements about habeas corpus reform appear to be the principal reasons why Congress never successfully enacted any habeas corpus reform in any crime bill debate since the submission of the Powell and ABA Task Force Reports. That deadlock broke in 1995.

B. Terrorism As A Pretext For Habeas Reform?

The beginning of the end of Congressional debate on habeas corpus reform arguably came on June 19, 1995, with the bombing of the Alfred P. Murrah federal building in Oklahoma City. The bombing appears to have renewed Congressional resolve to respond to the need to reform federal habeas corpus procedure. While the need to combat terrorism served as a spur to take up the issue of habeas reform once again, the atmosphere lacked the careful deliberation about habeas reform that characterized earlier consideration of the issue. Rather than the studied opinion regarding the wisdom and efficacy of counsel provisions that characterized earlier debate, reform of federal habeas procedures came to be described as the “crown jewel” of counter-terrorism legislation. Debates in the House and the Senate leading up to the vote on AEDPA reveal that

217 See Lay, supra note 187, at 1063
219 See 142 CONG. REC. S3454, S3459 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("Look, it's time to pass this terrorism bill. It's time to let the people in Oklahoma City know we mean business here."); 142 CONG. REC. S4363, S4263 (daily ed. Apr. 29, 1996) (statement of Sen. Abraham) ("The Oklahoma City bombing finally provided the clarion call that made it possible for the Republican majority, with President Clinton's reluctant acquiescence, and over stiff resistance by a majority of the Democrats, to enact reforms to this legal quagmire.").
220 Most of the debate about the AEDPA Conference Report was devoted to the expanded law enforcement and immigration provisions that were provided to combat terrorism. See generally 142 CONG. REC. H3605 (daily ed. Apr. 18, 1996); 142 CONG. REC. S3427 (daily ed. Apr. 17, 1996); 142 CONG. REC. S3446 (daily ed. Apr. 17, 1996); 142 CONG. REC. S3454 (daily ed. Apr. 17, 1996); 142 CONG. REC. S3352 (daily ed. Apr. 16, 1996); 142 CONG. REC. S3365 (daily ed. Apr. 16, 1996); 142 CONG. REC. H3305 (daily ed. Apr. 15, 1996).
221 See 142 CONG. REC. H3605, H3607 (daily ed. Apr. 18, 1996) (statement of Rep. Barr) ("[W]e need habeas reform. That is the one thing, that most important element, the crown jewel here, that we must have."). Cf. id. at H3608 (statement of Rep. Buyer) ("[T]he essence described as that crown jewel of this bill is the reform of habeas corpus for an effective death penalty."); id. at H3606 (statement of Rep. Hyde) ("Now habeas corpus reform, that is the Holy Grail. We have pursued that for 14 years . . ."); 142 CONG. REC. S3454, S3476 (daily ed. Apr. 17, 1996) (statement of Sen. Inhofe) ("[T]he habeas provision is the heart and the soul of this bill.").
many of the changes that were made to habeas corpus were not responsive to the needs of the victims of the Oklahoma City bombing. As a comprehensive bill to combat terrorism, some argued, AEDPA seemed to lack many of the provisions that were designed to aid law enforcement in the growing war against terrorism. The background of terrorism, however, served to push the measures through both houses of Congress.

Those in support of habeas reform, principally Senators Hatch and Specter in the Senate, and Representative Hyde in the House, argued that the habeas reform component of the AEDPA was relevant to combating terrorism. Senator Hatch asserted that "[t]he American people do not want to witness the spectacle of these terrorists abusing our judicial system and delaying the imposition of a just sentence by filing appeal after meritless appeal. Further making the connection between the Oklahoma City bombing and habeas reform legislation, Senator Hatch advocated that "[c]omprehensive habeas corpus reform is the only legislation Congress can pass as part of the terrorism bill that will have a direct effect on the Oklahoma City bombing, or the Lockerbie bombing or the World Trade Center bombing."

In response to the “crown jewel” centrality of habeas reform spearheaded by Senator Hatch, opposition leaders rejoined that the proposed habeas reform affected only state, not federal prisoners.

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223 See id. at S3555-59 (statement of Sen. Biden) ("This is a habeas corpus bill with a little terrorism thrown in."). But see 142 CONG. REC. S3454, S3456 (statement of Sen. Hatch) (outlining the provisions of the bill that will “make a difference” against terrorism).
224 See 142 CONG. REC. H3605, H3617 (daily ed. Apr. 18, 1996); S3446-02, S3450 (daily ed. Apr. 17, 1996). Votes approving the AEDPA Conference Report in the House and the Senate were 293-133, and 51-48, respectively.
226 See 142 CONG. REC. S3454, S3470 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (noting that "[habeas reform] has been a long time coming in this country. It is something that I have worked on personally for more than a decade .... The lengthy appeals process in the Federal court has, in effect, defeated the deterrent effect of the death penalty.").
227 See 142 CONG. REC. H3605, H3606 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) ("We have pursued [habeas corpus reform] for 14 years," and the “survivors [of the Oklahoma City Bombing] want the habeas corpus. Habeas corpus is tied up with terrorism because when a terrorist is convicted of mass killings, we want to make sure that terrorist ultimately and reasonably has the sentence imposed on him or her.").
229 Id. at S3362.
230 Senator Biden elaborated on this point as follows:
If someone violates any provisions of this bill ... what happens to them? Do they go to State court and get tried in State court, and are they subject to the delays that occur in State courts? No; they go to a Federal prison. They get tried in a Federal court. They have Federal judges. They have Federal prosecutors. They have Federal people. No State judge gets to say a thing. No State prosecutor gets to appear in any position other than if they happen to be a witness .... Now, how does changing all the State ha-
Senator Biden believed that terrorism was serving as a pretext for habeas reform, and made it clear that the AEDPA was an anti-terrorism bill with little anti-terrorism teeth.\(^{231}\) In an effort to make a strong statement in the face of the Oklahoma City Bombing, he argued that Congress was in a frenzy to pass the legislation before the one-year anniversary of the historic terrorist incident.\(^{232}\) Habeas corpus defenders such as Senator Kennedy objected to the bill for its unprecedented curtailment of the "Great Writ," and the dangers that such "reform" would pose to the civil liberties of law-abiding Americans.\(^{233}\) In the end, these arguments either fell on deaf ears or were consumed by the political objective of marking the one-year anniversary of the Oklahoma City bombing with responsive "tough-on-terrorism" legislation.\(^{234}\)

