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

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

BY: MARY E. EADE

I. Introduction

This article updates "The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996" published last term in the Capital Defense Journal. It addresses early judicial interpretations of four provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996: (1) what it takes to qualify as an "opt-in" state; (2) when a conviction becomes final in non opt-in states, triggering filing deadlines in federal court; (3) what degree of deference is owed to state conclusions of law; and (4) what showing is required before a federal court can grant an evidentiary hearing.

II. Judicial Interpretations of ATEDA's Habeas Corpus Provisions

The plain language of ATEDA shrinks the writ of habeas corpus in two ways. First, it creates a new chapter, Chapter 154, applicable only in capital cases. For states meeting the chapter's requirements in their collateral proceedings, the chapter establishes a mechanism that constrains the time in which a petitioner may file a federal habeas petition and the types of claims that may be filed. For example, a petitioner in a qualifying state can be required to file in half the time of a petitioner in a non-qualifying state. Additionally, while ATEDA allows prisoners to raise claims that were properly raised in state court and decided on the merits, defaulted claims are subject to what may be a new standard. Those mechanisms are codified at 28 U.S.C. § 2261, et seq. Meeting the standards is called "opting in," so any state that qualifies is known as an "opt-in" state. Thus far, courts have held that § 2261 establishes a quid pro quo arrangement and have required strict compliance with its language. No state that has come up for review has satisfied the statute's mandates.

Second, ATEDA appears to constrict the availability of habeas relief generally by amending 28 U.S.C. §§ 2244, 2253, and 2254. Those amendments mandate greater deference to state conclusions of law and findings of fact, limit successive petitions, and impose restrictive standards for granting evidentiary hearings and appeals from district court denials of relief. This article addresses judicial interpretations of two of these restrictions—the deference owed to state court conclusions of law and the standard for granting an evidentiary hearing.


To date, California, Ohio, Tennessee, Texas, and Virginia have failed the test for opting-in to ATEDA's benefits of shorter filing deadlines and limits on the kinds of claims that may be raised. In Hamblin Primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 397 (1996) (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)).


2 Also significant is ATEDA’s apparent limitation on what types of claims a federal habeas court can hear. That question is governed by 28 U.S.C. § 2264(a) which prohibits hearing any claim that was not raised and decided on the merits in state court unless the petitioner meets one of three exceptions: (1) the failure to raise the claim was caused by "State action in violation of the Constitution or laws of the United States"; (2) was caused by the Supreme Court’s recognition of a new federal right made retroactive; or (3) was based on a factual predicate that could not be discovered with due diligence. Only one case has addressed this provision, Lindh v. Murray, 96 F.3d 856 (7th Cir. 1996). The Seventh Circuit explained that this provision replaced the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). Id. at 862.

3 28 U.S.C. § 2264(a) states that otherwise defaulted claims will be decided on the merits only if the petitioner’s failure to raise 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.

One commentator has argued that this standard apparently omits claims of actual innocence, which, prior to ATEDA, were a substitute for a petitioner’s inability to show cause for default. Larry W. Yackle, A

4 Section 2261 reads in relevant part:

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
v. Anderson, the district court denied Ohio opt-in status because, while state habeas petitioners have the right to counsel, that right is not absolute. Instead, Ohio public defenders retain authority to deny indigent petitioners counsel if they conclude that the issues raised do not have merit. That retained discretion directly violated § 2261(c) which mandates that all indigent state habeas petitioners be afforded counsel. Ohio failed for a second reason. Its law provides that when public defenders represent indigent habeas petitioners, they do not do so through "an order by a court of record." The court explained that its "decision was governed by the principle that Congress did not write Chapter 154 in terms of substantial compliance." Other courts are of the same opinion; they have ruled that § 2261 sets up a quid pro quo arrangement and that to "opt-in" states must strictly comply with the statute's language.

For example, the Court of Appeals for the Fifth Circuit in Mata v. Johnson ruled that Texas was not an opt-in state because it failed to provide explicit standards for competency of counsel and it failed to appoint counsel by virtue of a court order. The Texas Court of Appeals, which had been delegated the rule-making authority, established a rule that all appointed capital counsel must answer a questionnaire and submit it for approval to the Court of Criminal Appeals which would review it for competency on a case-by-case basis. The Fifth Circuit held that this mechanism failed §2261(b) because it did not establish "explicit standards."

Similarly, Florida failed the test set forth in § 2261(b). Only two Florida provisions addressed competency of capital habeas counsel (known as Capital Collateral Representatives (CCR)). One must have been a member of the Florida bar for at least five years, and a full-time assistant CCR must have been a member in good standing with not less than two years experience in the practice of criminal law. The United States District Court for the Northern District of Florida concluded that those provisions were simply inadequate. The court noted that there was no requirement that counsel have any degree of specialization in habeas proceedings, and there was no provision for standards governing substitute counsel should the CCR office be conflicted out. The court ruled that the plain language of §2261 "contemplate[d] counsel who are competent through capital, post-conviction experience." The court found that general supervision by the Supreme Court of Florida was not sufficient. Noting that capital habeas proceedings often present complex, and sometimes novel, issues and that their success depends on experienced counsel, the court refused to accept the standards as adequate.

Instead, § 2261 called for a specific mechanism that ensured competent, experienced habeas counsel would be appointed.

