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**WHEN DEATH BECOMES AN OPTION: HOW AEDPA'S
OPT-IN PROVISIONS WILL VIOLATE THE
CONSTITUTIONAL RIGHTS OF HABEAS CORPUS
PETITIONERS**

*Alexander Brock**

For centuries, the writ of habeas corpus has allowed imprisoned men and women to challenge the validity of their detention as the final source of relief from criminal sentences. For those convicted of the death penalty, it is the last resource standing between life and death. Despite its monumental significance in America's legal history, the "Great Writ" was dealt a devastating blow with the introduction of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. Designed to expedite the legal processes from sentencing to execution, AEDPA drastically limited the avenues of relief sought by habeas petitioners. Yet, the law included several further provisions that may allow qualifying states to "opt-in" to an even stricter set of limitations. The provisions would force petitioners to file habeas applications within untenable timeframes and practically strip federal courts of the ability to reverse convictions. If granted, petitioners in such states would face near-negligible odds of survival upon reaching federal habeas review. The result may realize the death of the "Great Writ" as we know it. This Note will challenge the validity of the "opt-in" provisions and propose several remedies to ensure the suffocating results of the provisions never reach the petitions of those seeking relief from death row.

INTRODUCTION

There is little debate among scholars that the Antiterrorism and Effective Death Penalty Act of 1996¹ has profoundly changed the way criminal appeals work in the United States.² Once referred to as the “Great Writ,” the federal writ of habeas corpus remains the last means of relief for prisoners facing legal resistance from unyielding state courts.³ Trial errors are especially prevalent in cases involving the death penalty.⁴ According to a study from Columbia Law School, 70 percent of capital punishment trials contained “serious, reversible error[s]”⁵ over the twenty-two-year span that was the study’s focus.⁶ From 1973 to 1995, state appellate courts recognized the errors in less than half of those cases, leaving federal courts to address the remaining defective convictions.⁷

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¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2241–2256 (2006)) The Act was designed to “deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.”

² See Lincoln Caplan, *The Destruction of Defendants’ Rights*, THE NEW YORKER (June 21, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights>.

³ See generally U.S. CONST. art. I, § 9, cl. 2 (stating that “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”). See Emily Bazelon, *The Law That Keeps People on Death Row Despite Flawed Trials*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html> (summarizing habeas corpus as “[t]he idea [sic] that a prisoner has a right to petition a court to show that he or she is being held illegally.”).

⁴ Caplan, *supra* note 2.

⁵ *Id.*

⁶ James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (1999-2000).

⁷ *Id.* at 1850 n.37 (“... 41% of the capital judgments reviewed on state direct appeal were found to be tainted by serious error.”). According to the

Rather than addressing the crisis of state trial inaccuracy, Congress struck a decidedly different tone with the passage of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).⁸ According to legislators in the tough-on-crime 1990s, the problem was not a proliferation of trial errors leading to potentially mistaken convictions, but rather the years of costly appellate review delaying executions.⁹ “We are about to curb these endless, frivolous appeals of death sentences by those convicted of murder,” said Senator Bob Dole, the bill’s sponsor, in 1996.¹⁰ Senator Orrin Hatch, echoing Dole’s sentiments, proclaimed that AEDPA’s purpose was “to ensure that a . . . capital sentence imposed by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners.”¹¹ Though AEDPA was primarily framed as a response to international and domestic terrorism following bombings of the World Trade Center in 1993 and a federal building in Oklahoma City in 1995, the statute’s most profound effects have been on the procedures of habeas corpus.¹²

Moreover, AEDPA ushered in a new era of habeas law with its introduction of a one-year statute of limitations, restrictions on appellants’ ability to file successive or secondary petitions for habeas corpus, and stringent guidelines which prohibit federal courts from granting writs of habeas corpus to previously deserving petitioners.¹³ Accordingly, the passage of AEDPA has had disastrous effects on federal courts’ ability to grant relief at all,

Liebman study, of the cases remanded for error, 82% of defendants were found to be undeserving of the death penalty, including 7% who were found to be innocent. Without a powerful source of federal review, those defendants would likely have been executed unjustly. *Id.* at 1852; *see* Caplan, *supra* note 2.

⁸ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2241–2255; inserting new section codified at 28 U.S.C. §§ 2261–2266).

⁹ Keri Blakinger, ‘Express lane to death’: Texas Seeks Approval to Speed up Death Penalty Appeals, Execute More Quickly, HOUSTON CHRONICLE (Apr. 2, 2018), <https://www.chron.com/news/article/Express-lane-to-death-Texas-seeks-approval-12799384.php>.

¹⁰ *Id.*

¹¹ LOUIS J. PALMER, JR., THE DEATH PENALTY IN THE UNITED STATES 185 (2d ed. 2014).

¹² Bazelon, *supra* note 3.

¹³ John H. Blume, *AEDPA: The Hype and the Bite*, 91 CORNELL L. REV. 259, 270–71 (2006).

leaving several federal appellate judges to wonder whether they have any remaining role in the process.¹⁴ As former Ninth Circuit Judge Alex Kozinski writes, “we now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted.”¹⁵

While federal courts have grappled with diminishing capabilities in the realm of habeas law, petitioners have struggled to meet the suffocating demands of AEDPA’s statute of limitations.¹⁶ AEDPA’s purpose was to speed up the appellate process and insulate such processes from extended periods of litigation.¹⁷ While the law has notably failed to meet its intended results,¹⁸ the constricting one-year statute of limitations has nevertheless endured as a means of burdening capital petitioners with an unrealistic period of time for constructing their final pleas for relief before execution.¹⁹

In addition to the finality of execution, numerous factors point toward a need for a more lenient time requirement for death penalty appeals. Those familiar with the process of drafting federal writs of habeas corpus will agree that it is a long, intricate, and enormously involved process that requires extensive mitigation work and legal research.²⁰ Defense counsel is tasked not only with sculpting a legal defense that navigates AEDPA’s labyrinthine appellate structure, but also creating a profile of the appellant’s life and humanity.²¹ This strenuous process involves gathering a lifetime’s worth of information regarding relationships, school records, employment,

¹⁴ Bazelon, *supra* note 3.

¹⁵ *Id.*

¹⁶ Blakinger, *supra* note 9.

¹⁷ See ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, H.R. REP. NO. 104-518, at 2 (1996) (Conf. Rep.) (introduced and sponsored by Senate Majority Leader Bob Dole).

¹⁸ Blume, *supra* note 13, at 260–61.

¹⁹ Blakinger, *supra* note 9.

²⁰ Mary Pat Treuthart, Anne Branstad & Matthew Kite, *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 SEATTLE U. L. REV. 241, 245–46 (2002).

²¹ Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 102–103 (2010).

and community involvement, often requiring defense teams to track down and interview hundreds of affiliated parties.²²

Mitigation evidence is an essential element of any federal habeas appeal.²³ It demands elements of delicacy, expertise, and often patience.²⁴ It is a unique departure from traditional legal proceedings, as is capital law in general.²⁵ Painting a portrait of a petitioner's humanity is only half of the battle, as the ultimate goal is to provide tangible reasons to the court as to why the petitioner does not deserve to be permanently removed from the human race.²⁶ Naturally, this is a process that takes some time.²⁷

Furthermore, the ability to put together an effective habeas application is not a luxury; it is a constitutional right, and the last chance for men and women facing the death penalty to avoid impending execution at the hands of the state.²⁸ A one-year time limit may seem sufficient to laypeople and many legal practitioners alike; however, in the field of capital habeas law, AEDPA's one-year statute of limitations is simply another provision intended to frustrate petitioners' search for relief.²⁹

Yet, for AEDPA's designers and primary proponents, the drastic restrictions of the bill were not their final goal. The law contains several provisions designed to incentivize states to establish more rigorous public defense systems throughout all levels of state

²² Treuthart, Branstad & Kite, *supra* note 20, at 250–51; Lamparello, *supra* note 21, at 145–46.

²³ Treuthart, Branstad & Kite, *supra* note 20, at 245–46.

²⁴ Lamparello, *supra* note 21, at 145–46.

²⁵ Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 59–61 (2005).

²⁶ Treuthart, Branstad & Kite, *supra* note 20, at 245.

²⁷ Cooley, *supra* note 25, at 63–65.

²⁸ See *Lockett v. Ohio*, 438 U.S. 586, 607–09 (1978) (holding that juries must be allowed to contemplate “any aspect of the defendant’s character and record or any circumstances of his offense as an independently mitigating factor,” when considering the death penalty in the sentencing phase).

