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THE INCREDIBLE SHRINKING WRIT: HABEAS CORPUS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

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BY: JEANNE-MARIE S. RAYMOND

I. Introduction

A. Background

The Anti-Terrorism and Effective Death Penalty Act[1] (ATEDA) was signed into law by President Clinton on April 24, 1996. This article is Part I of a two part series. It will identify the major changes that the act makes to 28 U.S.C. § 2254, the *habeas corpus* provisions which apply to people incarcerated in state prisons, including those under sentence of death.[2] Part II, which will appear in the next *Capital Defense Journal*, will track developments in issues raised by ATEDA, including the first rounds of case law and suggested tactics for capital defense attorneys.

After several years of debate in Congress, *habeas corpus* "reform" legislation was passed as part of ATEDA last spring. The statute contains a number of restrictions that will surely make even more difficult the process of obtaining relief for death sentenced prisoners. Many with valid claims that they were convicted or sentenced in violation of the United States Constitution will doubtless be executed. ATEDA is yet another development heightening the importance of avoiding a death sentence at the pre-trial or trial level.

B. *Habeas Corpus* Before ATEDA: It Was Never Easy

Judicial interpretation of and additions to 28 U.S.C. § 2254 prior to ATEDA had erected numerous obstacles to obtaining federal *habeas corpus* relief. Those obstacles are and remain even more significant in Virginia, where the state courts continually rubber stamp death sentences.

Principal among the pre-existing (and **remaining**) obstacles are:

1. Procedural Default

The Supreme Court of Virginia rigidly enforces default and waiver.[3] Generally, federal courts will not review claims that are defaulted in state court for two reasons.[4] First, federal courts will decline to review these claims because they consider a failure to follow state procedural rules as "adequate and independent" state grounds for denying a claim. Second, these courts will adhere to the general policy of federal courts deferring to state courts.[5] Until recently, it was at least required that the state court decision rejecting the claim be **plainly** based on the state procedural bar. However, that requirement was significantly relaxed in *Coleman v. Thompson*.[6] Further, both the Virginia courts and the federal courts continually modify and supplement procedural default rules, so that it is nearly impossible for a defendant to fully comply with every rule the court exacts.[7] Defendants may only have defaulted claims heard by a federal court if "the prisoner can demonstrate cause for the default [that is, an acceptable reason] and actual prejudice [which concerns the impact of the violation] as a result of the alleged violation."[8]

2. Right to Counsel

Another problem that existed pre-ATEDA is that the right to counsel is not constitutionally required in collateral relief proceedings.[9] Because there is no right to counsel, there is no right to the effective assistance of counsel.[10]

There is now a statutory right to counsel for both state *habeas corpus*[11] and federal *habeas corpus*.[12] The absence of a constitutional requirement, however, means that no relief is available for errors or omissions of *habeas* counsel. The Virginia statute is explicit on this

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[2] Article I, § 9, cl. 2 of the United States constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended." However, Congress has the power to determine the scope of the Great Writ.

[3] *See, e.g., Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993), and case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26 (1993) (holding that a motion to strike entire jury panel was defaulted because counsel failed to object at time each of three venire members were dismissed for cause); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), and case summary of *George*, Capital Defense Digest, Vol. 4, No. 2, p. 8 (1992) (holding that a claim that verdict was influenced by passion or prejudice in part because a charge of abduction with intent to defile was consolidated for trial with the capital murder charge was defaulted because defendant failed to object to consolidation at trial); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991), and case summary of *Yeatts*, Capital Defense Digest, Vol. 4, No. 1, p. 20 (1991) (holding that a claim that it was error to admit a post-sentence psychiatric report as evidence of future dangerousness was defaulted because the evidence was admitted without objection at trial; objection to introduction of white shoes into evidence was defaulted because not briefed on appeal; appellate review of denial of motions for mistrial waived because motions were not timely made); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991), and case summary of *Quesinberry*, Capital Defense Digest Vol. 4, No. 1, p. 23 (1991) (holding that an objection to definitions given in jury instructions was defaulted because not made until the jury retired); *Spencer v. Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989), and case summary of *Spencer*, Capital Defense Digest, Vol. 2, No. 2, p. 10 (1990) (holding that a challenge to death penalty statute as vague was defaulted because not raised at trial); and *Fisher v. Commonwealth*, 236 Va. 403, 374 S.E.2d 46 (1988), and case summary of *Fisher*, Capital Defense Digest, Vol. 1, No. 2, p. 3 (1989) (holding that several assignments of error were defaulted because defendant failed to make contemporaneous objections at trial).

