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I. INTRODUCTION

The new Roberts Court has shown a willingness to allow defendants facing a death sentence and even those already sentenced to death to prove their innocence. In one case, a capital defendant sought to introduce evidence that another person committed the rape, robbery, and murder that he was alleged to have committed.[1] A state rule prohibited him from doing so because his evidence barely raised a suspicion or inference that another committed the crime.[2] A unanimous Supreme Court held that the rule did not provide the defendant "a meaningful opportunity to present a complete defense."[3] In another case, a defendant who had already been convicted and sentenced to death offered evidence for the first time during his federal habeas proceeding that he was not responsible for the rape and murder and that another individual was.[4]

Because of concerns about comity, federalism, and finality, federal courts are normally precluded from considering any evidence or any claim not presented first to the state courts.[5] A divided Supreme Court, however, held that the federal courts could consider the evidence which exonerated him and implicated a third party and his other constitutional claims. Otherwise, a miscarriage of justice would result because no reasonable juror would have voted to convict the defendant if it had been presented with

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1. *Holmes v. S. C.*, 126 S. Ct. 1727, 1730–31 (2006).
2. *Id.* at 1731 (quoting *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941)).
3. *Id.* at 1735 (quoting *Crane v. Ky.*, 476 U.S. 683, 690 (1986)).
4. *House v. Bell*, 126 S. Ct. 2064, 2080–86 (2006).
5. *E.g. Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. . . . We have also spoken of comity and federalism." (citations omitted)); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992) ("The writ strikes at finality of a state criminal conviction, a matter of particular importance in a federal system."); *McClesky v. Zant*, 499 U.S. 467, 491 (1991) ("Finality has special importance in the context of a federal attack on a state conviction. . . . Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them."); *Teague v. Lane*, 489 U.S. 288, 308 (1989) ("'[T]he court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' . . . Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review.") (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986) (plurality)).

the totality of the evidence.[6] Even if the trend of allowing inmates facing execution more leeway to prove their innocence continues, these inmates will continue to face major obstacles. This article examines two of the biggest obstacles that they face: the continuing problem of poor representation and the Antiterrorism and Effective Death Penalty Act, using the case of Johnny Ray Conner as an illustration. This article proposes some much needed reforms to ensure that inmates with valid claims of innocence can be heard.

II. THE GROWING PROBLEM OF INNOCENCE IN CAPITAL CASES

The Court's willingness to permit defendants facing execution to prove their innocence is an acknowledgement that the system is fallible. Nothing proves the system's fallibility more that the significant number of individuals convicted and sentenced to death only to be later exonerated. According to the Death Penalty Information Center, since 1973, approximately 123 individuals in 25 states have been released from death row because evidence of their innocence materialized after they were convicted and sentenced to death.[7] Most of these inmates spent a significant amount of time on death row and several came extremely close to being executed. In fact, it would defy logic to believe that an innocent person has not already been executed.[8]

The Houston Chronicle recently published one of the most convincing accounts to date of the possible execution of an innocent person.[9] After two construction workers were robbed and shot, one fatally, seventeen-year-old Ruben Cantu was charged with the murder along with a fifteen-year-old co-defendant.[10] "No physical evidence—not even a fingerprint or a bullet—tied Cantu to the crime."[11] He was convicted and sentenced to death based solely on the eyewitness testimony of the surviving victim.[12] This individual, an illegal immigrant at the time of the shooting who had been in the U.S. less than a year, identified Cantu only after police officers showed him Cantu's photograph on three separate occasions.[13] Days after he was convicted and sentenced to death, Cantu wrote a letter to the residents of San Antonio declaring, "My name is Ruben M. Cantu and I am only 18 years old. I got to the 9th grade and I have been framed in a capital murder case."[14] He was likely telling the truth.

The Chronicle discovered that the eyewitness recanted, saying that he felt

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6. *House*, 126 S.Ct. at 2086.

7. Death Penalty Information Center, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (accessed Oct. 8, 2006).

8. For instance, former U.S. Supreme Court Justice Sandra Day O'Connor has stated, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." Editorial, *Justice O'Conner on Executions*, N.Y. Times A16 (July 5, 2001) (available at http://www.deathpenaltyinfo.org/article.php?scid=17&did=392) (last accessed Dec. 30, 2006).