²⁹ Note, *Suspended Justice: The Case Against 28 U.S.C. § 2255’s Statute of Limitations*, 129 HARV. L. REV. 1090, 1099 (2016) [hereinafter *Suspended Justice*].

appellate litigation.³⁰ States that meet the (currently ambiguous) AEDPA Chapter 154³¹ requirements may potentially “opt-in” to these separate provisions if they establish a system to provide qualified legal assistance to appellants at trial and throughout each stage of their state appeals.³² While this may seem a noble effort to urge states to remedy defective systems that routinely lead prisoners to file hopeless pro se applications on state appeal, their final destination is much more sinister.³³

AEDPA’s opt-in provisions allow qualifying jurisdictions to implement a 180-day statute of limitations on filing habeas applications,³⁴ further restricting an appellant’s ability to file successive petitions,³⁵ and drastically limiting the claims that are allowed to be raised at the federal level.³⁶ Allowing states access to the opt-in provisions would likely lead to devastating results, as the already crushing effects of AEDPA would essentially be doubled.³⁷ Thus far, however, no state has qualified.³⁸

Nevertheless, that may soon change, as both Texas and Arizona have submitted applications to the Department of Justice (“DOJ”) with the stated goal of speeding up executions and delivering justice to victims’ families.³⁹ Although AEDPA’s initial provisions called for Article III courts to decide upon the adequacy of states’

³⁰ 28 U.S.C. §§ 2261–2266 (2018); see Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1374–75 (discussing that “one of the purposes of federal habeas corpus review is to incentivize state courts to ‘conduct their proceedings in a manner consistent with established constitutional standards.’”).

³¹ § 2261.

³² *Id.* (detailing the statutory requirements for states seeking access to AEDPA’s “opt-in” provisions); see RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE I* § 3.3 1–2 (7th ed. 2018).

³³ Blakinger, *supra* note 9.

³⁴ § 2263(a).

³⁵ § 2262(c) (directing federal courts to review untimely applications as successive petitions); § 2266(b)(3)(B) (negating petitioners’ ability to amend a petition by replacing it with the stringent standard for filing a successive petition).

³⁶ § 2264(a) (restricting the ability of federal courts to review claims that state courts have deemed procedurally defaulted).

³⁷ § 2263(a); Blakinger, *supra* note 9.

³⁸ Blakinger, *supra* note 9.

³⁹ *Id.*

qualifications, the rules were changed in the waning years of the George W. Bush administration.⁴⁰ Because the opt-in provisions require federal courts to conduct review pursuant to much-reduced timetables, Congress believed it was unlikely that those same courts would be eager to grant applications.⁴¹ As of 2007, the approval power has rested with the DOJ, which declined to grant any opt-in applications under President Obama.⁴² Today, that privilege lies with the Trump administration's DOJ, which is currently reviewing the two pending applications from Texas and Arizona.⁴³ Accordingly, because the certification power, as currently understood, appears to revolve entirely around the discretion of the Attorney General ("AG"),⁴⁴ public defender organizations in those states are rightly worried about what may be on the horizon.

This Note will argue that the system of habeas appeals mandated by AEDPA's opt-in provisions would, if implemented, violate the Suspension Clause of Article I of the Constitution, the Due Process clause of the Fourteenth Amendment, and the Administrative Procedure Act of 1946.⁴⁵ Part I will examine the Suspension Clause argument by investigating the "default" provisions of AEDPA,⁴⁶ pitted against the more stringent opt-in provisions,⁴⁷ with a focus on the manner in which these provisions have systematically dismantled legal avenues for relief previously available in federal habeas practice. Part II will provide an analysis of the current procedures dictating states' access to the opt-in provisions, and show how the framework violates the Administrative Procedure

⁴⁰ Kent Scheidegger, *New AEDPA Opt-In Regs Published*, CRIME AND CONSEQUENCES (Mar. 3, 2011, 2:10 PM), <http://www.crimeandconsequences.com/crimblog/2011/03/new-aedpa-opt-in-regs-publishe.html> (explaining the regulation promulgated to modify the opt-in granting procedures).

⁴¹ *See id.*

⁴² *See Blakinger, supra* note 9.

⁴³ *See id.*

⁴⁴ Complaint and Request for Relief at ¶ 41, *Tex. Def. Serv. v. U.S. Dep't of Just.*, No. 1:18-cv-00426-RBW (D.C. Cir. filed Feb. 23, 2018).

⁴⁵ *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2019).

⁴⁶ *See generally* 28 U.S.C. §§ 2241–2255 (2018).

⁴⁷ §§ 2261–2266.

Act, and further creates a substantial risk of depriving capital appellants of their Fourteenth Amendment Due Process rights. Part III will present several recent cases out of Texas to illustrate that the state has not achieved the quasi-utopian vision of indigent defense contemplated by Chapter 154's proponents. Finally, Part IV will explore solutions to the opt-in conundrum across all three branches of government in an effort to ensure that the dangers of the streamlined provisions never come to light. Ultimately, this Note will argue that the DOJ should not allow the pending state applications to come to fruition and bar all future applications from unleashing the constitutional infringements that will lead to copious undiscovered trial errors, and ultimately, the execution of numerous innocent appellants.

I. HOW AEDPA'S DEFAULT PROVISIONS HAVE ERODED THE GREAT WRIT AND WHY OPT-IN PROVISIONS WOULD BE THE NAIL IN ITS COFFIN

Translated literally from Latin as "you have the body," habeas corpus is derived from the legal traditions of medieval England and has been an unshakable concept in American law since the country's founding.⁴⁸ Though the writ has evolved in its specific application, its central purpose has remained the same.⁴⁹ In American law, habeas corpus is the means by which a prisoner may demand to be taken before a court to determine whether the custodian has lawful authority to detain him.⁵⁰ Justice William Brennan found the writ of habeas corpus to be one of the bedrocks of our legal system.⁵¹ Indeed, in the 1960s, the Warren Court oversaw a proliferation of the use of the Great Writ, bolstering federal review in light of state

⁴⁸ See Bazelon, *supra* note 3.

⁴⁹ Note, *The Freedom Writ: The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 658 (1948).

⁵⁰ *Id.* at 658–59.

⁵¹ *Fay v. Noia*, 372 U.S. 391, 430–31 (1963) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.").

improprieties from the process of arrest through the state trial and appellate structures.⁵²

However, the achievements of the Great Writ's proliferation – that is, a drastic reduction in executions of the innocent and those undeserving of capital punishment – did not come without its costs. Recent data suggests that states spend roughly \$1.2 million more on maintaining and implementing the death penalty than it would on a sentence of life without parole.⁵³ Unsurprisingly, the heavy cost comprised no small part of states' impetus behind pushing for steeper restrictions of the writ's usage.⁵⁴

A. *28 U.S.C. §2254(d): How AEDPA Stripped Federal Courts of the Ability to Address Wrongs in Capital Trial Convictions*

With the introduction of AEDPA, habeas law became an entirely new creature.⁵⁵ According to leading habeas scholars, AEDPA landed “like an atomic bomb” as it dismantled every level of legal practice within the field.⁵⁶ Three landmark habeas decisions from the Warren Court era which formed the backbone of contemporary habeas law were abrogated in one broad stroke.⁵⁷ Thus, federal courts' abilities to address wrongful convictions that found their way through state appellate courts were essentially stripped overnight.

⁵² Caplan, *supra* note 2.

⁵³ Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA UNI. POL. REV. 46, 47 (2016).

⁵⁴ Blakinger, *supra* note 9.

⁵⁵ Caplan, *supra* note 2.

⁵⁶ HERTZ & LIEBMAN, *supra* note 32, at 97.

⁵⁷ *Fay v. Noia*, 372 U.S. 391 (1963) (allowing federal courts to review and remand cases containing serious procedural flaws during trial); *Sanders v. United States*, 373 U.S. 1 (1963) (granting petitioners the right file secondary and successive petitions that either amend or replace a prior petition); *Townsend v. Sain*, 372 U.S. 293 (1963) (empowering federal courts with the ability to conduct additional evidentiary hearings where state fact-finding was improper or deficient).

As such, at least two federal judges have decried AEDPA's dramatic effects.⁵⁸ "The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era," wrote Stephen Reinhardt, a former judge of the Ninth Circuit Court of Appeals.⁵⁹ Judge Reinhardt staked his reputation as one of AEDPA's most prominent detractors, as he declined to strictly interpret the statutory language in overturning dozens of capital convictions during his thirty-five years on the Ninth Circuit Court of Appeals.⁶⁰ The Supreme Court often disagreed with Reinhardt's interpretations, and routinely reinstated the convictions overturned at the federal appellate level.⁶¹ Time and again, the nation's highest court has made clear that AEDPA's standards of review are not to be softened by judicial flexibility.

One such example is the unfortunate case of *Davis v. Ayala*.⁶² Hector Ayala was convicted of murdering three men in California during a robbery attempt gone awry.⁶³ However, prior to his trial, the prosecution struck all of the Hispanic members from a pool of more than 200 prospective jurors.⁶⁴ In response to demands from his defense counsel that these strikes be justified, the judge conducted a private, off-the-record meeting with the state counsel, absent the defense counsel's presence.⁶⁵ The judge accepted the state's unknown justifications, and Mr. Ayala was subsequently sentenced to death by an all-white jury.⁶⁶

⁵⁸ See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015); Bazelon, *supra* note 3.

⁵⁹ Reinhardt, *supra* note 58.

⁶⁰ See Caplan, *supra* note 2.

⁶¹ *Id.*

⁶² See *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

⁶³ *Ayala v. Wong*, 756 F.3d 656, 661 (9th Cir. 2014).