[4] *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[5] *Murray v. Carrier*, 477 U.S. 478 (1986).

[6] 501 U.S. 722 (1991); see also case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991).

[7] *See Sheppard v. Commonwealth*, 250 Va. 379, 464 S.E.2d 131 (1995), and case summary of *Sheppard*, Capital Defense Journal, Vol. 8, No. 2, p. 9 (1996) (holding that several claims were defaulted because no throw-away general assignment of error to application of future dangerousness, even though specific errors assigned); and *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114 (1996), and case summary of *Goins*, Capital Defense Journal, this issue (finding that different **argument** made on trial level objection than on appeal).

[8] *Coleman*, 501 U.S. at 750 (1991).

[9] *Murray v. Giarratano*, 492 U.S. 1 (1989).

[10] *Coleman v. Thompson*, 895 F.2d 139 (4th Cir. 1990); *Strickland v. Washington*, 466 U.S. 668 (1984).

[11] Va. Code Ann. § 19.2-163.7.

[12] 21 U.S.C. § 848(q)(4)(B).

point.[13] Its utility is further limited by other factors. For example, the facts supporting claims raised on collateral review (such as ineffective assistance of trial and appellate counsel; violations of *Kyles v. Whitley*[14] and *Brady v. Maryland*[15] involving the failure of the prosecutor to reveal exculpatory evidence to the defendant; misconduct by the judge, jurors, prosecutor or police) will ordinarily be found outside the direct appeal record and must be developed at the state proceeding. Yet the decision to provide resources for discovering all of this was, and remains, discretionary at the state level. Resources are provided for in the same federal statute that provides for an attorney. However, these resources often arrive too late to help because claims may not be reviewed if the defendant failed to develop the supporting facts or raise the claim in the state courts.[16] With no resources guaranteed for state court proceedings, there will likely be no adequate factual development.

3. The *Teague v. Lane* Doctrine

Yet another barrier to *habeas* relief prior to ATEDA was the rule set forth in *Teague v. Lane*, which held that new rules of constitutional criminal procedure should not be applied retroactively to cases in which final judgment has already been rendered.[17] In its simplest terms, this doctrine means that a death sentenced prisoner will be denied relief although there was fundamental constitutional error at trial, and the error was explicitly recognized by the United States Supreme Court, if the United States Supreme Court opinion recognizing the error came when the prisoner's case was at *habeas*. Unless the error falls into an exception to the doctrine, relief will not be given retroactively because the judgment of conviction became final at the time the United States Supreme Court denied the prisoner's petition for *certiorari* from state direct review.[18]

4. Harmless Error Review

Still another hindrance to federal *habeas* relief was, and is, the harmless error standard applied to errors acknowledged at this stage. This standard, which the court declared in *Brecht v. Abrahamson* as that to be applied by federal courts in assessing on *habeas* review the impact of trial error, is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'"[19] Thus, even when the court found that a claim did constitute error in the trial, the defendant can only get a new trial if this relaxed harmless error standard is met. By contrast, when error is found on direct appeal, relief must be granted unless the state, the beneficiary of the error, can show that it was harmless beyond a reasonable doubt.[20] Thus, state courts are rewarded for erroneous rulings on direct appeal because their error will later be judged by the more forgiving *Brecht* standard.[21]

These and other doctrines of an activist United States Supreme Court show that the writ of *habeas corpus* has been shrinking for the last fifteen years. The new act shrinks even further what little remained of the writ.

II. Principal Features of ATEDA

In addition to, not in lieu of, the obstacles to relief described in Section I, ATEDA shrinks the availability of relief in the federal courts for federal constitutional violations even further. This shrinking is accomplished in two ways.