9. Lise Olsen, *Did Texas Execute an Innocent Man?* http://www.chron.com/disp/story.mpl/front/3472872.html (Nov. 20, 2005).

10 *Id.*

11. *Id.* at "No Physical Evidence."

12. *Id.* at "Emotional Testimony."

13. *Id.* at "Another Visit."

14. Olsen, *supra* n. 9.

pressured by the police to identify Cantu.[15] In addition, the fifteen-year-old co-defendant stated under oath that Cantu was not with him on the night of the shooting and was not otherwise involved in the crime.[16] As is typical of capital cases, his attorneys did not conduct a complete investigation. According to the Houston Chronicle, witnesses who could have possibly provided an alibi for Cantu on the night in question were never interviewed and Cantu's habeas counsel never interviewed the only eyewitness to the crime.[17]

A responsible prosecutor would have responded to the Cantu story by conducting an independent investigation into why the police would aggressively pressure an illegal immigrant to make an identification, why a district attorney would bring capital murder charges and seek to execute a defendant based on the testimony of one eyewitness, why neither the police nor anyone else interviewed possible alibi witnesses, and why there was a complete breakdown in the criminal justice system in her county. In fact, a responsible prosecutor would seek reforms to ensure that an innocent person is never again executed. The district attorney in question did neither of these things. Instead, she announced that her office would begin an investigation into whether the *eyewitness*, who barely survived the shooting, should be charged with felony murder![18]

The growing number of exonerations and cases like Cantu's[19] has made the public much more skeptical about capital punishment. While a majority of Americans continue to support capital punishment, the number has declined in recent years.[20] Furthermore, when given the option of life without parole, polls continue to show that a majority of Americans prefers that option.[21] Each year, juries are sentencing fewer defendants to death.[22] Furthermore, a number of reforms designed to ensure that innocent persons are not convicted and sentenced to death have been implemented. For instance, defendants have been granted greater access to physical evidence in order to conduct DNA testing, even after they have been convicted,[23] and North Carolina recently enacted legislation establishing an Innocence Inquiry Commission that would have the jurisdiction to investigate claims of innocence.[24] While the public's skepticism is healthy and the reforms that have been enacted are laudable, innocent persons will likely be convicted and sentenced to death because they continue to receive substandard representation.

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15. *Id.* at "Was He Pressured."

16. Olsen, *supra* n. 9.

17. *Id.* at "No Physical Evidence."

18. Rick Casey, *'Murder by Perjury' in Cantu Case?* Houston Chronicle B1 (Dec. 4, 2005).

19. Strong evidence has surfaced that another innocent individual was executed. Kate Zernike, *In a 1980 Killing, A New Look at the Death Penalty*, N.Y. Times A15 (July 19, 2005) (discussing efforts to exonerate the late Larry Griffin).

20. The Gallup poll found that 65% of the American public supported capital punishment, down from 80% support in 1994. Joseph Carroll, *Gallup Poll: Who Supports the Death Penalty?* http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266 (accessed Oct. 8, 2006).

21. *Id.*

22. Liz Halloran, *Pulling Back From The Brink: Why Are Death Sentences and Executions Dropping?* U.S. News & World Rpt. 36 (May 8, 2006).

23. *E.g.* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (mandating postconviction DNA testing in order to receive federal funds for DNA labs).

24. N.C. Gen. Stat. Ann. § 15A-1462 (West 2006); Patrik Jonsson, *North Carolina Creates a New Route to Exoneration*, Christian Science Monitor 1 (Aug. 10, 2006).

III. CONTINUED OBSTACLES

A. Lack of Competent Representation

Only a very small minority of those who commit murder are sentenced to death. Justice White wrote in 1972 that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[25] It is, however, possible to explain the few cases in which death sentences are meted out. Almost invariably, the defendant who is sentenced to death was poorly represented. The quality of defense counsel is the most important factor in determining which defendants end up on death row. As Justice Ginsburg has observed, "[p]eople who are well represented at trial do not get the death penalty."[26] Effective lawyers not only prevent defendants from receiving death sentences but also protect innocent persons from being convicted. Attorney General Janet Reno stated,

> A competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor's case, both to test the basis for the prosecution and to challenge the prosecutor's ability to meet the standard of proof beyond a reasonable doubt. A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence. . . . A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted. . . . In the end, a good lawyer is the best defense against wrongful conviction.[27]

