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A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus

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A LINE IN THE SAND: THE SUPREME COURT AND THE WRIT OF HABEAS CORPUS*

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Although our panel is technically entitled "Criminal Law," I want to spend my time talking about habeas corpus. While the writ of habeas corpus is a civil remedy, the Supreme Court's current cases tell us a great deal about the Court's view of federalism, and federalism is increasingly becoming a key issue in all areas of American government, including criminal law.[1] The writ of habeas corpus is also inextricably linked to criminal law and the process through which we operate our criminal courts.

For the last two decades, the Great Writ has been under assault by both courts and politicians. Politicians, always anxious to rally votes, have latched onto the public's increasing concern about crime. Taking advantage of that concern, they encourage the public to view the writ of habeas corpus as the enemy — as the tool through which liberal dupes release vast hordes of violent criminals back into the general public. The courts, on the other hand, have focused on concerns of their own; increasingly overwhelmed with habeas petitions, they have begun retrenching the availability of the writ. Last year, Congress and the President jumped on the retrenchment bandwagon with the Antiterrorism and Effective Death Penalty Act of 1996.[2]

Is there an end in sight to this retrenchment process? Or will it continue until all vestiges of the right to habeas have been eviscerated? As I will discuss, I think an end has come to court initiated reform, at least as far as first petitions are concerned. The four habeas opinions handed down by the Supreme Court in the 1995-96 term tell us where the Court has drawn the line in the retrenchment

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1. I find it very interesting that the trend in criminal law is exactly the opposite of the trend in almost every other area. With the election of the Republicans in 1994 and the promulgation of their Contract with America, the watchword (or more accurately, "watch phrase") has become less federal power, and more state power. When it comes to criminal law, however, the idea seems to be the more federal law on the subject, the better.

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2244).

process. As these cases show, the Court will not accept any additional restrictions on first petitions. The Court has taken a more ambiguous position, however, with respect to second and successive petitions. Unfortunately, Congress' entry into the reform arena has gone a great deal farther than the Supreme Court was willing to go. In the hands of the Supreme Court, habeas ceased to be a strong, vital remedy, but it was still a remedy. In the hands of Congress, habeas has probably ceased to exist altogether.

Before turning to the opinions from last term, let me give you a brief history of the writ. Although the writ of habeas corpus has existed since the inception of this country, it was originally available only to prisoners of the federal government.[3] Over the last one hundred years, however, the availability of the Great Writ has vastly expanded. The first step in this expansion occurred after the Civil War, when Congress expanded the availability of the writ to include prisoners of state governments.[4] The next key steps occurred in the first half of this century, when most of the provisions in the Bill of Rights were extended to the states through the Fourteenth Amendment.[5] These steps allowed the number of habeas petitions to expand exponentially.[6] Not only could state prisoners now petition for the writ, the grounds available to them had greatly increased.

Approximately two decades ago, the Supreme Court started a pattern of retrenching the availability of habeas writs, particularly through creating very technical procedures for the petitions.[7] Over the last few years, however, we have seen the Supreme Court drawing a line and saying, in effect, "This is far enough. We have retrenched it as far as we are going to, and we think we have reached the appropriate balance."[8] This trend continued in the 1995-96 term.

THOMPSON V. KEOHANE

Taking the cases in the order the Supreme Court decided them, the first habeas decision last term was *Thompson v. Keohane*,[9] which the Court decided in November 1995. The case began with the discovery of a woman's murdered body. The body turned out to be that of Thompson's wife, and suspicion promptly focused on him. Alaskan state troopers asked Thompson to come to the station on the pretext of identifying his wife's belongings.[10] The troopers used the opportunity to question him, and during the questioning, Thompson

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3. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 785 (2d ed. 1994) (construing Reconstruction Act of Feb. 5, 1867, Ch. 28, 14 Stat. 385 (codified as 28 U.S.C. §§ 2241-2255)).

4. *See id.* at 786 (construing Reconstruction Act of Feb. 5, 1867, Ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241-2255)).

5. *See id.* at 787.

6. *See id.* at 787-88.

7. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Stone v. Powell, 428 U.S. 465 (1976).

8. *See, e.g.*, Schlup v. Delo, 115 S. Ct. 851 (1995); McFarland v. Scott, 114 S. Ct. 2568 (1994).

9. 116 S. Ct. 457 (1995).