⁶⁴ *Id.* at 660.

⁶⁵ *Id.* at 661.

⁶⁶ *Id.*

Writing the opinion for the Ninth Circuit Court of Appeals, Judge Reinhardt granted Mr. Ayala's *Batson*⁶⁷ claim, holding that his conviction could not be upheld in light of the serious, reversible error.⁶⁸ Writing on behalf of the Supreme Court in a 5-4 decision, Justice Alito disagreed.⁶⁹ Under the convoluted scheme of review created by AEDPA, which insulates trial errors from meaningful review as the case works its way up the chain of appeals, the Supreme Court found the error in Ayala's trial to be "harmless,"⁷⁰ and thus not deserving of redress from federal courts.⁷¹

"We assume for the sake of argument that Ayala's federal rights were violated, but that does not necessarily mean that he is entitled to habeas relief," Justice Alito wrote.⁷² Despite the striking nature of this statement – that the Court was willing to permit the execution of a man whose Constitutional rights had been violated via demonstrably unfair proceedings – Justice Alito's reasoning was rooted in the remarkably complex case law that has arisen in AEDPA's wake.⁷³ In its current formulation, the standard of what constitutes a reversible error becomes more and more stringent the further a case travels up the appellate ladder.⁷⁴

⁶⁷ *Batson v. Kentucky*, 476 U.S. 79, 79–81 (1986) (holding peremptory challenges by prosecutors used to exclude potential jurors on the basis of race, ethnicity, or sex to be unconstitutional).

⁶⁸ *Wong*, 756 F.3d at 693.

⁶⁹ *Davis v. Ayala*, 135 S. Ct. 2187, 2191 (2015).

⁷⁰ The process of review at the federal level requires courts to employ several standards of review on top of each other. The result is not only unnecessarily complex, but also extremely burdensome to appellants and federal courts seeking to rectify obvious constitutional violations at the trial level. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 619 (1993) (holding the standard for habeas relief is whether error had "substantial and injurious effect or influence" on jury verdict); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) (establishing the "harmless beyond a reasonable doubt" standard); *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007) (holding that an improper standard of review applied at the direct appeal level is not sufficient reason for reversal).

⁷¹ *Davis*, 135 S. Ct. at 2208.

⁷² *Id.* at 2197.

⁷³ *Id.* at 2198.

⁷⁴ *See* Joseph J. Langkamer, Comment, *Harmless Error and AEDPA: Brecht's Applicability After Fry*, 80 TEMP. L. REV. 529, 534 (2007).

At the direct appeal level, state courts are instructed to follow the precedent of *Chapman v. California*, which precludes reversal and remand where “the court [is] able to declare a belief that [the error] was harmless beyond a reasonable doubt.”⁷⁵ For federal courts, the restrictions become much more severe, starting with an opinion from Chief Justice Rehnquist just three years before AEDPA’s enactment.⁷⁶ In *Brecht v. Abrahamson*, the Court implemented an “actual prejudice” requirement to the error test, demanding the federal courts investigate as to whether the purported error “had substantial and injurious effect or influence in determining the jury’s verdict.”⁷⁷ While this standard is ambiguous on its face, ensuing case law has shown that *Brecht* review sets a bar that is nearly impossible for appellant’s habeas counsel to meet.⁷⁸

Specifically, federal courts may only grant relief if they have “grave doubt” regarding the error’s effect on the jury.⁷⁹ Moreover, there must be more than just a “reasonable possibility” that the error undermines the jury’s verdict.⁸⁰ The *Brecht* doctrine’s justifications are rooted heavily in notions of federalism, comity, and finality, reflecting the view that “state[s] [are] not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error.”⁸¹ While *Brecht* made the availability of relief at the federal level strikingly difficult to procure, AEDPA made it even harder.⁸²

The Supreme Court showed how disastrous AEDPA’s effects could be for appellants’ rights in the 2007 case *Fry v. Pliler*.⁸³ In *Fry*, the California Court of Appeal mistakenly applied the *Brecht* “actual prejudice” standard at the state level, where it should have reviewed the trial verdict through the *Chapman* “harmless beyond a

⁷⁵ *Chapman*, 386 U.S. at 24.

⁷⁶ See *Brecht v. Abrahamson*, 507 U.S. 619, 623–24 (1993). AEDPA was enacted in 1996. See *supra* note 1.

⁷⁷ *Id.* at 637–39, 623–24.

⁷⁸ See, e.g., *Calderon v. Coleman*, 525 U.S. 141, 145–46 (1998).

⁷⁹ *O’Neal v. McAninch*, 513 U.S. 432, 434 (1995).

⁸⁰ *Brecht*, 507 U.S. at 637.

⁸¹ *Calderon*, 525 U.S. at 146.

⁸² See 28 U.S.C. § 2254(d) (2018).

⁸³ See *Fry v. Pliler*, 551 U.S. 112 (2007).

reasonable doubt” lens.⁸⁴ Despite this misapplication, Justice Scalia explained that federal courts remained bound by AEDPA’s review requirements.⁸⁵ Pursuant to AEDPA’s § 2254(d), federal courts are only to inquire whether an appellant’s claim has been “adjudicated on the merits” in state courts.⁸⁶ If so, AEDPA’s extremely heightened deference to state sovereignty is applied.⁸⁷

For Mr. Ayala, § 2254(d) of AEDPA was the final nail in his proverbial coffin. Because the California courts had deemed the exclusion of all available black and Hispanic jurors without recorded explanation a harmless error in Mr. Ayala’s trial, federal courts’ deference became an automatic certainty.⁸⁸ In a dissenting opinion in *Ayala*, Justice Sotomayor discussed the reality of *Batson* claims, explaining that federal courts would have no ability to address the merits of such a claim using the methods of review employed by the majority.⁸⁹

When AEDPA’s dust finally settles, Justice Sotomayor’s argument may prove to be prophetic. Essentially, AEDPA has left fundamental constitutional protections — such as defendants’ freedom from racially discriminatory trials — in the hands of state courts who have a vested interest in the finality of intrastate trial results.⁹⁰ As shown by Columbia University’s empirical study, the natural conclusion of such deference is the implementation of hundreds of flawed death sentences.⁹¹ Furthermore, one could reasonably conclude that dubious prosecution tactics like those employed in *Ayala* will not only go unaddressed, but will likely be encouraged and practiced as a matter of course by ambitious district attorneys who can operate with increased confidence that trial infringements will go uncorrected. This is not to imply that state appellate courts are in cahoots with local prosecutors; rather, increased prosecutorial conduct tends to be a natural byproduct of

⁸⁴ *Id.* at 114, 119.

⁸⁵ *Id.* at 120.

⁸⁶ § 2254(d).

⁸⁷ *Id.*

⁸⁸ *Davis v. Ayala*, 135 S. Ct. 2187, 2198, 2210 (2015).

⁸⁹ *Id.* at 2211.

⁹⁰ *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 145–46 (1998).

⁹¹ *Liebman et al., supra* note 6, at 1850.

relaxed appellate oversight.⁹² If the opt-in provisions were allowed to amplify AEDPA's constraints on federal courts, the resulting ripple effects may produce unimaginable, yet predictable, improprieties in criminal trials nationwide.

B. 28 U.S.C. § 2254(d): How AEDPA's One-Year Statute of Limitations Has Slashed Appellants' Ability to Effectively Seek Relief from Death Sentences

Before the enactment of AEDPA, there were no time limits on when a petitioner could file a habeas corpus application.⁹³ The timing of a petition was governed merely by judicial rules that permitted courts to dismiss applications arising out of unreasonable delay, resulting in prejudice to the state.⁹⁴ However, the overarching guidepost was the Suspension Clause of Article I, Section 9 of the Constitution.⁹⁵ The Suspension Clause, simply designed, states, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁹⁶ The latter portion of the clause is what famously justified President Lincoln's suspension of the writ directly after the Civil War, but it hardly can be said to apply to any contemporary circumstance.⁹⁷

Federal circuit courts across the country have held that AEDPA's one-year statute of limitations does not violate the Suspension Clause.⁹⁸ According to the Fifth Circuit Court of

⁹² See Tiffany R. Murphy, *Federal Habeas Corpus and Systemic Official Misconduct: Why Form Trumps Constitutional Rights*, 66 U. KAN. L. REV. 1, 2–3 (2017).

⁹³ *Suspended Justice*, *supra* note 29, at 1099.

⁹⁴ *Id.*

⁹⁵ U.S. CONST. art. I, § 9, cl. 2.

⁹⁶ *Id.*

⁹⁷ Kathryn E. Wetherbee, Comment, *Looking for Comity in the Habeas Corpus World: The Suspension Clause in Relation to the AEDPA as Amended by the USA Patriot Act*, 76 MISS. L.J. 1045, 1053 (2007).

⁹⁸ See, e.g., *Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107 (2d Cir. 2000) (holding that the statute of limitations does not constitute an unconstitutional suspension of the writ because it leaves petitioners with a reasonable opportunity to have their case heard on the merits).