Consequently, the political pressure to respond to terrorism in part pushed habeas reform through both houses of Congress under circumstances which previously had been legislatively impossible.\(^{235}\) The debates also reveal that, at least in part, the legitimate concerns for the vitality of habeas corpus were ultimately sacrificed for the habeas corpus cases have anything to do with terrorism?

142 CONG. REC. S3352, S3356 (daily ed. Apr. 16, 1996) (statement of Sen. Biden).\(^{231}\) See id. at S3355 (statement of Sen. Biden) (noting perjoratively that "[t]his is a great habeas corpus bill. That is what it is. This is a habeas corpus bill with a little terrorism thrown in.").

142 CONG. REC. S3454, S3457-59 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy) (quoting Justice Potter Stewart that "Swift Justice demands more than just swiftness."); see also id. at S3462 (statement of Sen. Feingold) (stating that "many of the proposals which have been offered throughout this debate to combat terrorism simply went too far and placed the civil liberties of all Americans in peril,") (quoting a New York Times article reporting "Members of Congress are exploiting public concerns about terrorism to threaten basic civil liberties."); see also 142 CONG. REC. S3427, S3439 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan) ("It is troubling that Congress has undertaken to tamper with the Great Writ in a bill designed to respond to the tragic circumstances of the Oklahoma City bombing last year. Habeas corpus has little to do with terrorism.").

142 CONG. REC. S3352, S3356 (daily ed. Apr. 16, 1996) (statement of Sen. Biden).\(^{232}\) See id. (statement of Sen. Biden) (noting that the while the Senate passed legislation quickly following the Oklahoma City Bombing, "[t]he House sat on it for a better part of a year," and remarking, "Does it not seem kind of coincidental . . . that after a year we are finally urgently bringing this bill up on the week of the anniversary of the bombing?"); see also 142 CONG. REC. S3427, S3439 (daily ed. Apr. 17, 1996) (statement of Sen. Moynihan) ("It is troubling that Congress has undertaken to tamper with the Great Writ in a bill designed to respond to the tragic circumstances of the Oklahoma City bombing last year. Habeas corpus has little to do with terrorism.").

233 Some critical members of the Senate cast votes approving the bill, while objecting to the habeas reform provisions because they did not adequately protect civil liberties. See, e.g., 142 CONG. REC. S3454, S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Dodd) ("I believe that the habeas reform measures in this bill are ill-advised . . . . However . . . there are enough positive elements in the bill that allow me to vote for it."); see also id. at S3465 (statement of Sen. Levin) (stating that he will vote for S. 735, although "the habeas corpus provisions of the bill are . . . problematical."); id. at S4370-72 (statement of Sen. Specter) (stating that while he supports the legislation, he thinks "the bill is too restrictive" in limiting the ability to present a claim of innocence, and in not strengthening "minimal constitutional standard for ensuring adequate counsel at trial.").

234 It is also noteworthy that the makeup of Congress drastically changed in 1994. The "Republican Revolution" created a Republican majority in both houses of Congress.
broader, and more politically expedient aim of combating terrorism. Unlike in previous sessions of Congress, habeas reform, relative to combating terrorism, was not important enough for it to maintain its previous characterization as a "killer amendment." Or, alternatively, the fact that the terrorism bill had become a "Christmas tree" for habeas reform was less problematic for those who ultimately voted for it in early 1996 than it had been in previous years. This political turn of events is significant because it illustrates a pattern that characterizes the legislation. Just as habeas corpus was, in a sense, sacrificed in Congress at the feet of terrorism, the fairness concerns embodied in the counsel pre-conditions of the opt-in provisions, misunderstood as they were, were similarly sacrificed at the feet of federalism and finality in the death penalty.

