

## **Brief Analysis of S.1088**

*(As Amended, and Adopted, on October 6, 2005)*

### **Overview**

On October 6, 2005, the Senate Judiciary Committee adopted an amendment in the nature of a substitute offered by Senator Specter. This substitute amendment replaces Senator Specter's previous substitute amendment. Further examination may warrant an update of this analysis.

The new substitute is not very different from its predecessors, S. 1088 as introduced and the previous Specter substitute, in terms of impact. *First*, while a few of the original jurisdiction-stripping provisions have been moved into the "opt-in" section (Chapter 154), they have been replaced in the rest of the statute (Chapter 153) with substantive and procedural hurdles that will inevitably preclude review just as surely as would the previous language. *Second*, the tolling provisions have been improved in that they now more closely resemble current law, thus allowing most petitioners to pursue an appeal of a postconviction denial without jeopardizing their petitioner's ability to meet the federal statute of limitations. *Third*, the provisions on retroactivity, DNA, clemency, victims' statute incorporation, and *ex parte* appear to remain unchanged from the amendment adopted by the Senate Judiciary Committee in July. *Fourth*, there appears to be a new section on the granting of stays of execution where counsel is sought.

In sum, this amended legislation suffers from nearly all of the same infirmities as earlier versions. It still strips the federal courts of their jurisdiction to hear the vast majority of habeas claims. It still, in a variety of ways, increases the burden of proof -- already quite strict -- for indigent petitioners who have not had access to lawyers and the resources needed to pursue their cases. It still changes the longstanding purpose of habeas corpus from a means of determining whether an individual has been unconstitutionally convicted or sentenced solely into a poorly-conceived and largely unworkable forum for proving innocence.

This substitute adds a new level of concern. By substituting a new standard for the well-understood "cause and prejudice," it injects confusion into settled law and will cause much delay as the courts struggle to interpret this new language. The new standard substitutes "innocence" for "prejudice"; demands a far higher threshold showing of innocence than settled law requires; and penalizes prisoners who did not have access to counsel or resources in state court with which to establish their claims. This statute will preclude relief for individuals who are in fact not guilty of the crime of which they were convicted.

Finally, there has still been no showing of need for this kind of radical reform of the habeas corpus laws. A hearing on this proposal has been scheduled for October 26, and a markup will be held the following day.

### Chapter 153

#### Exhaustion - § 2

Non-capital petitioners, and capital petitioners in states that do not meet the new Chapter 154 requirements, would still see their ability to exhaust claims eviscerated unless they could establish innocence. Under current law, and particularly under *Rhines v. Weber* decided last term, the federal district court “for good cause” can stay a petition to allow the prisoner to exhaust state remedies. The prisoner is subject to whatever state rules exist for adjudicating that claim, and then returns to federal court for habeas review under AEDPA. This procedure, which respects the doctrines of federalism and comity, recognizes that state courts should be given an opportunity to resolve claims in the first instance, and that “good cause” may exist (for example, if the authorities concealed evidence) for the claims not having been raised previously.

Under this amendment, however, the petitioner would *not* return to state court for adjudication of unexhausted claims. Rather, a federal court could consider a claim on its merits in the first instance if the petitioner could show “cause” and “a reasonable probability of *innocence*,” or, in the alternative, that the petitioner is “more likely than not” innocent. Then, to obtain relief, the inmate would further have to demonstrate that denial of the claim would violate a standard that is basically current § 2254(d) (the state court’s determination – though there will not have been one here – was contrary to law or unreasonable).

There are serious problems with this provision:

- ! Subjecting this class of prisoners to additional burdens is unnecessary. Prisoners from states that provide decent postconviction counsel under amended Chapter 154 will have to meet an even higher “innocence” standard. Toughening the exhaustion rules for prisoners in states that do *not* provide reasonable access to counsel and resources is neither logical nor just. It will also prevent merits review in instances where egregious constitutional error prevented a fair trial, and where the indigent prisoner was not at fault for not adequately presenting the claim before the state courts.