A. Procedural and Substantive Advantages to "Opt-In" States

There are special provisions applicable to capital cases only and available to states that **successfully** claim that their state collateral proceedings qualify. In order for a state to be eligible for these provisions, the state must provide competent counsel for indigent defendants, as well as compensation for counsel and reasonable litigation expenses.[22] ATEDA also requires that the statute or rule which prescribes the process for appointing counsel must also provide standards of competency.[23] These states are said to have "opted in" to the special provisions. A state that has opted in receives advantages in the areas of filing deadlines and cognizable claims.

1. Filing Deadlines

Prior to ATEDA, there were **no** filing deadlines. Instead, the state would negotiate a filing deadline by scheduling an execution date if, in the opinion of the Attorney General, the prisoner was not taking sufficiently rapid action toward filing a petition. Therefore, the change in the filing deadlines is the most significant change of which attorneys need to be aware. These deadlines vary depending on whether the state is one where the opt-in procedures apply.

For non-opt-in states, the filing deadline is one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[24] It is unclear whether judgment becomes final at the time a decision is made by the state court on direct review or at the time *certiorari* proceedings in the United States Supreme Court are concluded. However, it is most likely that the statute will be interpreted to mean that the judgment becomes final at the time a petition for *certiorari* is denied (or granted and then lost on the merits).

The change in deadlines is one of the benefits given to opt-in states. While the act significantly shortens deadlines in all cases generally, the opt-in provisions shorten the deadlines even more. If the state is an opt-in state, the prisoner has only "180 days after final State court affirmance of the conviction and sentence on direct review."[25] The time is tolled while *certiorari* relief is being sought from the United States Supreme Court, and while state collateral relief is being sought.[26] In addition, the

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13 Va. Code Ann. § 19.2-163.8(D).

14 115 S. Ct. 1555 (1995).

15 373 U.S. 83 (1963).

16 *See McCleskey v. Zant*, 499 U.S. 467 (1991); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

17 489 U.S. 288, 316 (1989).

18 For an example of how the *Teague* doctrine is applied, *see O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996), and case summary of *O'Dell*, Capital Defense Journal, this issue. In that case, a seven to six decision to apply *Teague* to bar the defendant's claim will likely kill O'Dell.

19 507 U.S. 619, 623 (1992) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

20 *Chapman v. California*, 386 U.S. 18 (1967).

21 For an example of the benefit to the rubber stamp Supreme Court of Virginia, *see* case summary of *Tuggle v. Netherland*, Capital Defense Journal, this issue.

22 28 U.S.C. § 2261(b).

23 *Id.*

24 28 U.S.C. § 2244(d)(1)(A).

25 28 U.S.C. § 2263(a).

26 28 U.S.C. § 2263(b)(1) & (2).

district court can grant an additional time of thirty days upon "a showing of good cause."[27] Thus, death sentenced prisoners in opt-in states are given a significantly shorter time to file federal *habeas corpus* petitions.[28]

2. Cognizable Claims

The opt-in provisions also limit the types of claims which may be raised and decided on the merits in federal court. This only applies in states that have met the opt-in requirements. Chapter 154 of the Act allows consideration of claims that have been raised properly and rejected on the merits in state court, surviving the procedural maze described in the previous section. Other claims may only be decided on the merits if petitioner's failure to present them on the merits was

> ... (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.[29]

These limitations are generally the pre-ATEDA limitations that had already been fashioned by the Supreme Court. However, "[c]onspicuously missing is the Supreme Court's rule that a prisoner need not have a good reason for default in state court, if the prisoner shows that she is probably innocent."[30]

B. Further Advantages to the State

Even if a state does not meet the opt-in requirements, ATEDA still provides several advantages to the state including deference to state conclusions of law, deference to state fact finding, standards for granting appeal from district court denials, and limits on successive petitions.

1. Deference to State Conclusions of Law

ATEDA narrows the chances for a prisoner to receive relief from a federal *habeas corpus* petition by the new requirement that the federal courts defer to **state court** conclusions of **federal law**. The new law requires that a writ of *habeas corpus* will not be granted on claims that were decided on the merits in a state court proceeding unless the determination

> (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.[31]

This provision is entirely new and, depending on how it is interpreted, may limit federal courts' ability to correct errors of federal constitutional law by state courts. Considerations of comity and federalism similar to those informing the *Teague* doctrine seem to be at issue. However, *Teague* is grounded on fairness to state judges who might not have been expected to anticipate a constitutional requirement imposed later by the United States Supreme Court. This provision mandates deference even when the state court is fully informed about existing constitutional requirements and still errs.