The expedience of reforming habeas corpus, under the guise of combating terrorism, contributed to the defects in the opt-in provisions by diverting Congressional attention from careful consideration of the consequences of habeas corpus reform for indigent capital prisoners in States that do not qualify for the benefits of the opt-in provisions. In its haste, Congress failed to fully understand the significance of the Powell Committee's recommendation that the "default" habeas procedures remain unchanged. Moreover, Congress amended general habeas procedure in ways that diminished the persuasive force of the opt-in provisions. Congress focused solely on the consequences of its legislation when States opted-in to the provisions and completely ignored the alternative possibility, presented today, that rather than opting-in to the new provisions, States would choose to maintain the status quo of inadequate post-conviction defender systems, while reaping the unqualified finality benefits of reform provided by the "default" habeas procedures. These factors coalesce to demonstrate how a muddled perception of the Powell Committee rationale led to an understanding of the Powell recommendations under which the fairness concerns reflected in the counsel pre-conditions were eclipsed by accommodations for finality and federalism. The current reality reflected in the cases determining the States' eligibility for the opt-in provisions reveals how misguided Congress was in accepting the federalist arguments that advocated that States be allowed to establish their own standards. The result, as the cases reveal, has been sloppy legislation that fatally affects indigent capital prisoners.

26 See supra note 214 and accompanying text.
27 See supra note 215 and accompanying text.
28 See Hartman & Nyden, supra note 20, at 387 (1997) ("[T]he AEDPA goes far beyond the decisions of the Burger and Rehnquist Courts in shifting the balance of power to the states in the administration of their criminal justice systems. Implicated by the passage of the AEDPA are notions of comity, finality, and economy of judicial resources as opposed to notions of justice, due process, and equal protection of the laws for all.").
29 See supra note 191 and accompanying text.
VI. CONGRESSIONAL ERROR COMPOUNDED

The inadequate accommodation of fairness relative to the accommodation of finality in the opt-in provisions is partially rooted in the pressure on Congress to respond quickly to the Oklahoma City Bombing, partially in Congress’s misunderstanding of the Powell Committee counsel rationale, and partially in Congress’s failure to recognize the significant effect the default habeas rules have on the persuasive potential of the opt-in provisions. Two additional factors Congress did not consider contributed further to the imbalance between the realization of fairness and finality objectives in the opt-in provisions. First, Congress harbored the unrealistic expectation that, in light of the States’ historical failure to comply with the spirit of the Sixth Amendment, States would nevertheless affirmatively respond to the incentives of the opt-in provisions. Second, Congress did not consider the message it sent to the States when it de-funded the federal Post Conviction Defender Organizations.

A. States’ Failure To Comply Fully With Gideon and Powell

Since *Gideon v. Wainwright*, States have been required by the Sixth Amendment of the United States Constitution to provide counsel for indigent defendants in criminal cases. In addition, *Powell v. Alabama* and *Douglas v. California* require states to provide counsel for capital defendants through the direct review process. These requirements have not been fully realized for all indigent defendants, and the fault lies as much with the courts—both state and federal—as with the States themselves. As Stephen Bright concludes in an article detailing the extent to which States have failed to provided counsel to indigent defendants:

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242 287 U.S. 45 (1932).


245 See Bright, *Counsel For the Poor*, supra note 94, at 1882-83 (documenting cases that demon-
Courts have issued many pronouncements about the importance of the guiding hand of counsel, but they have failed to acknowledge that most state governments are unwilling to pay for an adequate defense for the poor person accused of a crime. Unfortunately, the Supreme Court has not been vigilant in enforcing the promise of Powell and Gideon. Its acceptance of the current quality of representation in capital cases as inevitable or even acceptable demeans the Sixth Amendment.\textsuperscript{246}

The reality that States have not provided adequate counsel for indigent defendants has been decried by the American Bar Association as a pressing problem in death penalty litigation. Citing a study prepared for the Texas State Bar Association in its report calling for a moratorium on the death penalty,\textsuperscript{247} the ABA reports:

Systematic studies reveal the depths of the national crisis of counsel in capital cases . . . . [Death penalty] states typically do not use central appointing authorities to choose counsel in capital cases; states do not assign more than a single lawyer to represent a capital defendant; states fail to monitor the performance of assigned counsel in capital cases; states do not compensate appointed counsel adequately; and states fail to fully reimburse counsel for support services.\textsuperscript{248}

Hence, given that States historically ignore the constitutional right to counsel for indigent defendants at trial and on direct review, Congress was extremely misguided in expecting that States would respond to incentives to take action that is not statutorily or constitutionally required.\textsuperscript{249} Despite this reality, Congress deferred to

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\textsuperscript{246} Bright, \textit{Counsel For the Poor, supra} note 94, at 1882-83.

\textsuperscript{247} See Coyne & Entzeroth, \textit{supra} note 81, at 3 (explaining the reasons supporting the ABA's decision to call for a moratorium on the death penalty, citing the States' failure to provide adequate counsel as a reason for this resolution.)

\textsuperscript{248} Id. at 14 (citing SPANGENBURG GROUP, ABA STUDY: AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POST-CONVICTION DEATH PENALTY CASES (1993)).

\textsuperscript{249} The danger created by linking the provision of counsel with the States' decision to opt-in to the statutory scheme was foreshadowed in testimony by a pro bono capital attorney:
federalist arguments that maintained States should be left to their own prerogatives.\textsuperscript{250} As the cases determining the States' eligibility for the opt-in provisions bear out the truth of the ABA's statement today, Congressional expectations were ill-founded and unreasonable.