- ! The amendment replaces the familiar “cause and prejudice” doctrine (familiar in habeas proceedings, though not previously applied to exhaustion) with one of “cause and probable innocence.” This is both unnecessary and problematic:
  - , “Prejudice” as it has been defined by the Supreme Court is an exacting standard. (*See Strickler v. Greene*).
  - , Prisoners who did not have access to qualified, compensated counsel in state postconviction will find it all but impossible to establish “reasonable probability of innocence” when they get to federal court. Habeas corpus review has traditionally provided the opportunity for those who did not have counsel or resources in state proceedings to prove their innocence or other right to relief.
  - , Requiring *any* showing of innocence here would allow (and provide incentive for) prosecutors to withhold evidence or discovery in the hope that the petitioner will not be able to meet this high burden even if he or she later gets access to the information.
  - , The “innocence” showing called for here is also significantly different from that under current law. It requires that the fact finder “would not have found that the applicant *participated in* the underlying offense.” That means, for example, that a prisoner who ultimately gets access to proof establishing that he was neither involved in nor even aware of a co-defendant’s plan to rob or kill inside a store will never be able to present that evidence to any state or federal court if he had not exhausted it. Similarly, a prisoner who can show that he would not even be *eligible* for the death penalty would not be able to present his claim in any court if it had not been exhausted. Under this provision, prisoners could remain convicted of or punished for offenses of which they are not guilty.
  - , The showing of innocence must be tied to the constitutional violation. If a petitioner gets access to evidence to establish his or her innocence that is not tied to the constitutional error, it is unclear how or when he or she could ever present it.
- ! Establishing probable innocence of the underlying crime and tying it to the constitutional error still would not be sufficient even to gain access to federal review. The petitioner then would have to show that the federal court’s denial of

the claim would be contrary to or an unreasonable application of Supreme Court law, or an unreasonable determination of a factual matter.<sup>1</sup> Particularly where the state has withheld the tools with which to present and exhaust the claim, it would be unfair for the state to then gain the benefit of § 2254(d)'s deferential approach.

- ! Petitioners who cannot meet the “cause and probable innocence” standard mentioned above will have to show that it is “more likely than not” that they are innocent *and* then satisfy §2254(d).

This higher innocence standard suffers from the same flaws noted above: many prisoners, particularly in states that do not satisfy the “opt-in” provisions, will not have access to the resources necessary to prove their innocence. As with the earlier provision, the petitioner would have to show that he had nothing to do with any aspect of the offense in order to be allowed to proceed with his claim, and would have to link the evidence of innocence to the constitutional claim of error.

This provision essentially requires the prisoner to prove innocence *plus* – she would have to show that not only was it more likely than not that no reasonable factfinder would find her guilty of *any* aspect of the offense, but that denying her relief would be contrary to Supreme Court precedent. It makes little sense to require a person to establish *more* than innocence in order to even get her claim heard in the federal courts.

- ! Claims that do not meet the exceptions noted above will be dismissed “with prejudice.” Unlike current law, which permits later federal review of previously unexhausted claims, this would permanently foreclose federal consideration of these constitutional claims.
- ! In addition to the substantive problems outlined above, the new “cause and probable innocence” standard represents an extraordinary and extraordinarily problematic deviation from the well-established and well-understood “cause and prejudice” standard. It will result in lengthy delays in cases as courts struggle to interpret these new terms.

### Amendments - § 3

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<sup>1</sup> This is similar but not identical to § 2254(d)(2)'s “unreasonable application of the facts.” It is not immediately clear what is intended by this change.

The changes to the amendment section parallel those for exhaustion. They thus suffer from the same problems in deviating from the “cause and prejudice” standard and requiring instead a showing of innocence that virtually no prisoner will ever meet.

This proposed section has additional flaws:

- ! It eliminates the doctrine of “relation back.” (i.e., where amendments that relate back to claims already in the petition are permitted). The Supreme Court has already sharply limited the ability of new claims to “relate back” to previous ones. Moreover, all civil litigants must meet the standards of Rule 15 (c) of the Rules of Civil Procedure, which include that doctrine. It is unclear why habeas litigants, who face prison terms or death, should be subject to a different and more onerous standard.
- ! The Supreme Court resolved the issue of amendments this past term in *Mayle v. Felix*, already setting the bar high for habeas petitioners. This provision would overrule that decision. Under the proposed provision, petitioners could amend only once, and that would be before either the statute of limitations runs or the state answers the petition, whichever comes earlier. Simply by answering the petition quickly, the state could thus foreshorten a prisoner’s ability to ever present his claims for federal review.

### Procedural Default - § 3

Amended S. 1088 retains the jurisdiction-stripping default provision of the original. Its exceptions mirror those noted above: “cause and ‘probable’ innocence” or a showing that “more likely than not no reasonable factfinder would have found that the applicant participated in the underlying offense.” This amendment therefore suffers from the flaws noted above.