Appeals, § 2244(d)(1) does not unconstitutionally suspend the writ of habeas corpus, but merely “alters the procedure.”⁹⁹ The Tenth Circuit Court of Appeals has found that the statute cannot be found to violate the Suspension Clause unless it “renders the habeas remedy ‘inadequate or ineffective’ to test the legality of detention.”¹⁰⁰ In very rare cases, AEDPA’s exception for “equitable tolling”¹⁰¹ may be activated, thus allowing petitioners the opportunity to extend the statute of limitations for factually unique situations.¹⁰² Despite this avenue only being available in the most extraordinary of circumstances,¹⁰³ no federal appellate court has found that § 2244(d)(1) infringes upon the Suspension Clause.

While the Supreme Court has yet to address the issue of AEDPA’s statute of limitations with specificity, several other cases that discuss the constitutionality of ancillary provisions with respect to the Suspension Clause provide some insight on how the court may possibly view the one-year time limit as a violation.¹⁰⁴ In *Felker v. Turpin*, the Court took on AEDPA’s drastic limits on appellants’ ability to file secondary or successive petitions.¹⁰⁵ The *Felker* Court characterized the writ of habeas corpus as “a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.”¹⁰⁶ Fitting with such a portrait, the Court found the tightening of restrictions on secondary and successive petitions to be “well within the compass

⁹⁹ See *Rojas v. Cockrell*, 44 F. App’x 652 (5th Cir. 2002).

¹⁰⁰ *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998) (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

¹⁰¹ *Wyzykowski v. Dep’t of Corrections*, 226 F.3d 1213 (11th Cir. 2000) (holding that the availability of equitable tolling exceptions and open questions for actual innocence claims renders the one-year statute of limitations a permissible burden on petitioners).

¹⁰² See 28 U.S.C. § 2244(d) (1) (B), (C), and (D).

¹⁰³ See, e.g., *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (holding that a petitioner is only entitled to the benefit of equitable tolling where “he presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time.”).

¹⁰⁴ See *Felker v. Turpin*, 518 U.S. 651 (1996).

¹⁰⁵ *Id.* at 657–59.

¹⁰⁶ *Id.* at 654.

of this evolutionary process” and in line with Suspension Clause jurisprudence.¹⁰⁷

However, this “evolutionary process” is precisely what separates restrictions on successive petitions.¹⁰⁸ Limitations on appellants’ ability to file secondary or successive petitions were in place well before AEDPA, and reflect the concept of evolutionary flux conveyed by the Court.¹⁰⁹ However, as previously mentioned, no codified time limitation on habeas petitions existed prior to the enactment of AEDPA in 1996.¹¹⁰ Thus, if addressed directly, the Supreme Court could find that AEDPA’s one-year statute of limitations falls outside of the evolutionary process of the abuse-of-the-writ jurisprudence and, consequently, constitutes a violation of the Suspension Clause.

Such an idea is bolstered by the holding in *Boumediene v. Bush*, where the Court addressed the accessibility of the writ of habeas corpus to detainees at Guantanamo Bay in light of the Detainee Treatment Act of 2005.¹¹¹ In *Boumediene*, the Court addressed *Felker* directly, justifying the decision with the observation that *Felker* “did not constitute a substantial departure from common-law habeas procedures.”¹¹² Rather, the Court characterized *Felker* as “codif[ying] the longstanding abuse-of-the-writ doctrine.”¹¹³ Thus, because *Felker* merely codified established principles, it did not constitute a restriction of access to the writ. The *Boumediene* Court went on to analyze two other habeas-related cases, *Swain v.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Suspended Justice*, *supra* note 29, at 1099.

¹¹⁰ *Felker*, 518 U.S. at 714–15.

¹¹¹ *Boumediene v. Bush*, 553 U.S. 723, 723–24, 733–35 (2008) (invalidating 28 U.S.C. § 2241, which provided that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo.”).

¹¹² *Id.* at 774–75.

¹¹³ *Id.*

*Pressley*¹¹⁴ and *U.S. v. Hayman*.¹¹⁵ In both cases, the Court found that the statutes in question were “designed to strengthen, rather than dilute, the writ’s protections.”¹¹⁶ Since the applicable statutes merely altered the administrative avenues for prisoners seeking relief rather than constricting them, the Court found no violation to the Suspension Clause in either situation.¹¹⁷

In contrast, the Court found that the Detainee Treatment Act was “intended to circumscribe habeas review,” in holding the statute unconstitutional.¹¹⁸ This is a crucial distinction, despite the fact that the Court’s holding in *Boumediene* upheld the constitutionality of AEDPA overall by reaffirming *Felker*. As no time limit on habeas appeals was in place before AEDPA, there is no longstanding doctrine to codify. Moreover, AEDPA does not merely establish administrative alternatives to habeas practice; it alters it entirely, and in no way strengthens its availability as did the statutes in *Swain* and *Hayman*.

Furthermore, the Court in *Boumediene* examined the legislative intent behind Congress’s passing of the Detainee Treatment Act, observing that Congress “did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure.”¹¹⁹ Because Congress had the intent to strip detainees at Guantanamo Bay of the ability to attain habeas relief, the law constituted a violation of the Suspension Clause.¹²⁰ With AEDPA, the intent is almost certainly the same. Imposing a one-year statute of limitations where there once was none in no way bolsters the writ, nor does it simply alter procedural avenues. Congress made its intent clear in 1996: the goal of AEDPA

¹¹⁴ *Swain v. Pressley*, 430 U.S. 372, 384 (1997) (upholding a District of Columbia statute that barred federal courts from addressing habeas claims until petitioners had exhausted all local sources of collateral review).

¹¹⁵ *U.S. v. Hayman*, 342 U.S. 205 (1952). (upholding a California statute that required petitioners to pursue a state remedial hearing before seeking habeas relief at the federal level).

¹¹⁶ *Boumediene*, 553 U.S. at 776.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 778.

¹²⁰ *Id.* at 779.

was to “curb . . . endless, frivolous appeals of death sentences,”¹²¹ and to “ensure that a . . . capital sentence imposed by a state court could be carried out . . . ”¹²²

The arguments for the unconstitutional suspension of the Great Writ would be magnified twofold were the opt-in provisions implemented in Texas and Arizona.¹²³ Perhaps most concerning is that the Court’s analysis in *Fry*, which dictates that federal courts may not intervene when state appellate courts employ a mistakenly heightened standard of review, would further weaken an already crippled federal review power.¹²⁴ In order to access the fruits of AEDPA’s opt-in provisions, the state must display that it has provided adequate counsel at every stage of the state appellate process; however, the same provisions do nothing to address adequacy concerns within the courts themselves.¹²⁵ Furthermore, the current standards as to what constitutes “competent counsel” for purposes of accessing the opt-in provisions are vague, and do little to reveal what a successful state framework must look like.¹²⁶ In theory, a state with a well-funded public defense apparatus could be allowed to access AEDPA’s opt-in provisions while prosecutors, trial judges, and state appellate judges could all be permitted to oversee rampant constitutional violations without fear of reproach.

*C. Effective Mitigation will be Devastated by the
Suffocating Time Constraints of the Opt-In Provisions*

Beneath the surface of its convoluted legal framework, habeas corpus is a truly bizarre area of law in that it includes a uniquely human element. For an appellant on death row, there is generally no

¹²¹ Blakinger, *supra* note 9.

¹²² PALMER, JR., *supra* note 11.

¹²³ Blakinger, *supra* note 9 (warning that states that implement these opt-in provisions would both shorten the legal process and limit appeals options for their death-sentenced prisoners).

¹²⁴ *Fry v. Pliler*, 551 U.S. 112, 119–20 (2007).

¹²⁵ 28 U.S.C. §§ 2261–2266 (2018).

¹²⁶ 78 Fed. Reg. 58,160, 58,183 § 26.22(b)(2) (“Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.”).

light at the end of the tunnel; the options are often execution or a lifetime in prison with no possibility of parole.¹²⁷ Thus, it is the peculiar role of the habeas counsel to argue, at times, that the appellant deserves life in prison over an execution at the hands of the state.¹²⁸

This is where notions of humanity intersect with legal doctrine in a way unlike any other area of law.¹²⁹ In addition to a team of qualified attorneys, each public habeas office generally staffs a handful of non-legal mitigation specialists for the specific task of presenting the human side of the client.¹³⁰ Mitigation specialists, usually highly-skilled individuals with a background in social work, are tasked with showing the virtuous sides of a client in an attempt to show that he or she is unworthy of being removed from the human race.¹³¹ This is a near-impossible endeavor for experts working within the one-year AEDPA time frame.¹³² As such, it is preposterous to assume it can be done in time to craft a petition within six months.¹³³

Accordingly, mitigation specialists are an indispensable part of capital defense at all levels of the case, from the sentencing phase at trial to habeas and clemency petitions.¹³⁴ Notably, the current certification standards, as per the AG's 2013 regulation, omit any mention of furnishing mitigation specialists in a manner consistent

¹²⁷ Lamparello, *supra* note 21, at 138–39.

¹²⁸ Treuthart, Branstad & Kite, *supra* note 20, at 241.

¹²⁹ See generally Caplan, *supra* note 2.