B. Mixed Messages From Congress

The passage of habeas reform of the species found in the opt-in provisions becomes more curious considering Congress' contemporaneous de-funding of the Death Penalty Resource Centers, or Post-Conviction Defender Organizations (PCDOs). Since 1988, these federally-funded organizations have provided post-conviction representation for death row prisoners in as many as twenty states. In the budget crisis that deadlocked the country in the summer of 1995, these organizations were defunded starting April 1, 1996.\textsuperscript{251} When juxtaposed with the opt-in provisions, the defunding of the PCDOs reveals a contradiction in Congress's expectation that the States would opt-in to the new provisions. Congress, by its own example, established a precedent that the States were likely to follow, and as it turns out, have followed. By defunding the PCDOs, Congress eliminated its own "mechanism," which, for the previous ten years, had effectively provided the very service that the States are now expected to provide themselves. The PCDOs were federal exemplars of mechanisms that provided for the "appointment of counsel and compensation of reasonable litigation expenses" for capital defendants challenging their capital convictions in state and federal habeas review.\textsuperscript{252}

\textsuperscript{250} None of these bills does anything about improving the quality of counsel, either at trial or in post-conviction proceedings. They would keep in place state systems that still provide the most paltry of compensation for the most serious of cases . . . . Nothing will be solved by encouraging the states to extend to their state habeas proceedings the same inadequate provisions for compensating counsel that they now employ at the original trial stages.


\textsuperscript{252} See 139 CONG. REC. S14,940-02, S14,942-44 (daily ed. Nov. 3, 1993) (statement of Sen. Hatch) (arguing that the State should be allowed to have a choice of setting standards for counsel requirements because congressional standards would be "difficult to fulfill").


\textsuperscript{254} This characterization of PCDOs is communicated by former United States Attorney General Nicholas Katzenbach:

As federal judges of all perspectives have recognized in the past seven years since this requirement was instituted, the early assignment of competent counsel in postconviction proceedings actually speeds capital cases along
The opt-in provisions communicate, at least in part, the proposition that the provision of counsel for condemned prisoners in collateral proceedings is a desirable component of the death penalty review process. At the same time, however, the de-funding of the PCDOs communicates the message that this is not a service that is worth providing with necessary resources. An attempt to clarify Congress' message could perhaps be made on the grounds of federalism: it is a more desirable arrangement in the view of Congress and the States that the States take responsibility for providing counsel to capital prisoners for collateral proceedings. However, the truth of this argument is belied by the evidence that shows that the States, despite the incentives provided by the opt-in provisions, have failed to adequately fund post-conviction representation for capital prisoners.

The States' failure to respond to the opt-in provisions is apparently consistent with the value judgment communicated by Congress in defunding the PCDOs; that the allocation of resources to support counsel for capital prisoners in state post conviction proceedings is not worth the cost or the trouble, regardless of the incentives provided in the statute. Until the States opt-in to the provisions, there is no reason to believe that the States do not share Congress' value judgement that funding counsel is unimportant. If the opposite were true, it would be simple to find a State that has fully and affirmatively satisfied the counsel preconditions to the opt-in provisions. As suggested above, the disincentive of having to expend the resources to provide for the appointment and compensation of post-conviction counsel for capital prisoners appears to have convinced the States to opt for the status quo.

and reduces their cost. As administered through the twenty Post-Conviction Defender Organizations now serving most of the federal districts, this mechanism for providing counsel reduces the time necessary for the courts to find qualified lawyers, reduces delays while assigned lawyers attempt to learn the latest law in this complex area, reduces reversible errors and delay from inexperienced lawyers, and provides extremely cost-effective support for private pro bono attorneys taking on cases that the PCDO's [sic] cannot handle themselves.


See POWELL REPORT, supra note 70, at 3240 ("[T]he Committee believes that provision of competent counsel for prisoners under capital sentence . . . is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.")).

*A. Reaccommodating Fairness in Habeas Reform*

Congress has previously demonstrated that it has the political will to serve the interest of fairness in the death penalty, as evidenced by its granting a statutory right to counsel for federal habeas corpus proceedings in the Criminal Justice Act and in the Anti-Drug Abuse Act of 1988. One simple adjustment to reintegrate the fairness factor into the reform of habeas corpus was previously suggested by the American Bar Association (ABA) when Congress initially considered reforming habeas corpus. The ABA recommended, in an attempt to offset the overcompensation in favor of death penalty finality made to the States, that the one-year statute of limitations, which applies when the State has not satisfied the counsel preconditions of the opt-in provisions, should be tolled until the State appoints competent counsel to represent a prisoner. This tolling provision is, as the ABA explains,

essential to the proposal. It is the aim of the Association to provide sufficient time not only for diligent and comprehensive prosecution of the case by the prisoner and counsel, but also for solemn and studied scrutiny by the courts. Thus, any time during which the prisoner does not have death-qualified counsel . . . the limitations period should be tolled.

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254 *See ABA Task Force Report, supra* note 86, at 264.  
255 The ABA version of the statute of limitations reads as follows:  
That § 2241 of title 28, United States Code, is amended—By inserting the following immediately after the last sentence:  
(e)(1) In the case of a petitioner under sentence of death, any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within one year from the following date, whichever is appropriate: . . . (2) The time requirements established by this section shall be tolled: (A) During any period in which the prisoner was not represented by counsel, as defined in section 2254(h).  