10. *See id.* at 460-61.

confessed to the murder. His confession was used against him at trial.[11] In his habeas proceeding, Thompson argued that his confession should not have been admitted at trial because the state troopers did not read him his *Miranda* rights prior to the interrogation.[12] Resolution of this argument rested on whether Thompson was "in custody" at the time of his confession; *Miranda* warnings are required only when a suspect is interrogated while in police custody.[13]

As required by the exhaustion rules,[14] Thompson had raised this issue during his state proceedings, and the Alaskan courts ruled that he was not "in custody" for purposes of *Miranda*.[15] Once Thompson initiated his habeas proceedings, the federal courts faced the issue of whether the decision of the Alaskan courts was entitled to deference.[16] All nine justices on the Supreme Court agreed that the issue of whether a suspect is "in custody" is a mixed question of law and fact.[17] Seven justices agreed that "in custody" determinations qualify for independent review and that no presumption of correctness should be given to the state decision on this issue.[18]

Justice Ginsburg wrote the opinion for the Court and spoke for all seven justices in the majority.[19] The opinion promulgates a two-part test for determining whether a state court decision should be given a presumption of correctness. According to the opinion, the first question a court should ask is whether the issue is a basic primary or historical fact, as these are the types of issues "to which the statutory presumption of correctness dominantly relates."[20] In other words, in the context of this case, things such as where the suspect was questioned, how long he was questioned, the conditions of the questioning, whether he was arrested, etc.—all those sorts of questions are ones of basic primary fact. The federal courts must give a presumption of correctness to state court findings on these types of issues.[21]

Answering "no, this issue was not a basic primary or historical fact," does not, however, end the inquiry. One more question must be asked: "Does the resolution of the issue depend heavily on the trial court's appraisal of witness credibility and demeanor?"[22] In other words, if this is the type of determination for which an appellate court would give great deference to a trial judge because the trial judge was essentially a witness to the event, then it also deserves a presumption of correctness in a habeas proceeding.[23] Examples of

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11. *See id.* at 461-62.
12. *See id.* at 462.
13. *See id.* at 462-63 (quoting Miranda v. Arizona, 384 U.S. 436 (1966)).
14. Absent unusual circumstances, the only issues cognizable in habeas are ones which were properly presented to all appropriate levels of the state court.
15. *See Thompson*, 116 S. Ct. at 461-62.
16. *See id.* at 460.
17. *See id.* at 460, 467-68.
18. *See id.* at 460.
19. *See id.* Justice Ginsburg's opinion was joined by Justices Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer.
20. *See id.* at 464.
21. *See id.*
22. *See id.* at 465.
23. *See id.* at 464-65.

issues that qualify under this provision are the defendant's competency to stand trial and challenges to juror impartiality.[24] The decision emphasizes that these are matters that actually occurred in the courtroom, and thus the trial judge had knowledge of them that could not be reproduced on the record.[25] There is no way, then, that a federal court could be in an equal or better position to decide the issue than the state court. Since the "in custody" determination in *Thompson* revolved around matters that occurred at the police station, and the trial judge's only knowledge was the witnesses' testimony, which was reproduced in the record,[26] the state court determination that Thompson was not "in custody" at the time of his confession did not deserve a presumption of correctness.[27] The federal courts are thus entitled to review this issue de novo.[28]

Justice Thomas wrote the dissenting opinion, which was joined by Chief Justice Rehnquist.[29] As I mentioned earlier, the dissenters agreed that the "in custody" question was a mixed question of law and fact.[30] They disagreed, however, as to the appropriate test for determining whether a mixed question deserves a presumption of correctness.[31] According to the dissenters, what we need to look at is whether "as a matter of the sound administration of justice" the state court judge is in a better position to decide the issue.[32] In this case (and the reasoning will probably apply to almost every mixed question of law and fact), Thomas said that the state court was in a better position, so its determination should have been given a presumption of correctness.[33]

As I alluded to earlier, the theme of my talk is that the Supreme Court's recent habeas cases are drawing a line—the Court is saying it will retrench this far and no farther. *Thompson* is a significant case in establishing this theme. We have seven justices who declared that questions of law are reserved for federal judges in habeas proceedings. While that in and of itself is not a surprise, what was encouraging to see was the majority's position on mixed questions. When it comes to these types of determinations, federal courts will presume that the state court's resolution of the basic, primary factual issues are correct. When it comes to the ultimate legal questions of whether these facts amount to "in cus-