¹³⁰ Cooley, *supra* note 25, at 65.

¹³¹ *Id.*; Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 549 (1995) (“ . . . our system of death sentencing instead leads us to view capital defendants as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human.”).

¹³² Blume, *supra* note 13, at 270–71.

¹³³ Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 825–27 (2008) (“As developing mitigation evidence is time-consuming, early appointment of the mitigation specialist is essential. It takes months to conduct the interviews and amass the information needed and cull it to a presentable form.”).

¹³⁴ Lamparello, *supra* note 21, at 144.

with court-mandated protections.¹³⁵ A state defense framework that fails to provide mitigation specialists at each relevant stage of a case could violate the ineffective assistance of counsel standards set forth in *Strickland v. Washington*;¹³⁶ however, such a system could ostensibly be deemed acceptable by the AG in granting an opt-in application.¹³⁷

Regardless of the mitigation work product that may be created by state-level specialists, mitigation experts at the federal habeas level simply would not be able to do their job adequately under the 180-day time constraint of AEDPA's Chapter 154.¹³⁸ Effective habeas mitigation requires that an appellant's "medical, psychological, sociological, and family background must all be thoroughly investigated."¹³⁹ Such technical and personal data, accrued over the course of a lifetime, is not so easily procured. The mitigator must begin a medical investigation "literally from the embryo" to the present day.¹⁴⁰ In addition to unearthing a life's worth of medical files, the mitigation team must conduct interviews with virtually all individuals with whom the client has had meaningful contact with over the course of his life.¹⁴¹ Effective

¹³⁵ 78 Fed. Reg. 58,160 (Sept. 23, 2013); see *Jells v. Mitchell*, 538 F.3d 478, 494 (6th Cir. 2008). The court found that defense counsel's failure to hire a mitigation specialist until after the completion of the guilt-innocence phase constituted ineffective assistance of counsel. Thus, not only are mitigation specialists viewed as a necessary part of trial and appeals, but they also must be present and active throughout even the very earliest stages of a case.

¹³⁶ See *Strickland v. Washington*, 466 U.S. 668, 686–88, 691–93 (1984) (holding that, to establish ineffective assistance of counsel, a petitioner must show that his attorney's performance fell below objective standards of reasonableness and that such performance resulted in actual prejudice upon the jury's findings).

¹³⁷ See 78 Fed. Reg. 58,160 (Sept. 23, 2013); see also Complaint and Request for Relief, *supra* note 44, at ¶ 5, 31 (showing the current procedures include no mandate for providing mitigation specialists, nor is the AG required to respond to comments demanding such an inclusion).

¹³⁸ See Berrigan, *supra* note 133, at 825–27.

¹³⁹ Cooley, *supra* note 25, at 53.

¹⁴⁰ Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 895 (1990-91).

¹⁴¹ Cooley, *supra* note 25, at 57–58 ("Embarking on a family investigation is similar to 'constructing "a series of concentric circles.'" The innermost circle starts with the defendant and expands to his or her immediate family . . . [T]o fully appreciate the complexities of this inner most circle, a 'generational analysis'

mitigation also includes the collection of school records,¹⁴² the hiring of outside experts, and possibly translators,¹⁴³ as well as countless hours spent interviewing the client himself.¹⁴⁴ The tightened opt-in statute of limitations would bring about a shameful end to the valuable work these specialists perform and, consequently, detract from the portrait of humanity each client deserves before facing the certainty of his execution.

II. HOW UNLEASHING AEDPA'S OPT-IN PROVISIONS WOULD VIOLATE ADMINISTRATIVE PROCEDURE LAW AND INFRINGE UPON APPELLANTS' PROCEDURAL DUE PROCESS

The original proponents of AEDPA envisioned a future system of state appeals so robust that the need for lengthy federal review would be nothing more than a redundancy.¹⁴⁵ The opt-in provisions were designed for just that; a utopian legal system where all conceivable error would be eliminated by the time criminal appeals made their way through state appellate review.¹⁴⁶

A. *How AEDPA's State Certification Framework Violates Administrative Procedural Law*

Whether or not such a idyllic prospect is conceivable in the future, it is unlikely that any state appellate system has reached the desired standard of quality as of today.¹⁴⁷ "Opt-in presumes that we've reached this promised land of excellent and well-resourced

must be performed. To carry out a generational analysis, it is essential 'to gain the family's trust.' Doing so will likely require defense counsel to meet with the defendant and his or her family members on several occasions. Thus, developing this rapport and trust takes a considerable amount of time and energy.").

¹⁴² *Id.* at 56–57.

¹⁴³ *See id.* at 57.

¹⁴⁴ *Id.*

¹⁴⁵ Blakinger, *supra* note 9.

¹⁴⁶ Alexander Rundlet, Note, *Opting for Death: State Responses to the Aedpa's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 663–64 (1999).

¹⁴⁷ *See* Blakinger, *supra* note 9 (showing that none of the applying states has ever been deemed qualified for opt-in certification).

legal representation at all levels for everyone on death row and in fact we have not,” said Kathryn Kase, a former executive director of Texas Defender Services.¹⁴⁸ Fortunately, those in charge of granting access to the opt-in provisions have thus far agreed, as no state has yet to satisfy the qualifications laid out by AEDPA’s Chapter 154.¹⁴⁹ However, that reality is bound to change at some point in the near future now that the decision-making power ostensibly rests in the hands of political actors.¹⁵⁰ Since 2005, the power to grant state applications has been vested in the DOJ.¹⁵¹ Thus, for the foreseeable future, the ever-changing cast of characters in the Trump administration has the ability to open a legal portal that may indefinitely abrogate the power of federal courts to supervise state capital proceedings.¹⁵²

One major flaw with the current system of capital appeals — which AEDPA’s Chapter 154 rightly sought to address — is the lack of competent counsel at the state post-conviction level, which is arguably the most crucial point for appellants to present new evidence, preserve claims for judicial review, and raise serious constitutional arguments.¹⁵³ As currently construed, the Sixth Amendment guarantees indigent defendants state-appointed counsel at trial¹⁵⁴ and in direct review proceedings,¹⁵⁵ while federal law provides capital prisoners with counsel at the federal habeas level.¹⁵⁶ However, there is no such guarantee for state post-conviction proceedings.¹⁵⁷ Many indigent defendants are left to fend for

¹⁴⁸ Blakinger, *supra* note 9.

¹⁴⁹ See 28 U.S.C. § 2261 (2018).

¹⁵⁰ See Scheidegger, *supra* note 40.

¹⁵¹ Robin M. Maher, *Update on Opt-In Rule: Preliminary Injunction Prevents Implementation*, PROJECT PRESS (A.B.A. Death Penalty Representation Project, Wash. D.C.), Summer 2004, https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2014/summer/update-on-opt-in-rule-preliminary-injunction-prevents-implementation/.

¹⁵² See *id.*

¹⁵³ Complaint and Request for Relief, *supra* note 44, at ¶ 1.

¹⁵⁴ Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963).

¹⁵⁵ Martinez v. Ryan, 556 U.S. 1, 11–12 (2012).

¹⁵⁶ 18 U.S.C. § 3599(a)(1) (2018) (requiring the appointment of counsel in federal habeas appeals involving the death penalty).

¹⁵⁷ Complaint and Request for Relief, *supra* note 44, at ¶ 1.

themselves at the highest levels of state appeals, where competent legal representation is a necessity.¹⁵⁸ Thus, the opt-in provisions function as a sort of “quid-pro-quo,” incentivizing states to fill this gap in state representation in exchange for, in essence, guaranteed legal victory at the federal habeas level.¹⁵⁹

Yet, the question remains: what exactly does a “mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel”¹⁶⁰ look like? Unfortunately, the answer to that question appears to rest entirely within the AG’s discretion, with shockingly few procedural safeguards available for interested parties to influence the agency’s interpretation.¹⁶¹ In 2013, AG Eric Holder declared his view that the decision to grant access to the opt-in provisions is an “order” rather than a “rule” pursuant to the Administrative Procedure Act (“APA”).¹⁶² Such an interpretation denies interested parties all of the procedural participation privileges available in the APA’s rulemaking framework, including notice-and-comment proceedings.¹⁶³ According to a lawsuit by the Texas Defender Services, such an interpretation is incorrect pursuant to the APA, and may constitute an arbitrary and capricious implementation of the statute.¹⁶⁴

More concerning is the lack of restraints on the AG’s discretion in granting certification. If interpreted as an “order,” the AG may grant states access to the opt-in provisions without the states providing any evidence that they have complied with the requirements, and he may do so without responding to public comments or providing any explanation for his decision.¹⁶⁵ Furthermore, the current construction of the certification process

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at ¶ 17.

¹⁶⁰ 28 U.S.C. § 2265(a)(1)(A) (2018); 28 U.S.C. § 2261(b)(1) (2018).

¹⁶¹ 76 Fed. Reg. 11,705-01 (proposed Mar. 3, 2011); *see also* Complaint and Request for Relief, *supra* note 44, at ¶ 5, 30–31 (explaining the position of the AG that he may promulgate the regulation without addressing the concerns of interested parties).