Representing a defendant whom the state is seeking to execute presents additional challenges. For instance, the lawyer must be familiar with the complex law and procedure that applies only to capital cases.[28]

Most inmates on death row are indigent and do not have the necessary resources to employ counsel or to obtain the expert and investigative support they will need to mount an effective defense. Therefore, they must rely on the indigent defense system. While some public defenders perform admirably, many provide substandard representation to their clients.[29] More than forty years ago, the Supreme Court established the right to counsel for those accused of a serious crime.[30] The American Bar Association, however, has studied indigent defense systems across the United States and found that "[f]orty years after *Gideon v. Wainwright*, indigent defense in the United States is mired in a state of crisis."[31] The ABA study found that lawyers who provide representation in indigent defense systems sometimes are unable to furnish competent representation because they

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25. *Furman v. Ga.*, 408 U.S. 238, 313 (1972).

26. AP News, *Ginsburg Backs Ending Death Penalty*, http://www.truthinjustice.org/ginsburg.htm (Apr. 9, 2001).

27. ABA Standing Comm. on Leg. Aid & Indigent Defs., *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 3 (ABA 2004) (footnote omitted) (citing Off. of Justice Programs, U.S. Dept. of Justice, *Natl. Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice* vi-vii (2000)).

28. The Supreme Court has held that "the penalty of death is qualitatively different" and as a result has adopted requirements that are applicable only to capital cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson v. N.C.*, 428 U.S. 280, 305 (1976) (holding that the sentencer must be empowered to take into account all mitigating circumstances)).

29. ABA Standing Comm. on Leg. Aid & Indigent Defs., *supra* n. 27, at 7.

30. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

31. ABA Standing Comm. on Leg. Aid & Indigent Defs., *supra* n. 27, at 38.

lack the necessary training, funding, time, and other resources.[32]

The courts have been of little assistance in improving the indigent defense system. First, the Supreme Court has held that the Sixth Amendment right to counsel only applies to trial and the direct appeal.[33] Thus, some death row inmates must proceed through the critical state habeas proceeding without the guarantee of counsel.[34] Second, because the right to counsel does not apply to the habeas proceeding, the right to effective assistance also does not apply.[35] There have been instances when habeas counsel has missed critical filing deadlines,[36] has failed to raise valid legal claims, and has repeatedly made the same legal argument in case after case.[37] Yet the inmate has no avenue of relief for such dismal performance.

Although a death row inmate is entitled to relief if his trial or direct appeal counsel performance is ineffective,[38] counsel's performance has to be so abysmal under the standard adopted by the Supreme Court that very few inmates have been able to obtain relief. In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient[39] by showing that counsel performed outside the prevailing norms of the profession.[40] In determining whether counsel's performance is deficient, the Court indicated that considerable deference should be given to counsel's strategic choices.[41] Thus, if the prosecution can portray counsel's performance, no matter how inept, as a strategic decision, the defendant usually will not prevail.[42] Even if a defendant is able to demonstrate that his counsel performed inadequately under the Court's highly deferential standard, he must also prove that he was prejudiced by counsel's performance.[43] If the prosecution can convince the reviewing court that the defendant still would have been convicted even if counsel had performed reasonably, the defendant will be denied relief.

The only specific standard the Court has established is to require counsel to conduct an investigation if one is warranted under the circumstances.[44] Other than that, the Court has refused to establish any new standards that counsel must meet, even in capital cases. Because the test the Court has adopted is so malleable, counsel's

32. *Id.*

33. *Murray v Giarratano*, 492 U.S. 1 (1989) (no right to counsel in postconviction proceedings).

34. Once an inmate's case proceeds to federal court, there is a statutory right to counsel. *See* 21 U.S.C. § 848(q)(4)(B) (1970); *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

35. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991).

36. *E.g. In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (The defendant's attorney filed his appeal forty days after the filing deadline. The court, however, held that the appeal could be considered because Wilson proved extraordinary circumstances that excused the late filing.); Allan Turner, *'Railroad Killer' Offers Apology at Execution*, Houston Chronicle A1 (June 28, 2006) (The inmate was executed despite the fact that his appellate attorney failed to file an appeal on his behalf.).

37. *See e.g.* Chuck Lindell, *Lawyer Makes 1 Case for 2 Killers*, Austin–American-Statesman A01 (Feb. 26, 2006).