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24. *See id.* at 464.
25. *See id.* at 465.
26. *See id.* at 465.
27. *See id.* at 465-66.
28. *See id.* at 466-67.
29. *See id.* at 467 (Thomas, J., dissenting).
30. *See id.* at 467-68.
31. *See id.*
32. *See id.* at 468.
33. *See id.* at 468. "The state trial judge is, in my estimation, the best-positioned judicial actor to decide the relatively straightforward and fact-laden question of *Miranda* custody. . . . In making the custody determination, the state trial judge must consider a complex of diverse and case-specific factors in an effort to gain an overall sense of the defendant's situation at the time of the interrogation. . . . Assessments of credibility and demeanor are crucial to the ultimate determination, for the trial judge will often have to weigh conflicting accounts of what transpired. The trial judge is also likely to draw inferences, which are similarly entitled to deference, from 'physical or documentary evidence or . . . other facts.' . . . The Miranda custody inquiry is thus often a matter of 'shades and degrees' . . . that requires the state trial judge to make any number of 'fact-intensive, close calls'". *Id.*

tody," however, the federal courts will review the issue de novo. In other words, the federal courts are keeping a meaningful role for themselves in determining whether a writ of habeas should be issued; they will not cede too much of the key decision-making authority to the state courts.

LONCHAR V. THOMAS

The Supreme Court's next habeas decision, *Lonchar v. Thomas*,[34] was decided in April 1996. *Lonchar*, like *Thompson*, is a somewhat promising decision from the Court.[35] In *Lonchar*, we have a situation where Mr. Lonchar did not file a habeas petition until very, very shortly before his scheduled execution.[36] Several other petitions had been filed on his behalf by his brother and sister, but those had eventually been dismissed.[37] This was *his* first federal habeas petition.[38]

The state filed a response with the district court essentially saying, "look, this is unreasonable delay. This was an eleventh hour petition. District Judge, you should not stay this execution and you should dismiss this petition based on 'Lonchar's inequitable conduct' in waiting almost six years, and until the last minute, to file a federal habeas petition."[39] The district judge refused to dismiss the petition, holding that it did not meet the standard for dismissal set out in Rule 9.[40] For those of you who do not practice in this area, a special set of rules supplements the Federal Rules of Civil Procedure for habeas cases. These rules are called, cleverly enough, the Rules Governing Section 2254 Cases in the United States District Courts. Rule 9(a) of the habeas rules addresses late petitions and sets out a standard for dismissing delayed petitions.[41] The district court held that Lonchar's petition did not meet these standards and refused to consider any other standard.[42]

The state appealed the stay to the circuit court, which reversed the district court.[43] According to the Eleventh Circuit, the district court erred in focusing solely on Rule 9(a).[44] The appellate court ruled that the lower court should

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34. 116 S. Ct. 1293 (1996).

35. I say "promising" because I am of the school that believes that habeas is a very important remedy and that it is crucial for it to continue to fill that role.

36. *See Lonchar*, 116 S. Ct. at 1296.

37. *See id.* at 1295-96.

38. *See id.* at 1296.

39. *See id.* at 1296.

40. *See id.* (citing R. GOVERNING § 2254 CASES IN U.S. D. CT. 9).

41. "Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." R. GOVERNING § 2254 CASES IN U.S. D. CT. 9(a).

42. *See Lonchar*, 116 S. Ct. at 1296.

43. *See id.*

44. *See id.*

have considered equitable reasons outside of Rule 9, and remanded with directions that the district court dismiss both the stay and the petition.[45]

Lonchar then appealed to the Supreme Court. The issue before the Court was whether a federal court could dismiss a first federal habeas petition for "serious delay" based on equitable considerations not embodied in statutes, rules, or prior precedents.[46] I have chosen to refer to *Lonchar* as a five-four decision. If you look just at the judgment, however, the Court unanimously agreed to vacate the Eleventh Circuit's decision and remand for further proceedings. When you look at why the justices vacated the opinion and what they wanted to happen on remand, however, the justices split five to four.

The five justices in the majority[47] held that federal courts cannot properly dismiss a first habeas petition for special reasons that are not embodied within the framework of the existing rules.[48] What does this mean in plain English? Basically, the Court held that a test existed for dismissing late habeas petitions. And since a test already existed, federal courts can't run around making up alternative tests or using ad hoc reasons instead of applying the Rule 9 test.