However, the problems with this section run even deeper. Current habeas jurisprudence on procedural bars is predicated on notions of federalism: If a state has an established rule that serves a legitimate goal and is applied fairly, no federal court will touch its judgment. But if the rule is announced after compliance has become impossible, or is applied in a haphazard manner so that it cannot logically be deemed a “rule,” federal review cannot be precluded. Furthermore, often defaults are incurred because a prisoner was deprived of the tools with which to assert the claim. Amended S.1088, like the original bill, would penalize the petitioner for problems beyond his control:

- ! Procedural defaults often occur because ineffective counsel fails to present claims

or because the state withholds the evidence or the tools necessary to assert the claim (*Banks v. Dretke and Williams (Michael) v. Taylor* are recent examples). Requiring a showing of innocence before a petitioner can present such a claim only rewards the state for misconduct. Moreover, absent the required showing of innocence, a state court would be free to apply a procedural rule that had not been announced before it was allegedly violated, or that served no legitimate state interest. This proposed provision would penalize petitioners for no reason.

- ! This provision also allows for jurisdiction over defaulted claims if the Supreme Court has *already* determined that that particular rule “does not afford a reasonable opportunity” to present the federal claim. This exception is not capable of being met. The Supreme Court sets rules of general application for the state and federal courts to follow, and has developed a jurisprudence on procedural bars. Yet under this purported exception, using Missouri as an example, only that state’s trial courts that repeat the exact default problem remedied in *Lee v. Kemna* would gain the benefit of the rule. Given how rarely the Supreme Court takes certiorari on any matter, much less on questions of a state’s application of its default rules, this exception would be a virtual nullity.
  
- ! The amendment also suffers from the same problems as the earlier version of S. 1088 in that even some claims addressed on the merits by state courts will be subject to procedural bars in federal court, and, rather than requiring state courts to clearly announce their rulings, S. 1088 would require federal courts to comb the state record to resolve any ambiguity. These provisions needlessly undermine decades of Supreme Court jurisprudence in this area.

### Tolling - § 5

The bill as amended on October 6, 2005 improves on the earlier version by deleting several provisions. S.1088 will return to allowing tolling in state court when a *judgment* is being challenged rather than a *claim*, thus eliminating the problem created by having staggered statutes of limitations running at different times on different claims.<sup>2</sup> It also returns to the AEDPA’s tolling of all time spent in the state process, from original filing of the petition to denial of relief in the highest court, except in “original writ” jurisdictions.

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2 While the AEDPA speaks in terms of “judgment or claim,” and the earlier version of S.1088 allowed tolling only by claim, this amended version retains only the word “judgment.” It is not immediately clear what if any impact this would have on current practice.

However,

- ! The amendment continues to foreclose any opportunity for equitable tolling, no matter how egregious the reason for the failure to timely file. Given how rarely the courts grant such relief now, it is unclear why this very narrow avenue needs to be foreclosed.
- ! The amendment would limit tolling to “properly filed” postconviction applications. It is not clear how or when the determination is to be made as to whether the petition was “properly” filed.
- ! No definition of “original writ” jurisdiction is given.

### **Chapter 154**

#### **Capital Cases - § 8**

Several of the provisions of Chapter 154 would echo those of 153 but would make their exceptions even harder to meet. The amendment also advances the same changes on Attorney General review and DNA testing that have been criticized in previous versions.

Exhaustion: The rule here would very similar to that applying to all habeas cases, capital and non-capital, under Chapter 153. However, if a claim has not been exhausted, it cannot be considered by the federal court unless the petitioner can meet the exception currently set out in the statute under § 2254(e)(2). This means that he must show (1) that the claim relied on (a) a new rule of constitutional law made retroactive by the Supreme Court or (b) facts not previously discoverable *and* (2) that, by clear and convincing evidence, he is innocent of the underlying offense.

In other words, the petitioner must meet an even higher standard of proof of innocence than the one noted earlier in this memorandum (i.e., for non-capital cases and capital cases in non- “opt-in” states). Otherwise, the exhaustion rules in “opt-in” and non- “opt-in” states are virtually the same. As is true for Chapter 153 claims, if the petitioner has established his innocence based on new facts or new law, he still must demonstrate that the state court’s ruling was unreasonable or contrary to established law (i.e., he must show “innocence *plus*.”). Unlike Chapter 153’s exhaustion provision, this one would be retroactive to pending cases.