38. *See Strickland v. Washington*, 466 U.S. 668 (1984).

39. *Id.* at 687.

40. *Id.* at 687–88.

41. *Id.* at 689.

42. *Id.* at 690–91.

43. *Strickland*, 466 U.S. at 687.

44. *E.g. Rompilla v. Beard*, 125 S. Ct. 2456, 2463–67 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003).

performance is able to pass muster in most instances and most claims of ineffective assistance are not successful.[45] Given the crucial role of counsel in proving a suspect's innocence, the Court's efforts to give capital defendants more leeway to prove their innocence will ultimately prove futile until it requires more of counsel in terms of performance. If the Court were to adopt more stringent standards, pressure would then be on jurisdictions to devote more resources to indigent defense because they would get tired of the costs and inconvenience of retrying cases. Until this happens, we will continue to see innocent persons convicted, sentenced to death, and even executed.

B. The Antiterrorism and Effective Death Penalty Act

In 1996, Congress enacted and President Clinton signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA).[46] AEDPA was enacted in order to reform the habeas process. While it was designed to serve a number of purposes, its foremost purpose was to expedite the death penalty process so that more inmates could be executed in a shorter period of time.[47] I will not provide an exhaustive review of AEDPA as that task has already been undertaken by numerous legal scholars.[48] I will discuss a few of the provisions that most severely impact a death row inmate's ability to prove his innocence.

One of the most significant changes under AEDPA was the inclusion of a statute of limitations.[49] Prior to AEDPA, there was no statute of limitations in habeas matters.[50] An inmate is now required to file a habeas petition within one year of his conviction, becoming final on direct review, but there are also several complicated tolling provisions.[51] As a result, attorneys are often confused over the deadline for filing habeas petitions, depriving many petitioners of any federal review of their convictions, and in some cases, of their death sentences.[52] The problem with the statute of limitations is compounded by the fact that some inmates may not have legal assistance in the

45. *See* Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!* 51 Wayne L. Rev. 129 (2005). Justice Thurgood Marshall objected to the Court's standard because "it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting).

46. Pub. L. 104-132, 110 Stat. 1214 (1996).

47. For a discussion of AEDPA's legislative history, review Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996).

48. *E.g.* Randy Hertz & James S. Liebmann, *Federal Habeas Corpus Practice and Procedure* vol. 1, 5-107 (4th ed., LexisNexis 2001); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism after the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 John Marshall L. Rev. 337 (1997).

49. Under AEDPA, in most circumstances an inmate must file a habeas petition challenging his conviction and sentence within one year of the conviction becoming final on direct review. *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) ("[AEDPA] establishes a 1-year statute of limitations for filing a federal habeas corpus petition."); *Carey v. Saffold*, 536 U.S. 214, 216 (2002) ("[AEDPA] requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become 'final.'"). A conviction becomes final when the Supreme Court denies certiorari review or when the time to file a petition for writ of certiorari expires. *See Clay v. U. S.*, 537 U.S. 522, 527–28 (2003).

50. *Mayle v. Felix*, 125 S. Ct. 2562, 2569 (2005) ("In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction.").

51. *Pace*, 544 U.S. at 408.

52. *Wilson*, 422 F.3d at 875.

preparation of their habeas petitions.[53]

The statute of limitations also provides an inmate with a very short time to develop evidence of his possible innocence. It has frequently been the case that evidence exonerating a death row inmate was not immediately revealed.[54] It will often be difficult to obtain evidence of the inmate's innocence within such a short time period. An obvious response might be simply to file another habeas petition once the inmate has obtained evidence of his innocence. AEDPA, however, makes it almost impossible to do so.[55] Thus, an inmate could be in a situation where he has strong evidence of his innocence but no opportunity to present the evidence to a court.