2. Deference to State Fact Finding and Evidentiary Hearings

Prior to the enactment of ATEDA, a federal court was required to presume that a state court finding of fact was correct.[32] A prisoner could rebut this presumption if he were able to show convincing evidence that the finding was not correct. ATEDA creates a new standard that arguably requires even greater deference to state court findings of fact.

The prior statute allowed the presumption only if there was sound process in state court.[33] The new statute eliminates the language containing this requirement.[34] One commentator has explained, "Read literally, [the Act] eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard for the process from which it was generated."[35] This change applies in the same manner to both opt-in and non-opt-in states.

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[27] 28 U.S.C. § 2263(b)(3)(A) & (B).

[28] For an example of the time difference, take the hypothetical case of *Adams v. Commonwealth*. In a non-opt-in state, if the United States Supreme Court denied *certiorari* from the Supreme Court of Virginia's automatic denial of relief on appeal on December 1, 1996, then a federal *habeas corpus* petition must be filed by December 1, 1997, extended by the time required to seek state *habeas corpus* relief. (Note that federal *habeas corpus* law **requires** that state *habeas corpus* remedies be exhausted.) The new Virginia statute on state *habeas* requires appointment of counsel within 30 days after the state court affirms the conviction, but this does not always happen on time. Note also that there is no statutory or constitutional right to counsel to petition for *certiorari*. Therefore, if no petition for *certiorari* is filed in the example, a federal *habeas corpus* petition would have to be filed by March 2, 1997, extended by the time required to seek state *habeas corpus* relief.

If *Adams v. Commonwealth* occurred in an opt-in state, the petition for federal *habeas corpus* would be due on June 2, 1997, plus time required to seek state *habeas corpus* relief, as in the non-opt-in state. Note, however, that denial of state *habeas corpus* relief can be and is quite rapid under the new system because the Supreme Court of Virginia determines whether there is a need for an evidentiary hearing. Since the enactment of the new state statute, the Supreme Court of Virginia has **never** found the need for a hearing.

Thus, in an opt-in state, there is an even shorter time to do investigation, uncover hidden evidence, etc. (For an example of a case in which relief was granted, but may not have been under ATEDA, *see Amadeo v. Zant*, 486 U.S. 214 (1988) (involving counsel's chance discovery of prosecutor's manipulation of jury rolls). For an example of how great the need for resources and investigation was even before the limitations of ATEDA, *see McCleskey v. Zant* 499 U.S. 467 (1991) (finding that for twelve years, the state hid evidence that government agent planted in defendant's cell)). In addition, in Virginia, because of the period allowed for appointment of counsel, an additional month can be subtracted in which no one will be investigating.

[29] 28 U.S.C. § 2264(a).

[30] Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 397 (1996) (*citing Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

[31] 28 U.S.C. § 2254(d).

[32] 28 U.S.C. § 2254(d) (repealed by ATEDA); *Sumner v. Mata*, 455 U.S. 591 (1982).

[33] *Townsend v. Sain*, 372 U.S. 293, 313 (1963) described six situations in which a court might find that there was no sound process:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly

ATEDA also significantly reduces the chance that a prisoner will be granted an evidentiary hearing to develop facts in support of his claim. In addition to requiring a greater deference to state court findings of fact, the Act limits the circumstances in which a prisoner whose attorney failed to develop facts in the state court proceedings can develop and present them in federal court. In order to be granted an evidentiary hearing, the prisoner must show

> (A) the claim relies on —
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[36]

This provision apparently overrules *Keeney v. Tamayo-Reyes*,[37] the case in which the Supreme Court established the conditions for granting an evidentiary hearing. Prior to ATEDA, a prisoner could be granted an evidentiary hearing if he could show cause as to the attorney's failure to develop facts in state proceedings, or if he could show that he was probably innocent of the crime. Apparently, ATEDA has now combined the two previously alternative conditions, allowing an evidentiary hearing only when a prisoner can show **both** probable innocence and one of two specific reasons for failure to raise in state court. This provision applies to both opt-in and non-opt-in states.