It should be remembered that this provision (§ 2254(e)(2)) was written into the AEDPA to put a limit on the holding of evidentiary hearings where the petitioner failed to develop his evidence in state court. It was not written to penalize petitioners who did

not have counsel or resources or where the state withheld the evidence necessary to assert the claim.

Amendments: The same is true for the amendment section: the prisoner must first establish absolute innocence if she is to be permitted to amend. Here, the time limit is 180 days *or* the filing of the state's answer, whichever comes first. Unlike Chapter 153's provision on amendments, this one would be retroactive to pending cases.

Procedural default: The same is also true for claims found by the state courts to be procedurally barred, though here again the language of jurisdiction-stripping is employed. All the problems noted in the first section of this memo therefore apply. Furthermore, even if the state court reviewed the claim on the merits, but did so under a heightened standard of review (what is generally called "plain error" review), the federal court would also lack jurisdiction to review the violation unless innocence *plus* were first established.

Both procedural default provisions would be retroactive. However, if relief had already been granted on an otherwise defaulted claim under Chapter 153, it would not be rescinded.

DNA testing: This section, apparently unchanged from earlier versions of S.1088, purports to increase the availability of DNA testing but will likely serve to restrict it instead. The federal court "may" (but need not) order DNA testing if the petitioner meets several prerequisites *and* can show a reasonable possibility that the testing will be exculpatory. This means that she must somehow be able to establish as a threshold requirement the result the test is likely to give. Testing is also limited to that which was unavailable at the time of trial or to evidence that was solely in the possession of the state: in other words, if defense counsel had access to the testing or evidence and did not act, even the innocent inmate will not get review under this section. This provision should, but does not, address any other potentially exonerating scientific testing.

Attorney General certification: As in earlier versions, amended S.1088 would transfer the oversight of state counsel systems from the neutral federal courts to the nation's chief prosecutor, the United States Attorney General. Chapter 154's requirements would apply to those states that the Attorney General determined had provided competent counsel and reasonable litigation expenses in postconviction proceedings. Review of the Attorney General's decisions could be had only in the Court of Appeals for the D.C. Circuit; those decisions could be overturned only if proved to be "manifestly contrary to law" *and* "an abuse of discretion."

Motions for Appointment of Counsel: Amended S.1088 appears to add a section on stays of execution where a habeas petitioner has sought counsel pursuant to

*McFarland v. Scott*. It provides that any such stay will last only for 60 days after the appointment of counsel. Because this section describes the district court in which counsel is sought as one “that would have jurisdiction to entertain a habeas application regarding [petitioner’s sentence,” it is possible that state authorities might seek to argue that the federal court did not have jurisdiction in light of the default and other provisions referenced above, though it is doubtful that this was the intent of the section.

#### Clemency - § 9

As with earlier versions, S.1088 would deprive the district courts of jurisdiction to review any clemency decision or procedure. Only the Supreme Court would retain such authority in reviewing a decision of the state’s highest court. As these are also rare claims, it is unclear why there is any need for Congress to legislate in this area. Moreover, the rare cases where such a challenge might be made involve egregious problems, such as claims of racial bias, or state intimidation. This provision would insulate those claims..

#### Ex parte funding requests - § 10

Section 10, unchanged from earlier versions of S. 1088, would make it more difficult for indigents to seek assistance in proving their claims; would require review by a judge *other* than the one hearing the case; and would mandate immediate release of information on all expenses authorized for the petitioner. This change would not only further burden federal judicial resources but would also likely face constitutional challenges, as indigent and wealthy defendants would be treated differently; similar disclosure requirements are not imposed on the prosecution; and various protections (such as the right against self-incrimination) are not safeguarded.

#### Crime victims’ rights - § 11

Amended S.1088 has made no discernible change in the incorporation of 18 U.S.C. § 3771(b), a victims’ rights statute, into the habeas corpus statute. This incorporation continues to be problematic. This recently enacted federal law was meant to apply to federal *trials*, not postconviction proceedings. Litigation over the application of this law’s provisions (e.g., guaranteeing a victim’s right to be heard or to be free from delay) to habeas review is virtually inevitable.

#### DNA testing - § 13

This provision, which suffers from flaws similar to those mentioned in § 8, appears to remain unchanged.