*Id.* at 264.  
256 *Id.* at 44. The statute of limitations did not receive full support of the Task Force members. The effect of speeding up the process, with the penalty suffered by the prisoner for a lawyer's noncompliance with the statute of limitations, was very troublesome:  
The Task Force recommends a statute of limitations as "a great inducement to counsel and the petitioner to litigate properly and litigate well the first time through." However, dismissal, the sanction for lack of compliance with a statute of limitation—like other sanctions for defense attorney error in the capital process—is imposed not on the lawyer who is in control of the litigation, but on the client.  
The client may well have had absolutely no involvement in the selection of the lawyer or in the lawyer's failure to discharge his or her responsibilities. Vindication of constitutional rights would be precluded and the client exe-
Congress, obviously, did not adopt the recommendations made by the ABA. However, in light of the fact that none of the States have satisfied the counsel preconditions to the opt-in provisions, perhaps now is an appropriate time to adjust the general reform of habeas corpus to accommodate the fairness concerns embodied in the opt-in provisions. Amending § 2241 to include a tolling provision, as recommended by the ABA would help assure that capital prisoners are represented by counsel in state post-conviction proceedings, thereby equalizing the accommodation of fairness and finality concerns. The tolling provision would also provide additional incentive for the States to come within the terms of the statute. The second possibility for the correction of the imbalance in the accommodation of fairness in habeas reform lies in the hands of the Supreme Court.

**B. Revisiting Murray v. Giarratano**

*Murray v. Giarratano* was very new law when the Powell Report was released. Relying on the rationale of *Ross v. Moffitt* and *Pennsylvania v. Finley* four Justices of the Court found that indigent capital prisoners had no federal constitutional right to counsel in state post-conviction proceedings. The Court explains,

"Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in..."

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Id. at 212-13 (Minority Report of Stephen B. Bright).


258 417 U.S. 600 (1974) (holding that the right to counsel in criminal trials did not require a State to provide counsel for discretionary appeals).

259 481 U.S. 551 (1987) (holding that neither the Due Process Clause of the Fourteenth Amendment, nor the equal protection guarantee of "meaningful access to the courts" require States to provide counsel to non-capital prisoners seeking post-conviction relief).

260 *Giarratano* was a plurality decision. Chief Justice Rehnquist with Justices White, O'Connor, and Scalia held that the Due Process Clause does not require States to appoint counsel to indigent capital prisoners for post-conviction proceedings. Justices Stevens, Brennan, Marshall, and Blackmun dissented, on the grounds that *Pennsylvania v. Finley* required States "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Giarratano*, 492 U.S. at 15 (Stevens, J., dissenting) (quoting Pennsylvania v. Finley, 481 U.S. 551, 556 (1987)). Justice Kennedy, provided the fifth vote to form a plurality judgement, but was unprepared to join the plurality's reasoning. See *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring) (noting that "[t]he complexity of our jurisprudence in this area... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.").
fact considered to be civil in nature. States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well.\footnote{Giarratano, 492 U.S. at 8 (quoting Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987) (citations omitted)).}

In addition, the plurality reasoned that post-conviction counsel for indigent capital prisoners was not constitutionally required because direct appeal is the primary avenue for review of capital cases, and a State may "sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding."\footnote{Id. at 11.} Rejecting the Respondents' argument, the plurality concluded that the rule of Finley remained the same for capital and noncapital cases and should not be adjusted for capital prisoners.\footnote{See id. at 8-10. The plurality observed: Respondents, like the courts below, believe that Finley does not dispose of... [the] constitutional claim to appointed counsel in habeas proceedings because Finley did not involve the death penalty. They argue that, under the Eighth Amendment, "evolving standards of decency" do not permit a death sentence to be carried out while a prisoner is unrepresented. In the same vein, they contend that due process requires appointed counsel in postconviction proceedings, because of the nature of the punishment and the need for accuracy. Id. at 8 (footnote and citations omitted). The Giarratano Court also stated that "[w]e think... that the rule of Pennsylvania v. Finley should apply no differently in capital cases than in noncapital cases." See id. at 10.} Eighth Amendment protections that States must provide during the trial stages of capital cases, the plurality believed, were "sufficient to assure the reliability of the process by which the death penalty is imposed."\footnote{Id. at 10.}

A majority of the Court did not hold that the Constitution does not require the appointment of post-conviction counsel for indigent capital prisoners. Recall that Justices Stevens, Brennan, Marshall, and Blackmun dissented in Giarratano.\footnote{See supra note 260 and accompanying text.} Like the courts below, they credited the argument made by the Respondents that Bounds v. Smith\footnote{See Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.") (footnote omitted).} "[f]ar from creating a discrete constitutional right... constitutes one part of a jurisprudence that encompasses 'right-to-counsel' as well as 'access-to-courts' cases."\footnote{Giarratano, 492 U.S. at 16 (Stevens, J., dissenting). Rather than reading Bounds narrowly, as the plurality does, the dissent understood the case as part of the broad jurisprudence of the Fourteenth Amendment's Due Process Clause.} As the "fountainhead" of this jurispru-
dence the dissent cited *Powell v. Alabama*\(^{268}\) as demonstrating that "[p]articular circumstances" should determine the extent to which Fourteenth Amendment protections were warranted to guard against arbitrary criminal prosecution and punishment.\(^{269}\) This "particular circumstances" analysis, the dissent explained, was used by the Court in *Griffin v. Illinois*\(^{270}\) to invalidate the imposition of arbitrary restraints on appellate procedures,\(^{271}\) and was later applied to prohibit restraints imposed by the States on post-conviction review.\(^{272}\) The dissent further explained that the *Gideon v. Wainwright*\(^{273}\) requirement that counsel be provided to indigent criminal defendants and the *Douglas v. California*\(^{274}\) requirement of counsel for the first appeal as of right for indigent criminal defendants, emerged from this "particular circumstances" analysis of the Fourteenth Amendment.\(^{275}\)