¹⁶² Complaint and Request for Relief, *supra* note 44, at ¶ 4.

¹⁶³ 5 U.S.C. § 553(b), (c) (2018).

¹⁶⁴ Complaint and Request for Relief, *supra* note 44, at ¶ 5.

¹⁶⁵ *Id.*

does not govern precisely which collateral proceedings states must provide counsel for, nor what defines standards of competency for such counsel.¹⁶⁶ Thus, one avenue for defending against the impending implementation of opt-in provisions in “qualifying” states could rest with the administrative specialists on the D.C. Court of Appeals. The realistic expectations of such a proposal will be discussed in the final part of this Note.

B. Viewing the Opt-In Procedures Through the Lens of Procedural Due Process: A Balancing Test

In addition to violating the Suspension Clause, AEDPA’s opt-in provisions may constitute a violation of the Due Process Clause of the Fourteenth Amendment.¹⁶⁷ Specifically, when the proposed opt-in provisions are filtered through the foundational balancing test established in *Mathews v. Eldridge*,¹⁶⁸ it becomes morally apparent that the government’s perceived benefit from enacting the provisions does not outweigh the interests of appellants in fighting against their impending execution at the hands of the state.

According to the *Mathews* Court, a balancing test must be employed when the state attempts to take away an individual’s interest relating to life, liberty, or property.¹⁶⁹ As should be obvious in this context, the interest at stake is that of petitioners’ lives, which are certainly at risk of being deprived. Thus, the *Mathews* Court would ask to weigh the interest of the individual against that of the state, plus the potential value of added procedures (or in this case, keeping the current procedures in favor of the new opt-in provisions).¹⁷⁰

Again, the individual’s interest is apparent; retaining one’s right to existence and the right to seek a new trial where the initial one was fatally flawed. The state’s interest, on the other hand, is slightly more muddled. When the state of Texas was asked for its

¹⁶⁶ *Id.* at ¶ 6.

¹⁶⁷ “[N]or shall any state deprive any person of life, liberty, or property, without due process of law”

¹⁶⁸ *Mathews v. Eldridge*, 424 U.S. 319, 334–36 (1976).

¹⁶⁹ *Id.* at 331–32.

¹⁷⁰ *Id.* at 347–49.

justifications for seeking access to the opt-in provisions, its representatives struck a straightforward tone: “[o]pting-in would serve several purposes for Texans, including sparing crime victims years of unnecessary and stressful delays, ensuring that our state court judgments are respected by federal judges as cases progress, and reducing the excessive costs of lengthy federal court proceedings,” said one representative of the Texas Justice Department.¹⁷¹ If the state’s primary interest in restricting federal appeals is delivering “justice” to the families of victims and ensuring respect for state judgments, it would be extremely difficult to reconcile that with the interests of thousands of appellants sentenced to death and seeking adequate procedural safeguards.¹⁷²

However, the foundational due process principles of the Fourteenth Amendment that dictate criminal trials become murky at the appellate level. As the Supreme Court has pronounced, rights beyond the direct appeal stage are not necessary to satisfy due process, therefore not all criminal appellants receive them.¹⁷³ Thus, aside from the constitutional right to habeas corpus, academic scrutiny at the highest levels of criminal appeals has been markedly silent on concerns such as constitutional due process.¹⁷⁴

This is a mistake. Despite the absence of strict Fourteenth Amendment requirements beyond direct appeal, AEDPA’s residual ripple effects raise concerns over proceedings lower down the ladder, where due process and additional Sixth Amendment protections of the accused are mandated.¹⁷⁵ It could be argued that, as a logical conclusion of the void created between state and federal appellate courts, criminal defendants are more likely to have their

¹⁷¹ Blakinger, *supra* note 9.

¹⁷² *Id.*

¹⁷³ *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.”).

¹⁷⁴ Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 *HASTINGS L.J.* 1, 4–5 (2010).

¹⁷⁵ *See, e.g., Davis v. Ayala*, 135 S. Ct. 2187 (2015) (holding that a violation of defendant’s constitutional rights at the trial level were not remediable at the federal level when the federal constitutional error was harmless).

constitutional pre-conviction rights violated due to increased confidence of prosecutors and trial court determinations that will not be given discerning scrutiny up the ladder. Nonetheless, such a concept remains purely theoretical, given the assumption that state institutions are presumed to act in good faith in obtaining convictions.

Furthermore, there is a more immediate, discernable due process problem readily available. Upon closer examination of the collateral effects AEDPA has produced in state appellate review, it becomes apparent that a significant portion of criminal appellants have been denied the right to a “full and fair” review of their claims.¹⁷⁶ Accordingly, since state appellate courts have been granted the power to act with impunity in reviewing challenges as to the constitutionality of appellants’ adjudications, these appellants may have been denied due process rights.¹⁷⁷

Professor Paul M. Bator, a leading scholar on pre-AEDPA habeas law, explains that the main responsibility demanded by the Fourteenth Amendment Due Process Clause¹⁷⁸ is “to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case.”¹⁷⁹ He continues to posit that, where it is apparent that a court fails to do so, “the due process clause itself demands that its conclusions of fact or law should not be respected.”¹⁸⁰ Nevertheless, it is not necessary to conclude that AEDPA has unequivocally violated appellants’ right to a full and fair review of their convictions.¹⁸¹ Were an appellant to receive such a review of their constitutional claims (*i.e.* a *Batson* claim) at the direct appellate level, or in further state post-conviction proceedings, then due process rights to adequate review have been satisfied.¹⁸² Hypothetically, a state appellate framework may satisfy

¹⁷⁶ Marceau, *supra* note 174, at 4–5.

¹⁷⁷ *Id.* at 5–6; *Stump v. Sparkman*, 435 U.S. 349, 364 (1978).

¹⁷⁸ U.S. CONST. amend. XIV, § 1 cl. 2.

¹⁷⁹ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).

¹⁸⁰ *Id.*

¹⁸¹ Marceau, *supra* note 174, at 7.

¹⁸² *Id.*

due process twice-over by the time a case ever becomes ripe for federal review.¹⁸³

In this situation, working in hypotheticals would be misguided. It is the inverse situation that reveals a more troubling puzzle. What happens to due process requirements when state courts *fail* to perform their duty of full and fair adjudication of constitutional claims? The argument of AEDPA's proponents would appear to be that any remaining due process concerns are absorbed into Suspension Clause habeas protection.¹⁸⁴ However, with the wounded power of review AEDPA has inflicted on federal courts, it becomes more likely that due process concerns, in some cases, may never be addressed at all.¹⁸⁵

Such a perplexing scenario is revealed by the Supreme Court's holding in *Fry*. Though the Court unequivocally found that the state appellate courts had applied the incorrect standard of review causing it to improperly address the appellant's claim, federal courts remained bound by AEDPA's shackles.¹⁸⁶ Mr. Fry did not receive a full and fair adjudication of his claim that the trial court improperly excluded the testimony of his key witness¹⁸⁷ at any point in the state appellate framework.¹⁸⁸ Needless to say, the federal courts also failed to perform full and fair review due to the enormous substantive deference demanded by AEDPA.¹⁸⁹ This case presents one of many situations where AEDPA has led to an abridgement of appellants' constitutional due process rights by effectively, though indirectly, denying them the guarantee to receive full and fair review at some point along the appellate ladder.¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 9 n.25, 21–22.

¹⁸⁵ See Reinhardt, *supra* note 58, at 1219.

¹⁸⁶ *Fry v. Pliler*, 551 U.S. 112, 116–19 (2007).

¹⁸⁷ *Id.* at 115. This claim represented that Mr. Fry was deprived of the constitutional right for “a fair opportunity to defend himself, in violation of *Chambers v. Mississippi*, 410 U.S. 284 [1973].”

¹⁸⁸ See Marceau, *supra* note 174, at 7.

¹⁸⁹ *Fry*, 551 U.S. at 120 (limiting the question to exclude substantive issues of how the *Brecht* test was applied and only considering whether the state court used the correct standard of review).

¹⁹⁰ *Fry* has been cited in nearly four thousand cases since 2007; see, e.g., *Davis v. Ayala*, 135 S. Ct. 2187 (2015); see also *Connolly v. Roden*, 752 F.3d

Such issues would be severely exacerbated with the introduction of opt-in provisions that further strip federal courts of their ability to address glaring constitutional concerns.¹⁹¹ The impossible-to-meet standards for filing a successive or secondary petition, for example, would further increase the odds that an appellant will not have his claim legitimately adjudicated at the federal level, leaving only state institutions to guarantee that due process concerns are properly addressed.¹⁹² Without the failsafe of federal oversight, it is clear that such a guarantee is no guarantee at all.