Although Justice Breyer's opinion for the Court is sort of a mish-mash, it essentially offers two reasons to support its conclusion. First up is the ever pervasive legal history argument. According to the opinion, history reflects the fact that very specific traditions have developed to govern when habeas petitions should be granted and when they should be denied.[49] According to these traditions, habeas petitions should be dismissed only on the basis of formal rules — that is, rules embodied in cases, statutes, or in the federal rules.[50] According to the majority, courts have not and should not dismiss habeas petitions for any special ad hoc reasons.[51] In other words, the opinion does not dispute that the writ of habeas corpus is an equitable remedy, but an equitable remedy does not mean a remedy without standards.[52]

Secondly, and building on the historical argument, the opinion noted that judicial opinions, federal statutes, and the federal habeas rules all establish standards for a court to use in deciding whether to grant a habeas petition.[53] These rules give judges a great deal of discretion, and judges can exercise their discretion within the boundaries of the rules. They may not, however, go outside the boundaries of the rules.[54] The opinion emphasizes that this is especially true when an existing rule addresses the exact issue before the court.[55]

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45. *See id.*
46. *See id.*
47. *See id.* at 1295. The majority consisted of Justices Breyer writing for himself and Justices Stevens, O'Connor, Souter, and Ginsburg.
48. *See id.* at 1298.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.* at 1298-99.
53. *See id.* at 1298.
54. *See id.* at 1298-99.
55. *See id.* at 1299-1300.

In the present case, the issue was whether Lonchar's petition should be dismissed for unreasonable delay.[56] Rule 9(a) explicitly discusses this issue and provides guidelines for courts faced with this question.[57] If you look at the notes after that rule, said Justice Breyer, you see that many equitable conditions and considerations were thought of and taken into account by the drafters of the habeas rules when they formulated the guidelines in Rule 9(a).[58] Therefore, it would be improper for a federal court to ignore those guidelines and go outside the boundaries they establish.[59]

The concurring opinion was written by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, and Thomas.[60] These four agreed with the majority that Rule 9(a) provides the only grounds for dismissing the petition.[61] They further agreed that one of the reasons the case should be remanded was the Eleventh Circuit's failure to properly consider this rule.[62] The main difference between the concurring justices and the majority centers around something the majority dismissed as a basic preliminary issue.[63] Remember the procedural posture of this case — the decision being appealed was the circuit court's holding that the district court erred in granting the stay of execution.[64] The lower court had not issued a decision on the merits of the petition.[65] The question before the Court was what standards it should use in reviewing that stay.[66]

The majority thought the appropriate standard for review, and the correct procedure for making its decision, would be to see whether the petition had merit.[67] If so, then the stay was appropriate because the federal courts should not allow an execution to moot a potentially meritorious petition.[68] On this basis, the majority dove right into the issue of whether Lonchar's petition was properly dismissed as a delayed petition.[69]

The concurrence disagreed with this approach. Instead, the concurrers wanted to give judges more leeway in deciding whether or not to stay an execution.[70] According to the four concurring justices, it is very appropriate for

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56. *See id.* at 1300.
57. *See id.*
58. *See id.*
59. *See id.* at 1301.
60. *See id.* at 1304 (Rehnquist, C.J., concurring).
61. *See id.* at 1307.
62. *See id.* The court of appeals had instead focused its decision, and based its conclusion that the petition should be dismissed, on Rule 9(b), which deals with abuse of the writ. *See id.* (Rehnquist, C.J., concurring). The appellate court concluded that Lonchar had abused the writ, largely on the basis of the prior habeas petition that had been filed on his behalf by his brother and sister. *See Lonchar v. Thomas*, 58 F.3d 590, 592-93 (11th Cir. 1995). The concurring justices agreed that this was the wrong basis; it was improper to hold Lonchar responsible for what other people did on his behalf; the court should have looked only at whether Lonchar personally had previously filed a habeas petition. *See Lonchar*, 116 S. Ct. at 1307 (Rehnquist, C.J., concurring).
63. *See id.* at 1296.
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.* at 1296-97.
68. *See id.* at 1297.
69. *See id.* at 1298.
70. *See id.* at 1304-05 (Rehnquist, C.J., concurring).

federal judges to consider not just the merits of a petition in deciding whether or not to issue a stay, but to also consider the eleventh hour nature of a petition.[71] This is a very ominous sounding declaration, as it would seems to say that a state can execute a person before a first federal habeas petition is ever adjudicated.