Further, the statute has no provision according the right to have defaulted claims heard if it can be shown that but for the constitutional error, no reasonable jury would have found the petitioner eligible for the death penalty. This claim was previously recognized by the United States Supreme Court in *Sawyer v. Whitley*.[38]

3. Appeals from the District Court and Stays of Execution

The statute restricts the ability of petitioners from all states to appeal denials by the federal district courts. "Opt-in" states are also given advantages with respect to stays of execution. Because of the essential interplay, both provisions are discussed in this section.

a. Appeals from Denial by District Court

The Act contains two major changes to the appellate procedure that affects state prisoners. These changes affect both opt-in and non-opt-in states. First, the prior statute allowed either a district court judge or circuit court judge to issue a certificate of probable cause authorizing appeal to the circuit court. The new statute allows appeals only if a circuit court judge issues a certificate of appealability.[39]

The new statute does not, however, impose a higher standard for granting a certificate of appealability. The new statute requires "a substantial showing of the denial of a constitutional right."[40] This is the same standard the United States Supreme Court used in interpreting the previous statute in *Barefoot v. Estelle*.[41] Therefore, the new statute only creates additional limits to the granting of certificates of appeal "by giving the task of issuing them to judges whose workload will be expanded if they respond positively."[42]

Second, the prior statute made no explicit limitations on the issues to be appealed. The new statute requires that the certificate of appealability specifically name the issues which have met the substantial showing requirement.[43] One commentator stated, the purpose of the provision is "to prevent an appellate court that has accepted an appeal with respect to one issue from considering any other claims in the case."[44]

b. Stays of Execution

If a state qualifies as an opt-in state, a stay of execution is automatically given from the time of the final state order.[45] The stay expires if the prisoner does not file a petition before the time for doing so has elapsed, waives his right to file such a petition, or files a petition but "fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review."[46]

Nevertheless, a stay expires upon denial of relief by the federal district court. In Virginia, this means counsel can expect to be litigating the "substantial showing" required for appeal and a stay application simultaneously under the pressure of an execution date.[47]

4. Successive Petitions

ATEDA imposes significant limitations on the power of federal courts to hear successive petitions for *habeas corpus*. First, the statute requires that any claim raised in an earlier petition "shall be dismissed."[48] A claim that is raised for the first time in the successive petition may only be heard in limited circumstances:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

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supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

34 28 U.S.C. § 2254(e).
35 Yackle, *supra* note 30, at 388.
36 28 U.S.C. § 2254(e)(2).
37 504 U.S. 1 (1992).
38 505 U.S. 333 (1992).
39 28 U.S.C. § 2253(c)(1).
40 28 U.S.C. § 2253(c)(2).
41 463 U.S. 880, 893 (1983) (holding that the standard for granting a certificate of probable cause is requirement that a petitioner make "a substantial showing of the denial of [a] federal right.") (citations omitted).
42 Yackle, *supra* note 30, at 391 n.4.
43 28 U.S.C. § 2253(c)(3).
44 *The New Habeas*, The Public Interest Litigation Clinic Missouri Capital Case Update, p. 3 (March-May 1996).
45 28 U.S.C. § 2262(a).
46 28 U.S.C. § 2262(b)(3).
47 *See* Va. Code Ann. § 53.1-232.1 (concerning mandatory setting of execution dates).
48 28 U.S.C. § 2244(b)(1).

(ii) 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 factfinder would have found the applicant guilty of the underlying offense.[49]

The apparent purpose of this section is to encourage prisoners to file all claims together in the first petition and to discourage attempts to file multiple petitions. However, limiting successive petitions to new claims which either involve a new rule or actual innocence so severely narrows the opportunity to have a successive petition granted that it seems unlikely that any prisoner could meet the standard.

