Federal *Habeas Corpus* Law and Practice—The Antiterrorism and Effective Death Penalty Act of 1996

By F. Martin Tieber

You are a defense attorney handling a criminal appeal and you have just lost in the state's highest court. Where and how do you appeal? There are two roads to travel if you have federal constitutional issues. You can continue the criminal appeal by petitioning for *certiorari* in the U.S. Supreme Court. A *cert* petition must be filed within 90 days, and, unless the case is unusual or highly visible, you generally need to demonstrate a split of authority between the Michigan Supreme Court and other state supreme courts or federal courts of appeal in order to generate the interest of the nation's high court. The other option, for those whose clients are in state custody, is to initiate a *habeas corpus* action in federal district court against the warden who is holding your client.

A Petition for Writ of *Habeas Corpus* (from the Latin: "You have the body") is a civil common-law and statutory procedure that provides collateral review. The "Great Writ" is the "*ad subjiciendum*" form that tests the constitutionality of your client's imprisonment. The writ is "inextricably intertwined with the growth of fundamental rights of personal liberty." *Fay v Noia*, 372 US 400; 83 S Ct 822; 9 L Ed 2d (1963). The historical importance of the writ over centuries is at odds with it's recent contraction through common law, beginning in the 1970s with decisions of the Burger Court and continuing through the present-day Rehnquist Court.[1]

Fourth Amendment claims are no longer cognizable in *habeas corpus*[2] (although it has been held that failure to raise a winning search and seizure issue can still be raised as ineffective assistance of counsel).[3] Stricter rules with respect to contemporaneous objection (procedural default and cause and prejudice exception), retroactivity and exhaustion have been adopted.[4] State court fact-finding has been given greater deference.[5]

Despite these limitations, the Great Writ is available to correct severe malfunctions in state criminal justice systems and to redress errors impugning the integrity of the fact-finding process. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Practitioners must be aware, however, that congressional activity last year may have reduced that availability. Trial and appellate strategy in criminal cases demands a full understanding of the new limitations.

THE ACT: EFFECTIVE DATE, RETROACTIVITY AND NEW TIME LIMITS

On April 24, 1996, the president signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (codified, *inter alia*, at 28 USC 2244 *et seq.*) As can be gleaned from the title, one of the motivating forces behind the AEDPA was the politically popular goal of reducing the time from conviction to execution in death penalty cases, thereby making the death penalty more "effective."

Because *habeas corpus* review is an essential aspect of the appeal process in death penalty cases, Congress sought to achieve its goal by setting new limits on this process. Although Michigan does not employ the death penalty, title I of the AEDPA affects federal *habeas corpus* review of Michigan felony convictions, since most changes wrought by the AEDPA are applicable to nondeath penalty cases as well.

While it has been just over a year since the AEDPA was signed, there have been a substantial number of federal opinions interpreting its various provisions. Unanimity is rare, but there is general agreement that the effective date of the AEDPA is April 24, 1996. *Lyons v Ohio Adult Parole Authority*, 105 F3d 1063 (CA 6, 1997) *rev'd in part*, *Lindh v Murphy*, 521 US ___; 117 S Ct 2059; 138 L Ed 2d 481 (1997) (AEDPA not retroactive on noncapital cases).

With respect to retroactive application, Section 107 of title I of the AEDPA, which sets out special *habeas corpus* procedures in capital cases and will be discussed below, is specifically applicable to pending cases. Litigants have used this language in Section 107 to urge that the general *habeas corpus* reforms throughout the remainder of title I should not apply to pending cases. The Sixth Circuit did not buy this argument in *Lyons*, *supra* at 1067, holding that procedural changes were applicable to pending noncapital cases. However, that ruling was recently reversed by the U.S. Supreme Court in *Lindh v Murphy*.[6] The AEDPA applies only to those noncapital cases filed after its effective date.

Other than the subtle but significant changes in the scope and standard of federal review of state court convictions, which will be discussed below, the most important change is the new statute of limitations. Previously, federal *habeas corpus* petitions could be filed at any time after state review. In fact, exhaustion requirements[7] encouraged delay of some claims until all claims were ready for federal review. The AEDPA demands that petitions be filed within one year of the conclusion of "direct review."[8] Allowance is made for claims prevented through unconstitutional state action or for newly recognized, retroactive constitutional rights. Also, where relevant, the one-year time limit will not begin to run until the factual predicate of a claim could have been discovered through the exercise of due diligence.