III. HOW THE TEXAS STATE CRIMINAL SYSTEM CONTINUES TO PRODUCE AND UPHOLD CONVICTIONS RIDDLED WITH ERRORS AND WHY THE STATE IS NOT WORTHY OF OPT-IN

Texas's request to access the opt-in provisions has prompted an outcry among local defender organizations who predict that the opt-in provisions' effects may be devastating on defense practices in the state.¹⁹³ As it currently stands, it can sometimes take months for federal courts to even appoint habeas lawyers, meaning the current one-year time frame is already significantly reduced by the time federal defenders acquire access to their client and relevant records.¹⁹⁴ Despite the obvious malignant effects on defense teams, the most concerning consequence of unleashing the opt-in provisions in Texas may have nothing to do with counsel; rather, the primary concern may be the courts themselves.

While the merits of the opt-in provisions are up for debate, it remains clear that the Texas state appellate system is riddled with

505, 506 (1st Cir. 2014) (quoting the heightened "substantial and injurious effect or influence" standard of trial errors set forth in *Fry*).

¹⁹¹ 28 U.S.C. §§ 2261-2266 (2018).

¹⁹² §§ 2262(c) (directing federal courts to review untimely applications as successive petitions); 2266(b) (3) (B) (essentially negating petitioners' ability to amend a petition by replacing it with the stringent standard for filing a successive petition); 2266(b) (3) (B) (essentially negating petitioners' ability to amend a petition by replacing it with the stringent standard for filing a successive petition).

¹⁹³ Blakinger, *supra* note 9.

¹⁹⁴ Marianne L. Bell, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J.L. & PUB. POL'Y 607, 608 (2000).

flaws, and should not be trusted to operate without substantive supervision from federal courts.¹⁹⁵ Several cases in recent years illustrate the idea that, regardless of the adequacy of the state's public defense framework, the Texas criminal court system should not be entrusted to produce convictions that are immunized from federal courts.¹⁹⁶

In *Moore v. Texas*, the Supreme Court addressed a habeas petition arising from the conviction of a Texas man with a profound mental disability.¹⁹⁷ What the Court found was rather disturbing. In reversing Mr. Moore's conviction, the Court held that the Texas Court of Criminal Appeals ("TCCA") had applied outdated and unverified methods of determining intellectual capacity that "creat[ed] an unacceptable risk that persons with intellectual disability will be executed."¹⁹⁸ Shockingly, in 2017, the TCCA employed the *Briseno*¹⁹⁹ factors, which adjudicate the existence of intellectual disability in a manner aimed at capturing "the 'consensus of Texas citizens' on who 'should be exempted from the death penalty.'"²⁰⁰ Thus, were it not for federal review, the State of Texas was prepared to execute an intellectually disabled appellant, in part, on the basis of whether or not laypeople believed him to be intellectually disabled.²⁰¹ This method creates tension with *Atkins v. Virginia*,²⁰² in which such executions were deemed unconstitutional.²⁰³ Perhaps more jarring than the outcome itself is the fact that the case had already made its way through the state

¹⁹⁵ Hannah Robertson Miller, "A Meaningless Ritual": How the Lack of a Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas, 87 TEX. L. REV. 267, 269 (2008).

¹⁹⁶ See *Moore v. Texas*, 137 S. Ct. 1039 (2017); see also *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006) (showing two examples of the failure of the Texas state appellate system to identify and remedy the faulty convictions of innocent petitioners).

¹⁹⁷ *Moore*, 137 S. Ct. at 1044.

¹⁹⁸ *Id.* at 1051 (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)).

¹⁹⁹ See *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

²⁰⁰ *Moore*, 137 S. Ct. at 1051 (quoting *Briseno*, 135 S.W.3d at 6).

²⁰¹ See generally *Moore*, 137 S. Ct. at 1051.

²⁰² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of the intellectually disabled violates the Eighth Amendment prohibition on "cruel and unusual punishment").

²⁰³ *Moore*, 137 S. Ct. at 1053; *Atkins*, 122 U.S. at 321.

system once before, only to be reversed and remanded by a federal district court.²⁰⁴

Other cases support the idea that Texas appellate courts appear to be more interested in upholding convictions than granting relief where justice demands it.²⁰⁵ In *Graves v. Dretke*, a man convicted for a series of brutal and notorious murders²⁰⁶ asserted that the prosecution had willingly withheld exculpatory evidence in procuring his conviction.²⁰⁷ The evidence he presented painted a stark picture.²⁰⁸ The chief prosecutor of the case accidentally revealed that the state's star witness at trial, who happened to be the state's initial suspect, had once confessed to committing the killings by himself, and on another occasion confessed to committing the killings with the help of his wife.²⁰⁹ This information was not available to Mr. Graves, nor his defense team, until years after trial.²¹⁰ The lower court found that the statement had been made, but was not a *Brady*²¹¹ violation because it was not "material" to the outcome of the case.²¹² Naturally, the Fifth Circuit Court of Appeals reversed the conviction, and remanded the case as per its instructions.²¹³ This prompted the state to admit that it did not have enough evidence to pursue the case, and drop all charges against the clearly-innocent Mr. Graves after spending 18 years on death row.²¹⁴ If not for the well-reasoned, unbiased federal review, Texas would surely have executed this man as well.²¹⁵ While these are

²⁰⁴ *Id.* at 1045–46.

²⁰⁵ See, e.g., *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006).

²⁰⁶ Pamela Colloff, *Innocence Found*, TEXAS MONTHLY (Jan. 2011), <https://www.texasmonthly.com/articles/innocence-found/>.

²⁰⁷ *Graves*, 442 F.3d at 336.

²⁰⁸ Colloff, *supra* note 206.

²⁰⁹ *Graves*, 442 F.3d at 337; see also *id.* (elaborating upon the findings of the federal court).

²¹⁰ *Graves*, 442 F.3d at 338.

²¹¹ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (holding that the prosecution must turn over all evidence that might exonerate the defendant to the defense).

²¹² *Graves*, 442 F.3d at 338.

²¹³ *Id.* at 345.

²¹⁴ Colloff, *supra* note 206.

²¹⁵ *Id.*

simply two cases among many, the numbers take on a different meaning when they denote human lives. In the realm of habeas, two mistakes are two too many. If a utopian system of state appeals exists – one that can dependably snuff out errors and misconduct – it certainly cannot be found in Texas in 2019.

IV. PROPOSED SOLUTIONS: SEARCHING FOR ANSWERS IN CONGRESS, THE COURTS, AND ADMINISTRATIVE AGENCIES

Picture the following scenario: a Texas man on death row has just exhausted his state appeals and is awaiting the appointment of his federal habeas counsel. Texas claims that its framework of state appellate defense counsel has achieved the qualifications necessary for opting-in to AEDPA's Chapter 154 provisions, thus giving the appellant six months to submit his habeas petition.²¹⁶ The freshly-appointed defense counsel is flummoxed and forced to gamble with a man's life.²¹⁷ Should it adhere to the state's assumption that the qualifications have been met? If so, numerous legal arguments must be thrown away, as they may not meet AEDPA's preservation standards.²¹⁸ The mitigation specialist will be left scrambling to assemble a portrait of a man's life within a few short months.²¹⁹ Alternatively, they could call the state's bluff. Counsel could file within AEDPA's default one-year statute of limitations and include all of the arguments it would normally with the risk of the petition being denied for untimeliness, all but guaranteeing the client's execution.²²⁰

Such was the conundrum confronted in *Ashmus v. Calderon*, in which California claimed that its mechanisms for the appointment of state appellate counsel had satisfied the criteria for accessing the

²¹⁶ Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners' Claims*, 28 QUINNIPIAC L. REV. 107, 130–31 (2009) (detailing a hypothetical version of the facts in *Ashmus v. Calderon*, 935 F. Supp. 1048 (N.D. Cal. 1996)).

²¹⁷ Bell, *supra* note 194, at 618.

²¹⁸ *Id.* at 619–20.

²¹⁹ *Id.*; see also Cooley, *supra* note 25, at 57 (providing examples of the wide range of tasks that must be completed to compile a credible mitigation report).

²²⁰ Bell, *supra* note 194, at 619.

opt-in provisions.²²¹ The United States District Court for the Northern District of California dispelled with the state's position, holding that California's mechanism for the appointment of counsel was deficient in several regards.²²² Notably, the state's system did not require appointed counsel to have any death penalty experience, nor did it contain provisions that would ensure counsel was actually appointed in a timely, effective manner.²²³ The pending opt-in application from the State of Texas continues to create a similar confusion for current habeas petitioners.²²⁴ There is no telling if the current DOJ would have reached the same conclusion as the court in *Ashmus*.²²⁵ Chaos of this nature has no place in the realm of habeas, where the stakes revolve around life or death decisions. Moreover, each of the three branches of federal government have a role to play in providing a remedy.

A. Congress Should Amend the 2005 Amendments to AEDPA Assigning Certification Power to the Attorney General

As is usually the case, Congress is the most appropriate forum to address the vital policy concerns surrounding opt-in applications. Upon its enactment in 1996, AEDPA's original certification power was vested in federal courts, which were responsible for determining whether states' indigent defense systems met the criteria set forth by statute.²²⁶ However, Congress soon realized that the courts, whose own time limits for issuing final determinations on appellants' habeas petitions would be strictly restrained through the opt-in provisions, were unlikely to invoke an appellate process that carries such a burden.²²⁷ For this reason, Congress amended AEDPA in 2006 to vest certification power in the Office of the Attorney General.²²⁸

²²¹ *Ashmus*, 935 F. Supp. at 1054.