The significance of *Lonchar* lies in the fact that five justices extensively discussed the importance of a first federal habeas petition, in both dicta as well as in the actual holding. Again, this advances my theme that we are seeing the Supreme Court drawing a line as if to say "this far and no farther." Over the last decade, the Supreme Court has erected many procedural roadblocks for habeas petitioners, especially for those filing second or successive petitions. The Court in *Lonchar* is sending a clear message that the first habeas petition is very important, despite existing restrictions. In other words, the Court thinks it is very important that all state prisoners who desire to file a federal habeas corpus petition get a meaningful first opportunity to do so. After that, however, all bets are off.

Let me tie this together by looking at *McFarland v. Scott*,[72] a decision from the 1993-94 term. *McFarland* grew out of a strange situation set up by the federal courts in Texas. Generally, a petitioner is required to first file a petition before he is eligible for appointment of counsel. Accordingly, petitioners often file a pro forma petition, get an attorney appointed for them, and the attorney then files an amended petition. A creative federal judge in Texas upset this apple cart by dismissing a pro forma petition on the merits, and then dismissing a later, substantive petition as an abuse of the writ.[73] This left petitioners in Texas reluctant to file a pro forma petition.[74] Accordingly, one petitioner first filed a motion for appointment of counsel, so that the initial petition could be drafted and filed by an attorney.[75] The Supreme Court said that this was a permissible procedure; an actual petition did not have to be filed before appointment of counsel.[76]

McFarland demonstrates how important that first federal habeas petition is to the Supreme Court.[77] The Court has put many limitations on habeas petitions, such as exhaustion and procedural default, but an entire set of even more stringent restrictions apply to second and successive petitions. In *McFarland*, the Court stated that it would not allow a lower federal court to gut the substance and significance of the first petition by creating additional hurdles for first petitions.[78] In other words, the Court refused to let a lower court render a

71. *See id.* at 1305-06.
72. 114 S. Ct. 2568 (1994).
73. *See id.* at 2570 n.1.
74. *See id.* at 2570-71 n.1.
75. *See id.* at 2570.
76. *See id.* at 2574.
77. *See id.* at 2572.
78. *See id.*

petitioner's first shot at federal habeas meaningless by not allowing a pro forma petition to be replaced by a substantive petition.

Lonchar continues this theme. Remember, the Eleventh Circuit wanted to add further restrictions to first petitions by allowing, even mandating, that the district court dismiss a first petition based on a standard other than the one articulated by the federal rules.[79] The Supreme Court refused to allow these extra restrictions, holding that the district court correctly thought itself bound by the standards established in the existing rules.[80] In other words, the Court will not accept further restrictions on a first petition.

GRAY V. NETHERLAND

The Supreme Court's third habeas decision last term was *Gray v. Netherland*,[81] which was a very, very standard habeas case. Gray was tried and convicted of capital murder, and the jury sentenced him to death.[82] One of the primary pieces of evidence against Gray was provided by his partner in crime who agreed to cooperate with the government and testified at trial that Gray actually pulled the trigger and committed the murder.[83]

At the beginning of the trial, the prosecutor provided the defense with notice of the evidence it intended to present during the penalty phase, should the jury convict during the guilt phase of the trial.[84] One of the issues during the penalty phase would be whether Gray presented a risk of future dangerousness.[85] To prove that he did, the prosecution planned to introduce some particular types of evidence tending to show that Gray had committed other crimes.[86] After the guilt phase and just before the start of the penalty stage, however, the prosecution effectively said, "Oh, and here are a bunch of other different kinds of evidence we are also going to introduce to show that you committed these prior horrible murders."[87] The defense attorney indicated that he was not prepared to rebut this additional evidence; he had prepared only for the evidence disclosed at the start of trial.[88] The trial judge declared that the penalty phase would proceed, and the defense attorney acquiesced without making a formal motion for a continuance.[89] Gray was sentenced to death.[90] In his habeas petition, he raised the issue of lack of notice and argued that the

79. *See* Lonchar v. Thomas, 116 S. Ct. 1293, 1295 (1996).
80. *See id.* at 1303.
81. 116 S. Ct. 2074 (1996).
82. *See id.* at 2078-79.
83. *See id.* at 2078.
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.* at 2079.

sentencing phase should not have proceeded without an opportunity for his attorney to properly prepare.[91]