Rather than addressing discrete "access-to-the-courts" or "right-to-counsel" questions, the dissent understood *Ross v. Moffitt*\(^{276}\) and *Pennsylvania v. Finley*,\(^{277}\) like the case before the Court, as raising questions that were addressed by *Powell, Griffin, Douglas,* and *Bounds.*\(^{278}\) The dissent proceeded to argue that the "particular circumstances" analysis of these cases warranted the conclusion that because there are significant differences between capital and noncapital cases, the rule of *Finley* should not control.\(^{279}\) As a reason for distinguishing between

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\(^{268}\) See *Powell v. Alabama*, 287 U.S. 45, 71 (1932). In *Powell*, the Court held as follows:

In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

*Id.* at 71.

\(^{269}\) *Giarratano*, 492 U.S. at 16-17 (Stevens, J., dissenting).

\(^{270}\) 351 U.S. 12 (1956).

\(^{271}\) See *Giarratano*, 492 U.S. at 17 (Stevens, J., dissenting) ("[O]nce a State allows appeals of convictions, it cannot administer its appellate process in a discriminatory fashion.") (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

\(^{272}\) See *id.* at 17 (Steven, J., dissenting) (citing *Lane v. Brown*, 372 U.S. 477 (1963) (paying for transcripts); *Smith v. Bennett* 365 U.S. 708 (1961) (paying a filing fee)).

\(^{273}\) 372 U.S. 335 (1963). The *Giarratano* dissent explains, however, that because of the Sixth Amendment's express guarantee of the right to counsel, *Gideon* "departed from the special circumstances analysis in favor of a categorical approach." *Giarratano*, 492 U.S. at 17 & n.2 (Stevens, J., dissenting).


\(^{275}\) See *Giarratano*, 492 U.S. at 17 (Stevens, J., dissenting).


\(^{278}\) See *Giarratano*, 492 U.S. at 19 (Stevens, J., dissenting) ("Although one might distinguish [*Ross* and *Finley*] as having a different legal basis than the present case, it is preferable to consider them, like *Powell, Griffin, Douglas,* and *Bounds,* as applications of the Fourteenth Amendment's guarantees to particular situations.").

\(^{279}\) See *id.* at 19 (Stevens, J., dissenting) ("[C]ritical differences between *Finley* and this case demonstrate that even if it is permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review proceedings without counsel's guiding hand.").
capital and noncapital cases, the dissent explained that the combination of the Court's and Congress' history of requiring counsel for capital defendants at trial and on direct appeal along with the "significant evidence that in capital cases . . . direct review does not sufficiently safeguard against miscarriages of justice to warrant the presumption of finality," and, therefore, that "the meaningful appellate review necessary in a capital case extends beyond the direct review process." The dissent asserted that counsel should be provided for post-conviction review because some States relegate claims normally heard on direct review to collateral review. Also significant was the fact that "[o]nce a [State] court determines that a claim is procedurally barred, a federal court may not review it unless the defendant can make one of the two difficult showings . . ." Because of the Court's previous distinction between capital and noncapital cases, the importance of post-conviction review in capital cases reflected in the success of past petitioners, the restriction by some States of the nature of claims that may be presented on direct review, and the Court's restrictive habeas corpus jurisprudence, the dissent contended that counsel should be provided for the State post-conviction proceedings of capital prisoners to ensure that all "substantial claims be presented fully and professionally in . . . [the] first state collateral proceeding."

Justice Kennedy, joined by Justice O'Connor, cast the vote to form a plurality in the judgment. He rejected, however, the rationale of the plurality that collateral proceedings are removed from the criminal

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280 Id. at 23 (Stevens, J., dissenting).
281 Id. at 24 (Stevens, J., dissenting).
282 See id. at 24 (Stevens, J., dissenting). The dissent cites cases such as Amadeo v. Zant, 486 U.S. 214 (1988) (prosecutorial misconduct); Brady v. Maryland, 373 U.S. 83 (1963) (same); Ex parte Adams, 768 S.W.2d 281 (Tex. Cr. App. 1989) (newly found evidence of innocence); Johnson v. Mississippi, 486 U.S. 578 (1988) (claims of ineffective assistance of counsel); see also Millemann, supra note 77, explaining that:

Capital post-conviction attorneys have discovered nonrecord facts that established prejudicial misconduct by the state, and violations of the constitutionally imposed disclosure rule in Brady v. Maryland; these discoveries have required reversals of a significant number of death penalties. Capital post-conviction attorneys have demonstrated the ineffectiveness of trial counsel by discovering evidence of the defendant's mental illness and disorder, mental retardation, and other compelling mitigating circumstances.