²²² *Id.* at 1071–72.

²²³ *Id.* at 1072–74.

²²⁴ Blakinger, *supra* note 9.

²²⁵ Complaint and Request for Relief, *supra* note 44, at ¶ 3.

²²⁶ 28 U.S.C. § 2261.

²²⁷ Scheidegger, *supra* note 40.

²²⁸ Complaint and Request for Relief, *supra* note 44, at ¶ 3.

It should be noted that the AG, regardless of whom it may be when such a decision is ostensibly made, is a politically-motivated actor.²²⁹ Likewise, death penalty appeals are an inherently political issue, as illustrated by the statements of the Republican legislators promoting AEDPA in 1996.²³⁰ Of course, Congress would have its own political considerations in mind in tackling the issue today.

This is precisely why such massive power to shape the future of habeas appeals should not be in the hands of the volatile political branches, and instead vested in the federal courts. Congress must amend AEDPA yet again, and restore the system of the statute's origins. Such a result would be possible while also addressing Congressional concerns regarding federal courts' willingness to enact such procedures to their own detriment. The solution would simply be to remove the burdensome time restraints that require federal courts to issue final judgments on habeas applications within 180 days.²³¹ After all, proponents of speeding up death penalty appeal processes seem to be more concerned with the "disruptive, dilatory tactics of counsel for condemned prisoners"²³² than they are with dilatory federal judges carefully conducting habeas review. Furthermore, there is no incentive for federal judges to delay the process other than taking the time necessary to analyze complex and important legal issues. Thus, any added delay would be incidental, minimal, and legally vital.

B. The D.C. Circuit Court of Appeals Should Find the DOJ's 2013 Regulation to be a Violation of the Administrative Procedures Act, and Demand the Agency Follow Established Rulemaking Procedures

As discussed in Part II of this Note, the AG's legal authority to grant opt-in certification to qualifying states is tenuous at best.²³³

²²⁹ See, e.g., Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

²³⁰ Blakinger, *supra* note 9.

²³¹ See 28 U.S.C. § 2263(a).

²³² PALMER, JR., *supra* note 11, at 185.

²³³ See *supra* Part II and accompanying text; see also Complaint and Request for Relief, *supra* note 44, at ¶ 5.

The 2013 regulation which details the AG's authority requires little to no transparency in the decision-making process, nor accountability to justify reasons for deciding upon states' applications.²³⁴ With such little guidance or repercussions restraining the AG's discretion, the certification process currently rests on dangerous footing as one based purely upon regulatory philosophy.²³⁵

However, there is reason to believe the DOJ misinterpreted the requirements of AEDPA when skirting the formal processes of notice-and-comment rulemaking prescribed by APA § 553.²³⁶ Pursuant to APA § 553, an administrative agency, such as the DOJ, when issuing a "rule" must allow a reasonable period for interested parties to participate in the crafting of the rule before the agency formally promulgates its regulation.²³⁷ In this case, such "interested parties" would include various state and federal defender organizations, individual appellants, prosecutors, and any other groups or individuals with a tangible interest in the result of the final regulation.

Yet, this participatory process never came to fruition prior to the 2013 regulation, as the DOJ interpreted the relevant statutory language of AEDPA as requiring merely an "order" to specify the guidelines of the certification process as opposed to a "rule."²³⁸ When the AG sets forth an "order," the requirements are much less stringent and the processes far less participatory.²³⁹ This allows the DOJ to shape the regulation to its own liking, and denies interested parties the opportunity that, in some cases, may govern the life or death of their clients.

There is evidence that points to the AG overstepping his authority with the 2013 regulation, which suggests that the particular processes dictating opt-in certification may require more formal,

²³⁴ See *supra* Part II and accompanying text; see also Complaint and Request for Relief, *supra* note 44, at ¶ 5.

²³⁵ See Blakinger, *supra* note 9.

²³⁶ Complaint and Request for Relief, *supra* note 44, at ¶ 36.

²³⁷ Administrative Procedure Act, 5 U.S.C. § 553(b), (c).

²³⁸ Complaint and Request for Relief, *supra* note 44, at ¶ 5, 41.

²³⁹ 5 U.S.C. § 553(b)(1)(A) An "order" in this context correlates with the APA's definition of an "interpretive rule" for purposes of procedural requirements. *Id.*

participatory procedures.²⁴⁰ In 2013, the Office of the Federal Public Defender for the District of Arizona filed a lawsuit opposing the AG's regulation.²⁴¹ The district court invalidated the regulation, finding it to be deficient in several regards and "arbitrary and capricious" in its implementation.²⁴² However, on review, the Ninth Circuit Court of Appeals reversed because the issue was not yet ripe for judicial review.²⁴³ Since the AG had not yet granted any opt-in applications, it could still be assumed that the AG would use his discretion to provide the plaintiffs with the procedural protections they sought.²⁴⁴

Although the Ninth Circuit never reached the merits of the issue,²⁴⁵ the analysis of the district court is encouraging for potential action in the future. The district court's hasty review of the merits on an unripe case may betray the court's judgment that, if implemented, AEDPA's current certification process would not withstand judicial review.²⁴⁶ Without proper authoritative footing on which to grant states' opt-in applications, the AG would be rendered powerless, thus forcing either the DOJ to commence lengthy rulemaking procedures compliant with APA § 553(b) and (c), or Congress to shift certification power back to federal courts.

C. The AG Should Refuse to Exercise his Discretionary Power, and Deny the Pending Opt-In Applications from Texas and Arizona

As shown by the ripeness review from the Ninth Circuit Court of Appeals, nothing illicit has yet to occur, and no judicial action will take place until the AG actively chooses to exercise the

²⁴⁰ See Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, No. C 13-4517 CW, 2014 WL 3908220, at *13 (N.D. Cal. Aug. 7, 2014).

²⁴¹ *Id.* at *1.

²⁴² *Id.* at *6-10.

²⁴³ Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, 816 F.3d 1241, 1244 (9th Cir. 2016).

²⁴⁴ *Id.* at 1254.

²⁴⁵ *Id.* at 1248.

²⁴⁶ See generally Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, No. C 13-4517 CW, 2014 WL 3908220.

discretionary power granted to him by Congress.²⁴⁷ Ideally, the AG would choose to deny the pending applications from Texas and Arizona, as the plethora of defense organizations in those states have requested,²⁴⁸ and deny any future applications until Congress revisits the issue of where to vest the certification power.

Even still, a rule with such immediate, dire consequences should never be left up to the whim of a single administrator, especially at a time when there has been habitual unrest and turnover at the highest levels of the DOJ. Until the AG formally acts on the pending applications from Texas and Arizona, habeas appellants are safe from the deadly constraints of Chapter 154.²⁴⁹ Even still, no appellant deserves to play the guessing game when his life is on the line.

CONCLUSION

As of today, AEDPA's opt-in provisions can only be analyzed through the hypothetical prism. Though no state has been able to access the hastened procedures, opt-in's dark cloud looms over habeas attorneys in the handful of states still seeking to expedite executions. Already pressed for resources,²⁵⁰ offices in Texas and Arizona must remain prepared to double productivity at a moment's notice.²⁵¹ Yet, the time required to craft a meaningful habeas petition cannot be quantified by hours on the clock.²⁵²

Imagine another hypothetical. A biographer meets her subject for the first time and details two plans for completing her work. First, she proposes the two meet occasionally, for two hours at a time, over the course of a year. The rest of the time will be spent meeting her subject's family, friends, co-workers, doctors, neighbors, teachers, and, of course, writing the book. Second, she proposes they meet every day, for six hours a day, in the span of a few months, completing the rest of the necessary work, if possible,

²⁴⁷ Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice, 816 F.3d at 1254.

²⁴⁸ Blakinger, *supra* note 9.

²⁴⁹ Scheidegger, *supra* note 40.

²⁵⁰ See Complaint and Request for Relief, *supra* note 44, at ¶ 8, 60.

²⁵¹ Blakinger, *supra* note 9.

²⁵² See, e.g., Berrigan, *supra* note 133, at 825–27.

in the time allowed. Which plan sounds more likely to succeed? Which is more aligned with the realities of humanity?

This is the stark reality facing the counsel of habeas petitioners. For the client, life or death will be dictated by the legal arguments counsel can derive from thousands of legal documents compiled over the course of years of proceedings.²⁵³ His or her life may hang on the portrait of humanity painted by a mitigation specialist in a few short months.²⁵⁴ His case will be brought before a potentially sympathetic, yet powerless, federal judge.²⁵⁵ Is this the image of justice envisioned by the tough-on-crime senators of the 1990s? If so, AEDPA's opt-in procedures will serve as a snapshot of one of America's more shameful eras, where the nation's judicial efficiency is cherished above the dignity and humanity of its citizens.

²⁵³ Blakinger, *supra* note 9.

²⁵⁴ Treuthart, Branstad & Kite, *supra* note 20, at 245–46.

²⁵⁵ See Reinhardt, *supra* note 58, at 1219–20.