Another problem for death-sentenced inmates seeking to prove their innocence is the requirement that they first present their claims to the state courts before the federal courts will be allowed to consider their claims.[56] Proponents of this requirement argue that punishing and controlling crime is the quintessential state function and that state courts should, therefore, be allowed the opportunity to correct any mistakes before any federal review occurs.[57] The state exhaustion requirement is problematic for several reasons. First, an inmate's attorney may fail to present his claim of innocence to the state court, thereby forfeiting any federal review of the claim in most circumstances.[58] Second, the state court proceeding is often perfunctory; it is frequently the case that no meaningful review of the defendant's claims takes place. For instance, in many states, the prevailing practice is for the state district attorney or state attorney general to draft the findings of fact and the order denying relief.[59] Third, the state court often does not adequately explain its decisions.[60] Finally, the state court's findings of fact and conclusions of law are entitled to deference in federal court.[61]

The most significant provisions of AEDPA are contained in section 2254(d), which limits the circumstances under which a federal court can grant a writ of habeas corpus. Section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

53. John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 Cornell L. Rev. 259, 290 (2006).

54. For information on exonerees, review http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05a (Sept., 2004).

55. Under AEDPA, a claim that was presented in a previous federal petition but is offered again in a second or successive federal petition "shall be dismissed." 28 U.S.C. § 2244(b)(1) (2000). A claim raised for the first time in a second or successive petition may be considered—but only in narrow circumstances. *Id.* at § 2244(b)(2).

56. *Id.* at § 2254(b)(1)(A).

57. *See Rose v. Mitchell*, 443 U.S. 545, 585 (1979) (Powell, J., concurring) ("Nowhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice. This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States' administration of that law." (citations omitted)).

58. *E.g. House*, 126 S. Ct. at 2064 (allowing unexhausted claims to be considered in order to prevent a manifest injustice).

59. Blume, *supra* n. 53, at 296. ("Some readers may be surprised to learn that in a number of states this is the prevailing practice. The attorney for the prosecuting agency submits a proposed order that the court frequently signs without making a single change. Many of these orders contain unsupported factual findings, nonexistent procedural defaults, and tenuous legal conclusions. This practice, while generally frowned upon, is also generally tolerated.").

60. *Id.* at 293.

61. *Id.* at 263–64.

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[62]

While the Supreme Court has not cleared up all the questions concerning the meaning of section 2254(d),[63] it has said that an inmate must do more than prove that a state court decision is incorrect in order to obtain relief.[64]

The Supreme Court has held that section 2254(d) requires that deference be given to a state court's findings of fact and its legal conclusions.[65] To illustrate the effect that section 2254(d) would have on an inmate seeking to prove his innocence, suppose an inmate files a habeas petition in state court, as required, claiming that his attorney was ineffective for failing to interview his alibi witnesses. The state court subsequently denies the claim, finding that the witnesses were not credible and that the attorney was not ineffective because of the overwhelming evidence of the defendant's guilt. In order to obtain relief in federal court, the inmate would have to prove by clear and convincing evidence that the state court's finding that his witnesses were not credible was incorrect and that the state court's conclusion that the evidence of his guilt was overwhelming was not only incorrect but also unreasonable.

Finally, if the inmate is unable to overcome section 2254(d) and loses in federal district court, his right to appeal is not automatic. He must apply to a federal appeals court for a Certificate of Appealability.[66] In order to have his appeal considered, he must convince a federal appellate court that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[67]

AEDPA is having the effect that its drafters intended it to have: it has made it more difficult for all inmates, including those who may be innocent, to obtain relief.[68] It also compounds the problem of poor representation. In the next section, I will discuss the case of a death row inmate whom I was appointed to represent and the difficulties I have encountered in trying to prove his innocence.

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62. 28 U.S.C. § 2254(d) (2000).

63. *Brown v. Payton*, 544 U.S. 133, 141 (2005) (stating that section 2254(d)'s "conditions for the grant of federal habeas relief have not been established").

64. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." (quoting 28 USC § 2254(d))).

65. *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997) (stating that 28 USC § 2254(d) dictates a "highly deferential standard for evaluating state-court rulings"). The AEDPA, however, does not mention the word deference, and scholars have discussed the constitutional problem of having federal courts defer to state courts' interpretation of the U.S. Constitution. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998).

66. 28 U.S.C. § 2253(b)-(c)(1)(A) (2000).

67. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

68. Blume, *supra* n. 53, at 284 ("Less than 1% of state prisoners who file federal habeas petitions ultimately prevail.").