"Direct review" is not defined within the statute and will have to be interpreted within the context of a particular state's appellate system. In Michigan it is safe to say that direct review ends with an opinion from the Michigan Supreme Court or an order from that Court denying leave to appeal. Although it would be logical to conclude that a timely *certiorari* request filed in the U.S. Supreme Court would constitute part of "direct review,"[9] and would thus toll the one-year statute of limitations during its pendency, that has not yet been decided.

The language of the AEDPA, Section 2244(d)(1)(A) ("... the limitation period shall run from ... the expiration of time for seeking [direct review] ...") has led some practitioners to conclude that the one-year limitation period does not begin to run until the expiration of time within which *certiorari* could have been sought (90 days after conclusion of Michigan Supreme Court action) even if no *cert* petition is filed. However, until this is firmly established the safe course is to mark time from the date of the final state order or opinion.

The AEDPA specifically provides for tolling of the one-year statute of limitations during the "pendency" of collateral postconviction proceedings. Preparation time, which can be extensive, is not covered. Defense attorneys must be careful that they do not exhaust the limitation period preparing a state postconviction collateral attack.

Criminal appellate defense practitioners must be attentive to problems raised by the new timing requirements. First, efforts should be made to lock-step federal issues in the state courts to avoid conflicts between the statute of limitations and exhaustion requirements. Second, and even more important, efforts should be made to ensure that representation is continued on a timely basis, even if this means petitioning the federal courts for appointment of counsel where appropriate.

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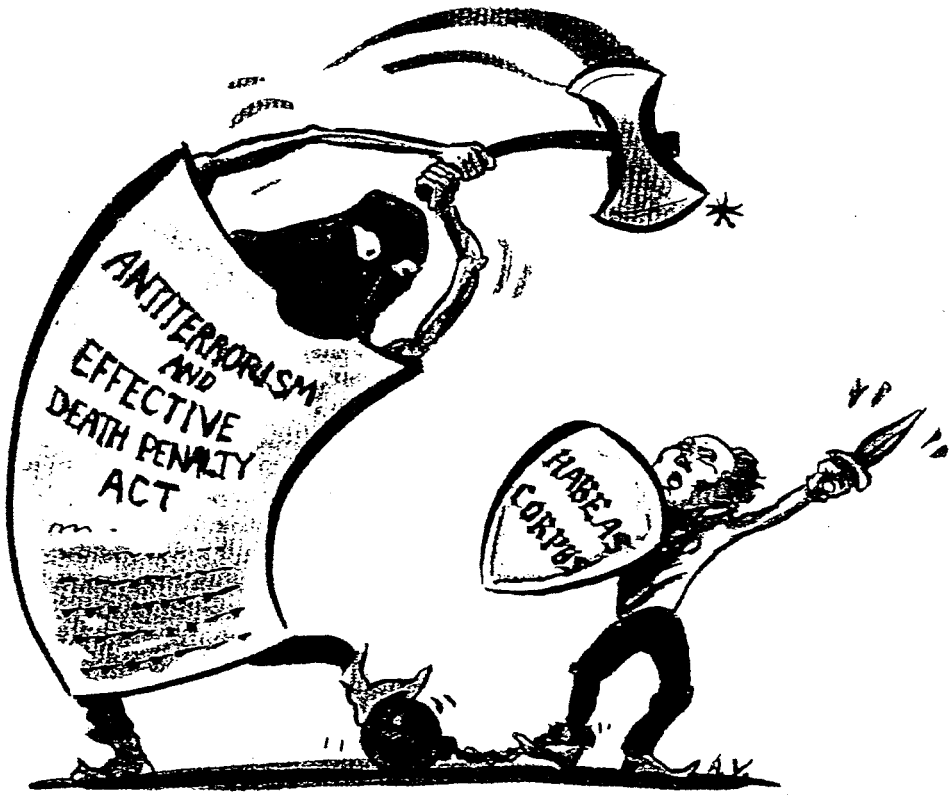
DEATH PENALTY CASES

Although Michigan is not a death penalty state, a brief explanation of death-penalty-specific provisions in Section 107 of title I of the AEDPA is in order. A state that seeks to impose the death penalty can "opt-in" to more stringent timing requirements by establishing, through statutory enactment or court rule, a mechanism whereby competent counsel will be paid reasonable fees to carry forward the necessary litigation. Competency standards must also be provided.