As in *Lonchar*,[92] we have a five-four decision.[93] The voting blocks were the same with the exception of Justice O'Connor.[94] Just as she has in numerous other cases, she proved to be the swing vote here. The *Gray* majority opinion was written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas.[95] The majority separated Gray's allegations into three issues:

1) Did the State violate *Brady*[96] by failing to disclose exculpatory evidence?[97]
2) Did the State violate Gray's Due Process rights by failing to provide him adequate notice of the types of evidence it intended to introduce at the sentencing phase?[98] and,
3) Did the State violate Gray's Due Process rights by misleading him about the evidence it intended to present at the sentencing phase?[99]

It then performed a standard habeas analysis, and concluded that

1) the *Brady* claims were not exhausted, and were thus procedurally defaulted;[100]
2) the notice of evidence claim would require a new rule and, therefore, was not cognizable in habeas;[101] and
3) it was not clear whether the misrepresentation issue was properly exhausted, so that issue was remanded to the lower courts for further proceedings.[102]

The dissent here is the important part. Justice Ginsburg wrote the primary dissent and was joined by Justices Stevens, Souter, and Breyer.[103] The theme of Justice Ginsburg's opinion is that the right to a full and fair opportunity to defend against the State's charges is one of the critical elements of due process in a criminal proceeding.[104] According to the dissenters, Gray was not accord-

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91. *See id.*
92. Lonchar v. Thomas, 116 S. Ct. 1293 (1996).
93. *See Gray*, 116 S. Ct. at 2074.
94. *See id.* at 2077.
95. *See id.*
96. Brady v. Maryland, 373 U.S. 83 (1963) (establishing that prosecutor must disclose material exculpatory evidence to defense).
97. *See Gray*, 116 S. Ct. at 2080.
98. *See id.* at 2081.
99. *See id.*
100. *See id.* at 2080-81.
101. *See id.* at 2084-85.
102. *See id.* at 2082-83.
103. *See id.* at 2085. Justice Stevens also wrote a brief separate dissent to emphasize an extra point. As he indicates, the evidence used against Gray in his sentencing phase was apparently not sufficient to support separate charges against Gray, as none were filed. *See id.* Indeed, the record developed in the habeas proceeding seems to indicate that the police had another suspect in the prior murders. Justice Stevens' separate dissent emphasizes his concern with the poor quality of evidence that was a key item in obtaining the death penalty against Gray. *See id.*
104. *See id.* at 2085, 2090.

ed that fundamental right at his penalty phase.[105] As the dissent notes, this is not a new rule.[106]

As I indicated earlier, the significance of *Lonchar* lies in Justice O'Connor's vote. In both *Gray* and *Lonchar*, we had five-four decision, with the voting blocks identical except for Justice O'Connor.[107] In *Lonchar*, Justice O'Connor provided the crucial fifth vote necessary to create a majority opinion that reiterated the importance of a first habeas petition. In *Gray*, she also provided the fifth vote to create a majority opinion that preserved the status quo as to first petitions. *Gray* demonstrates the willingness of the Court to sustain the existing procedural scheme in habeas. It also shows the willingness of the Court (and here I am showing my bias) to continue the cold, nit-picking, hyper-technical, divorced-from-reality trend of analysis within that procedural scheme. The dissenters were exactly correct when they accused the majority of adopting a divide and conquer scheme to dispose of Gray's claims.[108] *Gray* shows that while first petitions are important, the Court is very comfortable holding that to obtain a writ of habeas corpus, a petitioner must meet some very high procedural standards. In other words, *Gray* shows that the Court is not willing to lower those standards, but on the other hand, *Thompson*[109] and *Lonchar*[110] demonstrate that the Court will not raise them, either.

FELKER V. TURPIN

The last decision I want to discuss today is *Felker v. Turpin*.[111] As I am sure many of you are aware, last year President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996.[112] Title I of this statute changes habeas procedures in several ways.[113] The Supreme Court agreed near the end of the term to hear an expedited appeal contesting the constitutionality of a portion of this new statute.[114]

The facts of *Felker* are irrelevant because the Court focused on three procedural issues and decided not to hear the merits of the petition. Before we delve into those issues, however, let me give you a brief bit of background about the relevant statutory provisions. As I mentioned earlier, the Supreme Court has developed some extremely stringent regulations to govern second and successive habeas petitions. The new statute builds on these and establishes