IV. THE CASE OF JOHNNY RAY CONNER

On May 17, 1998, the owner of a Houston, Texas convenience store was murdered during a botched robbery.[69] Although there were several eyewitnesses to the crime, two of the eyewitnesses were unable to make any identification of the assailant.[70] The other eyewitnesses differed as to the assailant's height and clothing, whether he had facial hair, and whether he wore a baseball cap.[71] The only detail they all agreed about was that the assailant ran very fast from the scene of the crime.[72]

After the investigation focused on Mr. Conner, his picture was shown to the eyewitnesses who were able to provide a description of the assailant.[73] He was identified as the assailant by those eyewitnesses.[74] One, however, admitted that she picked his photograph out of the array because his was the only one containing Houston Police Department booking numbers.[75] After the eyewitness identifications, Mr. Conner was formally charged with the murder and attempted robbery of the storeowner, and he surrendered to the authorities.[76]

Because Mr. Conner was indigent and the state was seeking the death penalty, the trial court appointed two attorneys to defend him.[77] Both of the lawyers appointed to represent him had extensive criminal law experience and had previously defended others charged with capital murder.[78] Although funds had been appropriated to employ

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69. *Conner v. State*, 67 S.W.3d 192, 196 (Tex. Crim. App. 2001).

70. *See* Memo. & Or. 4, (Mar. 22, 2005) (on file with author).

71. *Id.* at 17, 18. ("[Eyewitnesses] could not agree on whether the gunman wore a hat or not or, if he did, on the color of the hat; they could not agree on whether he wore shorts or long pants or on the length or color of the shorts or pants; . . . in addition to the explicit inconsistencies, two of the witnesses testified that they saw the gunman's face for an extended period . . . yet neither testified that the gunman had Conner's distinctive tattoo of a teardrop under his eye . . . . Martha Meyers testified that the robber was between five feet [ten] inches and six feet one inch tall . . . but Conner's medical records show that he is only five feet six inches tall.").

72. *Id.* at 3–4.

73. *Id.* at 4.

74. *Id.*

75. Martha Meyers admitted that she noticed the police booking numbers on Mr. Conner's photograph and that the presence of these numbers influenced her identification of Mr. Conner as the man who fled from the crime scene on May 17, 1998:

> Q: Isn't it a fact, ma'am, the only particular individual in this particular grouping that has any type of numbers that denotes any type of police record is number five?
>
> A: Yes, sir.
>
> Q: Would that have anything to have done with you picking out number five?
>
> A: Yes, sir.
>
> Q: Are you absolutely positive about that?
>
> A: Yes, sir.

Pretrial Transcr. vol. 2, 51 (June 7, 1999) (on file with author).

76. Memo. & Or. 4.

77. *See* Tex. Crim. Proc. Code Ann. § 26.052(4)(e) (Supp. 2006) ("The presiding judge of the district court in which a capital felony is filed shall appoint two attorneys.").

78. Ricardo Rodriguez was the lead counsel for Mr. Conner and has been involved in approximately sixteen capital cases. Transc. Procs. 30 (Mar. 4, 2005). Jonathan Munier was appointed as co-counsel and based on his experience is on the list of lawyers approved by the State of Texas to represent defendants in capital murder cases. *Id.* at 55.

experts, Mr. Conner's trial attorneys did not hire an eyewitness expert to discuss the fallibility of eyewitness identifications, especially cross-racial identifications, as had occurred in this case.[79] Mr. Conner had a troubled upbringing, however, defense counsel did not retain a mitigation specialist as is typically done in capital cases involving defendants with backgrounds like Mr. Conner's.[80] Mr. Conner informed his trial counsel that he had injured his leg in high school playing football.[81] Given the eyewitness testimony that the assailant ran quickly from the crime scene, any evidence that Mr. Conner might have had difficulty running could have been crucial in raising reasonable doubt. At trial, however, defense counsel chose to put on no defense other than cross-examining the state's witnesses. Not surprisingly, Mr. Conner was convicted and sentenced to death.

After Mr. Conner was unsuccessful on direct appeal and in obtaining a writ of habeas corpus in state court, I was appointed to represent him in his federal habeas proceedings. One of the first things I did was review Mr. Conner's medical records. I learned from these records that he had an ongoing problem with his foot after he broke his leg in high school. The records indicated that he had developed a condition known as "foot drop." According to an expert that I retained for the case, "an individual with such an impairment would walk with a limp."[82] The expert further indicated that "if he attempted to move faster, either to walk faster or to run, that it would become more noticeable and more prominent."[83] Even though each eyewitness had said that the assailant ran extremely fast from the crime scene and none of the witnesses noticed the assailant having any difficulty running, the information concerning Mr. Conner's foot condition was never presented to the jury that convicted him and sentenced him to death.