Once a state opts-in, a *habeas corpus* petition must be filed within 180 days of the conclusion of direct review. The federal district court must then decide the petition within 180 days. The court is permitted one 30-day extension for good cause shown. The federal courts of appeal are subject to a series of time limits with respect to action on the case and both the district and circuit courts must give capital cases priority over all other cases.

EXHAUSTION

The rule demanding that a state prisoner exhaust all state remedies before seeking



federal review is modified in two respects. First, the federal courts are now authorized to *deny* a petition on the merits even though the issues have not been exhausted. Second, the federal courts are not permitted to infer state waiver of the exhaustion requirement from lack of response, although the state may still affirmatively waive the requirement. These changes award obvious tactical advantages to the state.

STANDARD OF REVIEW AND DEFERENCE TO STATE COURT FACT-FINDING

Federal *habeas corpus* has always been an extraordinary remedy, not to be used to relitigate state criminal dispositions on a routine basis.[10] State court fact-findings have been given great deference for some time under the U.S. Supreme Court's 1981 decision in *Sumner v Mata*.[11] The AEDPA has tightened these limits.

Under the language of the AEDPA, relief may be granted only if state court adjudication of the issues "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 USC 2254(d)(2). Factual determinations made by state courts continue to be presumed correct and under the Act may now be rebutted only by "clear and convincing evidence." *Id.*, Section 2254 (e)(1).[12] The standard of review for legal determinations and mixed questions of law and fact remains *de novo*. See *Pitsonbarger v Gramley*, 103 F3d 1297 (CA 7, 1996).

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While some practitioners feel that these substantive provisions reflect previous *habeas corpus* practice, it is apparent that the federal appellate courts, while not always in agreement on the precise meaning of the new language, are making frequent use of the Act's terminology in denying petitions for the writ.[13]

Whether the AEDPA shifts the focus of the federal courts to a significant degree remains to be seen. When signing the bill, President Clinton noted his expectation that the courts would construe subsections 2254(d) and (e) to permit independent federal court review of constitutional claims. While the federal judiciary is not likely to surrender its independence, the AEDPA may well affect how federal judges will review cases using the *de novo* standard.[14] Criminal defense practitioners, at trial and on appeal, can safeguard against a more limited federal review by identifying federal claims as early as possible and fully litigating them in the state courts.

The federal courts of appeal are subject to a series of time limits with respect to action on the case and both the district and circuit courts must give capital cases priority over all other cases.

SUCCESSIVE PETITIONS

The AEDPA places severe restrictions on second or successive petitions from the same petitioner. Any claim previously presented must be dismissed. New claims can be raised in a subsequent petition only if they depend on a new rule of constitutional law that the U.S. Supreme Court has made retroactive, or if their factual base could not have been previously discovered through due diligence. A petitioner relying on the second exception must also show that the "facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty...." 28 USC 2244(b).

APPEAL TO THE CIRCUITS

If a petition is denied in federal district court, review may be sought in the federal circuit court. Formerly, a "certificate of probable cause" was needed, and the certificate was initially requested of the district judge who denied the petition. A certificate of probable cause was granted if the petitioner could make a "substantial showing of the denial of [a] federal right."[15] The AEDPA now requires a "certificate of appealability." Language changes in Section 102 of the Act raised a question as to whether district judges still had authority to issue the renamed certificate. The federal appellate courts that have considered the issue have generally held, by rule or decision, that district courts may still issue the certificates.[16] The Sixth Circuit has reached this conclusion through case law, *Lyons v Ohio Adult Parole Authority*, 105 F3d 1063, 1073 (CA 6, 1997) *rev'd on other grds, Lindh v Murphy*, 521 US ___; 117 S Ct 2059; 138 L Ed 2d 481 (1997), and administrative order, *In re Certificates of Appealability*, AO 97-02, issued February 14, 1997. The new certificates must specify which issues are to be reviewed. The Sixth Circuit has noted the AEDPA's use of the language of the previous standard in holding that the criteria for determining whether a certificate should be issued has not been changed. *Lyons, supra* at 1073.