105. *See id.* at 2085, 2091-92 (Ginsburg, J., dissenting).
106. *See id.* at 2091.
107. *See* Lonchar v. Thomas, 116 S. Ct. 1293, 1304 (1996); *Gray*, 116 S. Ct. at 2074.
108. *See Gray*, 116 S. Ct. at 2090 (Ginsburg, J., dissenting).
109. *See* Thompson v. Keohane, 116 S. Ct. 457 (1995).
110. *See Lonchar*, 116 S. Ct. at 1293.
111. 116 S. Ct. 2333 (1996).
112. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2244).
113. *See id.* § 101.
114. *See* Felker v. Turpin, 116 S. Ct. 1588 (1996). Four justices dissented from the Court's decision to hear the case in an expedited manner. The actual opinion, however, was unanimous.

some new requirements. One of the key provisions of the statute is the new gatekeeping mechanism it creates to control second and successive petitions.[115] Previously, screening for abuse of the writ was left to the district courts in the first instance.[116] Under the new statute, however, if a person wishes to file a second or successive petition, he or she must first file a motion with the Court of Appeals seeking permission to file the actual petition.[117] The initial screening of second and successive petitions has now been given to a three judge panel in the relevant court of appeals.[118] The panel's decision to grant or deny permission to file the petition is not appealable.[119]

The first issue in *Felker* was whether the statutory provision barring the Supreme Court from reviewing these grants or denials unconstitutionally decreased the jurisdiction of the Supreme Court.[120] The Supreme Court found that it did not, as the Court retained its powers under original jurisdiction to hear petitions, and second petitions can be filed first in the Supreme Court.[121]

The petition at issue in *Felker* was a second petition, which raised the issue of what standards the Supreme Court should use when reviewing the merits of the petition. In addition to the gatekeeping mechanism, the new statute also contains standards to be applied by a court considering a second petition.[122] The gatekeeping mechanism did not restrict the Supreme Court, but is the Court bound to use these standards in reviewing Felker's petition? The Court basically ducked this issue, declaring that even if the new provisions do not control, they certainly provide the Court with guidance to use in considering second petitions.[123]

The final major issue in *Felker* was whether the new statute unconstitutionally suspends the writ of habeas corpus. The Constitution provides that the government may not suspend the writ of habeas corpus, absent certain extraordinary circumstances.[124] The Court upheld this portion of the statute, declaring that the primary restrictions in the statute apply only to second and successive petitions, and the restrictions that do apply to first petitions are not much more severe than those already created by the Court.[125] Accordingly, the statute does not unconstitutionally suspend the writ of habeas.[126]

It is still early to predict the significance of *Felker*. The Antiterrorism and Effective Death Penalty Act of 1996 contains many far reaching provisions,

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115. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 106.

116. Under existing case law and Rule 9 of the habeas rules. *See* discussion of *Lonchar, supra* text accompanying notes 30-65.

117. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 106(b).

118. *See id.*

119. *See id.*

120. *See* Felker v. Turpin, 116 S. Ct. 2333, 2338 (1996).

121. *See id.* at 2338-39.

122. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 106.

123. *See Felker* 116 S. Ct. at 2339.

124. *See* U.S. CONST. art. I, § 9, cl. 2 ("The 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.").

125. *See Felker*, 116 S. Ct. at 2339-40.

126. *See id.*

primarily in the form of procedural revisions. *Felker* was our first look by the Supreme Court at this new, controversial statute. It is surely not, however, the last. I unfortunately do not have time to go through the provisions of the new statute, but it is going to be very interesting to see what the courts do with it. My thumbnail prediction at this point is rather dire; since Congress decided to extend the writ to state prisoners, the courts will let Congress place as many restrictions as it wants on the remedy. I hope I am wrong, as the procedural restrictions in the new statute probably sound the death knell for habeas.

CONCLUSION

To briefly summarize, the Supreme Court's four habeas cases from the 1995-96 term tell us a great deal about the direction of court-imposed habeas reforms. Over the last few terms, the Supreme Court has slowed the pace of procedural reforms, at least when it comes to first petitions. While the Court created a number of very high procedural hurdles for first petitions, it did not render habeas a non-entity. Under the Court's reform regime, it is still possible to succeed on a first petition for a writ of habeas, although it is almost impossible to succeed on a second or successive petition. Unfortunately, Congress chose last year to enter into the "reform" arena and enact its own set of procedural changes. In all likelihood, the congressional reforms embodied in the Antiterrorism and Effective Death Penalty Act spell the end of habeas. In other words, Congress has done what the Court refused to do—render habeas a non-entity.