Millemann, supra note 77, at 479-80 (footnotes omitted).
283 Giarratano, 492 U.S. at 26 (Stevens, J., dissenting) (citing Murray v. Carrier, 477 U.S. 478 (1986) (holding that attorney error short of ineffective assistance of counsel is not cause for a procedural default) and Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that a defaulted-upon claim presented in a petition for habeas corpus will not be heard unless the petitioner can demonstrate "cause" for the default and "prejudice" resulting from the challenged action)).
284 See id. at 21 (Stevens, J., dissenting).
285 See id. at 23-24 (Stevens, J., dissenting).
286 See id. at 24-27 (Stevens, J., dissenting).
287 See id. at 28 (Stevens, J., dissenting).
288 Id. at 27 (Stevens, J., dissenting).
process. Agreeing with the dissent's view that the success of capital prisoners in vacating their death sentences in habeas corpus proceedings was a significant factor, Justice Kennedy asserted that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." Moreover, Kennedy agreed that the complex nature of habeas corpus made it "unlikely that capital defendants [would] be able to file successful petitions for collateral relief without the assistance of persons learned in the law." In light of the particular facts of Giarratano, however, Kennedy was reluctant to hold that "meaningful access" required that States furnish post-conviction counsel to capital prisoners. Since no death row prisoner in Virginia had been unable to obtain counsel to represent him in post-conviction proceedings, Kennedy was "not prepared to say that this scheme violates the Constitution." As a partial justification for this conclusion, Kennedy cited the contemporaneous sessions in Congress which purported to address the situation. Congress and state legislatures, Kennedy stated, unlike the Court, were capable of undertaking the comprehensive review of the issue of collateral review of capital cases. He did not want the Court to make a decision that might "pretermit other responsible solutions...." In a separate concurring opinion, Justice O'Connor shared this view. She was satisfied that the Court's decision "rightly leaves these issues to resolution by Congress and the state legislatures."

Almost ten years have passed since the Court decided Murray v. Giarratano. In the last decade, both Congress and the Court have significantly altered habeas corpus law. The cases determining whether the States have satisfied the counsel preconditions of the opt-in provisions demonstrate that the concerns addressed by the dissent in Giarratano have not fully been remedied. The most notorious of the death penalty states—Texas, Florida, Virginia, Georgia, Louisiana, Alabama, and Mississippi—have not, according to the courts, taken the measures to ensure "meaningful access" to the mandatory precursors to federal habeas corpus relief, state post-
Conviction proceedings.\(^{592}\) States with the largest death rows in America do not qualify for the opt-in provisions.\(^{593}\) That so many prisoners in states such as California and Florida, for example, who have federal habeas corpus proceedings pending but do not have counsel shows a different state of affairs than that observed by Justice Kennedy in *Giarratano*.\(^{594}\) When Justice Kennedy cast his vote in *Giarratano*, he found that “no prisoner on [Virginia’s] death row . . . has been unable to obtain counsel to represent him in post conviction proceedings . . .”\(^{595}\) It would be impossible to make such a finding today.\(^{596}\) Moreover, Justice Kennedy’s observation that “[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law,”\(^{597}\) when considered in light of the courts’ findings in every case that all States lacked standards ensuring the competence of post-conviction counsel, calls into question whether “meaningful access” is in fact being met in death penalty cases even where counsel is provided.

The opinions of Justices Kennedy and O’Connor in *Giarratano* at least partly relied on the fact that Congress was then considering the problem of post-conviction representation.\(^{598}\) Since then, Congress has legislated and the state legislatures have communicated through inaction on the issue of post-conviction counsel. Given the legislative results we currently live with, “a judicial imposition of a categorical remedy” would no longer “preterm other responsible solutions . . . considered in Congress and state legislatures.”\(^{599}\) The solutions heretofore provided by Congress and the States have been fatally non-responsive to fairness.

A categorical remedy, like the right to counsel declared in *Gideon*,\(^{600}\) would accommodate the concerns of fairness in the imposi-

\(^{592}\) See supra Part III.C.

\(^{593}\) The ten largest death rows in the United States are California (519), Texas (441), Florida (390), Pennsylvania (226), North Carolina (209), Ohio (191), Alabama (173), Illinois (162), Arizona (123), and Oklahoma (118). See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (1999), information provided at Death Row Inmates by State, Death Penalty Information Center (last modified Mar. 15, 1999) <http://www.essential.org/dpic/dpics.html>.

\(^{594}\) In *Ashmus v. Calderon*, the court found that “128 men and six women on death row are waiting for counsel,” and that “[m]ore than a quarter of the proposed class members are without counsel and are likely to remain so for some time.” See *Ashmus v. Calderon*, 933 F. Supp. 1048, 1055 (N.D. Cal. 1996). Further, the court found that there were 145 members of the proposed class who had habeas corpus proceedings pending, and that the class was growing at two to three individuals a month. See id. In *Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996), it was reported to the court that 86 out of 228 prisoners were not assigned counsel. See id. at 1154.


\(^{596}\) See supra Sections III.C-D.

\(^{597}\) Giarratano, 492 U.S. at 14 (Kennedy, J., concurring).

\(^{598}\) See id. at 13 (O’Connor, J., concurring); id. at 14 (Kennedy, J., concurring).

\(^{599}\) Id. at 14 (Kennedy, J., concurring).