CONCLUSION

Although the AEDPA has not been effective for long, much has been written about it and much of this writing suggests a curtailment of federal review of state court convictions. Criminal defense practitioners should plot strategy with this in mind. ■

Footnotes

1. See, generally, Marshall J. Hartman and Jeanette Nyden, Habeas Corpus *and the New Federalism after the Antiterrorism and Effective Death Penalty Act of 1996*, 30 John Marshall L Rev 337 (1997).
2. *Stone v Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).
3. *Kimmelman v Morrison*, 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 (1986). *Huynh v King*, 95 F3d 1052 (CA 11, 1996). But see *Holman v Page*, 95 F3d 481 (CA 7, 1996).
4. *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977); *Francis v*

Henderson, 425 US 536; 96 S Ct 1708; 48 L Ed 2d 149 (1976); *Engle v Isaac*, 456 US 107; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

5. *Sumner v Mata*, 449 US 539; 101 S Ct 764; 66 L Ed 2d 722 (1981).
6. *Lindh v Murphy*, 521 US ___; 117 S Ct 2059; 138 L Ed 2d 481 (1997) (chapter 153 amendments do not apply to pending non-capital cases).
7. See *Rose v Lundy*, 455 US 509; 102 S Ct 1198; 71 L Ed 2d 379 (1982).
8. For older cases where no petition was currently pending, many federal courts have allowed one year from April 24, 1996, the effective date of the Act. See *Lindh v Murphy*, *supra* at n 6.
9. See *Griffith v Kentucky*, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987).
10. *Barefoot v Estelle*, 463 US 880, 887; 103 S Ct 3383; 77 L Ed 2d 1090 (1983).
11. *Supra* at n 5.
12. 28 USC 2254(e) also limits the ability of state court prisoners to obtain a hearing in federal court for needed factual development. The Act directs that such a hearing can be ordered only when the U.S. Supreme Court has made a new rule of law retroactive or where facts to be developed could not have been discovered previously through due diligence. Even if one of these conditions is met, the Act goes on to require that the facts to be developed establish by clear and convincing evidence that but for the constitutional error no reasonable fact-finder would find the petitioner guilty.
13. Compare *Lindh v Murphy*, 96 F3d 856 (CA 7, 1996) *rev'd in part*, 521 US ___; 117 S Ct 2059; 138 L Ed 2d 481 (1997) with *Drinkard v Johnson*, 97 F3d 751, 769 (CA 5, 1996). See also *Pitsonbarger v Gramley*, 103 F3d 1293 (CA 7, 1996); *Swofford v Detella*, 101 F3d 1218 (CA 7, 1996); *Moore v Johnson*, 101 F3d 1069 (CA 5, 1996) *vacated and remanded* in *Moore v Johnson*, ___ US ___, 117 S Ct 2504; 138 L Ed 2d 1009 (1997) citing *Lindh*, *supra* at n 6; *Berryman v Morton*, 100 F3d 1089 (CA 3, 1996); *Hampton v Page*, 103 F3d 1338 (CA 7, 1997).
14. One commentator has suggested that the federal *habeas corpus de novo* review, which had evolved to be an examination of the federal claim independent of any state court decision or opinion on the matter, may now revert to a more traditional judgment of the validity of the state court determination. Larry W. Yackle, *A Primer on the New* Habeas Corpus *Statute*, 44 Buff L Rev 381 (1996).
15. *Barefoot v Estelle*, *supra* at n 10, 463 US at 893.
16. See *Hunter v United States*, 101 F3d 1565 (CA 11, 1996); *Houchin v Zavaras*, 107 F3d 1465 (CA 10, 1997); *Else v Johnson*, 104 F3d 82 (CA 5, 1997).