The standard is essentially the same as that used for the granting of evidentiary hearings. And, like the new standard for evidentiary hearings, it contains no provision that allows claims to be heard if the prisoner can show innocence of the death penalty.[50]

In addition to the substantive limitations on granting successive petitions, ATEDA places significant restrictions on the procedure for filing such petitions. The prisoner must first ask permission from the court of appeals to file the petition in the district court.[51] Supreme Court review of the denial is not available.[52] This provision was upheld in *Felker v. Turpin.* [53]

III. Current State of Some Unresolved ATEDA Issues

A. Application/Retroactivity

It is not yet clear whether ATEDA will be fully applied to cases pending in federal courts at the time of its enactment. The opt-in provisions include a statement that those provisions "shall apply to cases pending on or after the date of enactment."[54] However, there is no similar provision at any other place in the Act. Although it is likely that all of the provisions will apply only to cases pending on or after the date of enactment, prisoners whose cases were pending prior to enactment should probably continue with the *habeas* process as if the Act was being applied retroactively, so that they will not find their claims time barred in the event that the federal courts find the statute is to be applied retroactively. There has not yet been a determination of how long those prisoners will have to file federal petitions for *habeas corpus.* If a petitioner is required to file within a reasonable time, it is not clear how "a reasonable time" will be determined.[55]

B. Can Virginia Opt-In?

It has not yet been determined whether Virginia qualifies as an opt-in state. There is the potential that Virginia will qualify given that it does have collateral review for which counsel is statutorily provided. Early determinations from federal district courts in both Virginia and other jurisdictions, however, indicate that without further legislation or Supreme Court of Virginia action, Virginia may not qualify.[56] There are several problems with the Virginia scheme which could be raised to argue that Virginia does not meet the requirements. These problems include an absence of a right to resources, lack of adequate compensation for appointed attorneys, and questionable standards of counsel competency. The Fourth Circuit Court of Appeals has already held that Virginia cannot be considered an opt-in state for any cases in which collateral proceedings occurred prior to 1992.[57] Virginia's statute allowing the appointment of counsel in collateral proceedings was not enacted until 1992; therefore, any case at *habeas* prior to that time would not have received the benefit of the statute.

IV. Conclusion

The Great Writ has shrunk to almost nothing and it is even smaller in Virginia given the rubber stamp practices of the Supreme Court of Virginia and the Fourth Circuit Court of Appeals. Unresolved issues in ATEDA, however, must be vigorously and competently litigated. These issues are of such breadth and complexity that they require counsel appointed in state *habeas corpus* to seek assistance immediately. One of the best sources for this assistance is the Virginia Capital Representation Resource Center in Richmond.[58]

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[49] 28 U.S.C. § 2244(b)(2).

[50] Such a claim was previously recognized by the United States Supreme Court in *Sawyer v. Whitley,* 505 U.S. 333 (1992).

[51] 28 U.S.C. § 2244(b)(3)(A).

[52] 28 U.S.C. § 2244(b)(3)(E).

[53] 116 S. Ct. 2333. A concurring opinion, however, suggested alternative routes to review. *See* case summary of *Felker,* Capital Defense Journal, this issue.

[54] 28 U.S.C. § 2266(c).

[55] The Fourth Circuit Court of Appeals issued an order in *Dubois v. Netherland,* No. 96-10, order (August 27, 1996) stating that regardless of whether Virginia met the opt-in requirements, the 180 day deadline could not be applied retroactively to a prisoner in order to make his first federal *habeas* petition time barred prior to the enactment of ATEDA. Thus, although most of the provisions are probably applicable to pending petitions, the Fourth Circuit Court of Appeals has determined that the deadline provisions are not applicable.

[56] *Satcher v. Netherland,* 1996 WL 596270 (E.D. Va. Oct. 8, 1996); *Hill v. Butterworth,* 1996 WL 447194 (N.D. Fla. Aug. 7, 1996); *Ashmus v. Calderon,* 935 F.Supp. 1048 (N.D. Cal. 1996); *Austin v. Bell,* 927 F.Supp. 1058 (M.D. Tenn. 1996).

[57] *Bennett v. Angelone,* 92 F.3d 1336 (1996). *See also* case summary of *Bennett,* Capital Defense Digest, this issue.

[58] 1001 East Main Street, P.O. Box 506, Richmond, Va 23219; 1-800-697-6841.