Therefore, in his federal writ, I alleged that Mr. Conner had received ineffective assistance of counsel. During the evidentiary hearing, the state attempted to refute the medical records and even the prison records that noted Mr. Conner's foot problem by producing a videotape, shot without Mr. Conner's knowledge, purportedly showing him walking normally.[84] Almost comically, the video showed him walking with a limp.[85] Mr. Conner's trial counsel defended the decision not to investigate Mr. Conner's foot condition by stating that "I did not believe at the time and still do not believe that it was a credible defense to argue that the eyewitnesses had the wrong person because Mr. Conner allegedly had a limp."[86]

The federal district judge granted the writ of habeas corpus and ordered that he was entitled to a new trial.[87] She held that trial counsel's performance was deficient because they did no investigation into Mr. Conner's medical history and that, given the weakness

79. *Id.* at 38.
80. *Id.* at 43.
81. *Id.* at 42.
82. Transc. Procs. 17.
83 *Id.* at 22.
84. *Id* at 138–40.
85. *Id.* at 21.
86. Aff. Ricardo Rodriguez 3 (Apr. 9, 2001) (prepared in response to Mr. Conner's claim that he was convicted and sentenced to death as a result of ineffective assistance of counsel) (on file with author).
87. Memo. & Or.

of the state's case, his conviction was affected by their deficient performance.[88] The state is urging the appellate court to overturn the granting of the writ becuase it was not fully presented to the state courts by Mr. Conner's state habeas counsel as required by AEDPA. Thus, should Mr. Conner be denied the opportunity to prove his innocence, it will be due to the failings of his attorneys.

V. SUGGESTED REFORMS

What can be done to ensure that defendants like Johnny Ray Conner, who have a plausible claim of innocence, are afforded a meaningful opportunity to prove their innocence? First and foremost, defendants charged with capital crimes need better attorneys to represent them. As discussed earlier, that will happen once the Supreme Court establishes more stringent standards for determining when defendants have been rendered ineffective assistance of counsel. Second, the Supreme Court has held that the execution of an innocent individual would be constitutionally intolerable.[89] Incredibly, however, the court has yet to hold that an inmate can make a simple claim during his habeas proceeding that he is innocent.[90] The execution of an innocent person would obviously be a travesty and constitute a constitutional violation. Therefore, an inmate should be allowed to make such a claim. Furthermore, all procedural barriers to considering a claim of innocence ought to be eliminated.[91] An inmate should be allowed to make a claim of innocence whenever he has evidence that raises the possibility that he is innocent. For instance, it should not matter whether he has previously presented the claim to the state courts. There should be no concern about the proliferation of such claims as our courts are well equipped to distinguish meritorious claims from those that are frivolous.

Finally, AEDPA has created a unique situation whereby state courts in most instances will be the final arbiters of federal constitutional law.[92] Because AEDPA requires deference to a state court's interpretation of federal rights, there is the real possibility state courts will interpret the Constitution inconsistently, and such interpretations must stand—even if they are incorrect—as long as they are reasonable. Congress needs to ensure the integrity and uniformity of federal law by repealing or modifying this section of AEDPA.

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88. *Id.*

89. In *Herrera v. Collins*, the court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. 390, 417 (1993). Justice O'Connor added that "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." *Id.* at 419 (O'Connor, J., concurring).

90. In *House*, the Court was asked to decide whether a death row inmate would be permitted to raise a freestanding claim of innocence but the Court "decline[d] to resolve this issue." 126 S. Ct. at 2087.

91. For instance, federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. 28 U.S.C. § 2254(b)(1)–(c). Furthermore, a petitioner who fails to comply with a state procedural rule is barred from obtaining habeas relief unless he can demonstrate cause for the procedural default and prejudice attributable thereto. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991).

92. 28 U.S.C. § 2254(d).

VI. CONCLUSION

We continue to run the risk that an innocent person will be executed. These risks can be substantially minimized by providing defendants with better attorneys and by making a few modifications of AEDPA. The federal habeas process was changed in 1996 in order to accelerate the execution process. The habeas process is still flawed, however, because of the impediments an inmate faces in seeking to prove his innocence. Federal habeas law, therefore, needs to be changed again, this time in order to achieve greater accuracy and justice.