\(^{600}\) Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (holding that appointment of counsel
tion of the death penalty. The opportunity presented now is the same as the opportunity that was presented to the Court in *Gideon* when it overruled *Betts v. Brady*'s holding that "the appointment of counsel is not a fundamental right, essential to a fair trial." Just as the Court in *Gideon* acknowledged that "[n]ot only the [Powell v. Alabama] line of] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," the Court may be presented with the opportunity to recognize a categorical right to counsel for capital prisoners seeking post-conviction relief in state courts. The cases examining the States' satisfaction of the counsel preconditions to the opt-in provisions demonstrate that whatever expectations that Justices Kennedy and O'Connor harbored about the capacities of Congress or the States to accommodate fairness in the form of "meaningful access" to the judicial process for capital prisoners seeking post-conviction relief in state courts, these expectations have not been fulfilled.

**C. Living With the Status Quo**

In the wake of *Giarratano*, the American Bar Association noted "four important possible consequences" that merit attention. First, the Association noted that "[w]ithout [sic] a recognized right to counsel for state collateral challenges by indigent inmates, the volunteer lawyer system will have to continue in those states that choose not to fund state post-conviction counsel." With the increased rate of executions and the swelling death rows in the States, this is certainly true today. Second, the Association noted that "states that now do provide funding for capital collateral counsel might decide to eliminate that funding. Should this excision occur, there would, of course, be even greater pressure on the system of volunteer counsel." From the cases examined above, the States have not adequately responded to the call of the counsel preconditions of the opt-in provisions by providing for compensation of reasonable litigation expenses. This conse-

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311 316 U.S. 455, 473 (1942) (holding that appointment of counsel is not a fundamental right essential to a fair trial).
313 *Id.* at 344 (emphasis added).
315 *Id.*
quence, like the first, is true today, if not more dire. Third, the Association noted that “resource centers” [PCDOs], already quite important in the death-sentence review process, will probably get increased attention and will need greater funding and staffing to handle the workload.\textsuperscript{318} As discussed above in Section IV.B., Congress eliminated funding for the PCDOs contemporaneously with the enactment of the opt-in provisions.\textsuperscript{319} PCDOs were referred to by the \textit{Giarratano} dissent and plurality as providing assistance to certain States in accommodating “meaningful access.”\textsuperscript{320} The elimination of these services has further placed the burden on the volunteer lawyer system, which cannot accommodate the increased demand for their services.\textsuperscript{321} The elimination of PCDOs, as the elimination of the Florida Volunteer Lawyers’ Resource Center demonstrated,\textsuperscript{322} not only increases pressure on the volunteer lawyer system, but upon the inadequately funded State defender systems.\textsuperscript{323} Finally, the Association noted that “because the Supreme Court failed to acknowledge that inadequate resources at the trial stage of capital litigation necessitates adequate representation at later stages of the review process, we should...expect...a call for greater scrutiny of and funding for state trial and appellate counsel.”\textsuperscript{324} The courts, taking up the Powell Commission’s call, have been forced to scrutinize the systems for the appointment and compensation of post-conviction counsel. These measures, however, without a right to counsel or “meaningful access” do not protect the rights of those prisoners in the States who do not provide counsel.

Thus, the atmosphere that the Court encountered in \textit{Giarratano} has changed significantly. Congress’s reforms imposing a statute of limitations on habeas corpus with the objective of furthering finality has made the need for “meaningful access” in the form of counsel more pressing. Perhaps upon reexamination of the issue, with the accelerated rates of capital convictions, and the failure of many States to provide counsel for capital prisoners for state collateral proceedings, the Court could, in the right case, reconsider its \textit{Giarratano} deci-

\textsuperscript{318} Id.
\textsuperscript{319} See supra note 251 and accompanying text.
\textsuperscript{320} See Murray v. Giarratano, 492 U.S. 1, 30 (Stevens, J., dissenting) (“Of the 37 States authorizing capital punishment, at least 18 automatically provide their indigent death row inmates counsel to help them initiate state collateral proceedings. Thirteen of the 37 States have created governmentally funded resource centers to assist counsel in litigating capital cases.”); id. at 10 n.5 (Kennedy, J., concurring) (“These 18 States overlap to a significant extent with the 13 States that have created ‘resource centers to assist counsel in litigating capital cases.’”) It is important to note that of the procedures of 18 States cited by the dissent—California, Idaho, Maryland, North Carolina, Pennsylvania, and Tennessee, have been found inadequate under the new statute. See id.
\textsuperscript{321} See ABA Task Force Report, supra note 86, at 91-92.
\textsuperscript{323} See id.
\textsuperscript{324} ABA Task Force Report, supra note 86, at 91.
The explanation of the jurisprudence of the Fourteenth Amendment that encompasses the "access-to-the-courts" and "right-to-counsel" provided by the dissent, and partially accepted by Justices Kennedy and O'Connor, provides a significant foundation for the proposition that capital prisoners in state post-conviction proceedings require counsel to ensure fairness in and "meaningful access" to the judicial process.

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525 See generally Millemann, supra note 77, at 455 (written before Giarratano was decided, arguing that death-sentenced prisoners are constitutionally entitled to the assistance of appointed counsel to investigate, prepare, and litigate capital post-conviction proceedings); see also Note, Geraldine Szott Moohr, Murray v. Giarratano: A Remedy Reduced To A Meaningless Ritual, 39 AM. U. L. REV. 765 (1990).

526 Giarratano, 492 U.S. at 16 (Stevens, J., dissenting).

527 Giarratano, 492 U.S. at 14 (Kennedy, J., concurring) (noting the requirement of meaningful access).