This holding is significant in that it reaches beyond the plain language of § 2261 and requires that the competency standards set by a state must provide that appointed counsel be experienced habeas counsel. The decision is good law and gives hope that the courts will continue to be unwilling to gut habeas to the degree that the language of ATEDA suggests it may be eviscerated. Also, it represents a check against § 2261(e) of ATEDA which prohibits petitioners from raising ineffective assistance of counsel claims during state or federal collateral proceedings; instead, attorney incompetence may result only in appointment of different counsel.

Under the same rationale, the United States District Court for the Middle District of Tennessee found that Tennessee’s competency standards did not satisfy § 2261 because they did not ensure "that only qualified, competent counsel [would] be appointed to represent habeas petitioners in capital cases." The current standard required only that counsel be "a competent attorney licensed in the state." The court found that merely passing the state bar exam did not mean that counsel was competent to handle capital habeas proceedings. Moreover, stated the court, because § 2261(e) precludes ineffective assistance of counsel claims in state and federal collateral proceedings, it has become crucial that only qualified attorneys be appointed to represent indigent capital habeas petitioners. Thus, both Florida and Tennessee petitioners have been given a stronger guarantee of competent, experienced counsel than the language of ATEDA itself appears to afford.

Florida failed to meet §2261 for a second reason. According to the court, "any offer of counsel pursuant to Section 2261 must be a meaningful offer." A meaningful offer meant immediate appointment upon request. At the time the court heard Hill’s petition, there were a large number of capital prisoners who had accepted Florida’s offer of counsel but who had not yet been appointed counsel. The backlog showed that Florida had not "opted-in." It could not reap the benefits of shorter filing deadlines and limited claims. Finally, the court noted that to hold otherwise could have the "effect of shrinking the six-month statute of limitations under Chapter 154 to such a short amount of time that it would deprive capital defendants of procedural due process."

This conclusion affords an argument for counsel who must avert the application of shorter deadlines to capital habeas petitioners who are subject to ATEDA. Such petitioners include all those whose petitions

16 Id. at 1143-44.
17 28 U.S.C. § 2261(e) reads:

The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, in the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

19 Id. at 1162.
20 Id.
21 Hill, 941 F. Supp. at 1147 (emphasis in original).
22 Id. at 1144.
23 Id. at 1146-47.
24 Id. at 1147, n.35.
were pending on the date of enactment, April 24, 1996, since the Act expressly provides that it applies in such a situation. Even if a state has not opted-in, ATEDA has imposed a filing deadline; it 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.

For counsel who can show that the State delayed appointment or failed to timely provide any resource to which a habeas petitioner has a right, such as a psychological expert, there may be an argument that if applied, the filing deadline imposed by ATEDA would violate petitioner’s due process rights.

California attempted to opt-in under the provisions of § 2265 which provides the steps that states who have a unitary review system must take to qualify. In Ashmus v. Calderon, the United States District Court for the Northern District of California held that California was not an opt-in state. The state failed for three reasons: (1) its mechanism for the appointment and compensation of counsel precluded use of public funds to conduct a generalized investigation; counsel could only investigate claims “knowable by reference to the four corners of the appellate record”; (2) the state’s competency guidelines were inadequate; and (3) California had failed to make a “bona fide” offer of counsel.

California’s scheme for the appointment of counsel for capital habeas petitioners expressly barred spending public funds to conduct a generalized investigation geared to uncover facts that supported new claims, not just those that were discernable from the record. California’s scheme for the appointment of counsel for capital habeas petitioners expressly barred spending public funds to conduct a generalized investigation geared to uncover facts that supported new claims, not just those that were discernable from the record. California’s competency guidelines were generalized, allowing only counsel’s attention during the course of preparation for the pending appeal, i.e. only those discoverable from the record as it was developed. The court held that this limitation ran directly afoul of § 2265(a) which mandated that there be compensation for “such claims as could be raised on collateral attack.” This language encompassed all possible claims, not just those that were discernable from the record.

Additionally, the limitations “create[d] an objectively deficient standard for the performance of counsel appointed to seek collateral relief in satisfaction of” the quid pro quo arrangement set out in the new provisions of ATEDA. Like the Florida court and the Tennessee court, the California court refused to condone a mechanism that facilitated, even required, sub-par representation. Accordingly, the court ruled that California’s competency standards were insufficient. California had guidelines, but they were not a rule of court or statute, did not impose any mandatory standards, and did not require that counsel have any experience or competence in bringing habeas petitions. The court rejected the argument that competence in criminal appeals was the equivalent to competence in habeas proceedings, expressly noting the unique complexity of habeas. Finally, California, too, was backlogged by would-be habeas petitioners whose appointments of counsel were still pending.

The court ruled that the failure to make appointments contravened the express requirement of § 2265(b), by incorporating § 2261(c), mandates immediate appointment of counsel. California had not opted-in.

These opinions are significant in three respects. First, they establish a standard of strict compliance for opting-in. Second, they formally recognize the unique complexity of habeas corpus proceedings and require the states to embody this recognition in their standards of competency for appointed counsel. This mandate constitutes an infusion of fairness into the process that has not necessarily existed, particularly in Virginia (although, of course, these decisions do not govern Virginia). Third, they buttress the apparent congressional understanding that the limitations imposed by the opt-in provisions are fundamentally unfair absent some guarantees on the part of the states.

The Fourth Circuit also has found that Chapter 154 established a quid pro quo arrangement. In Bennett v. Angelone, the court specifically noted that Congress contemplated that states would only receive the benefits of ATEDA if they offered the guarantees demanded by Chapter 154. In apparent contradiction of this finding, the Fourth Circuit has, by order, given fourth circuit states some of the benefits of Chapter 154, even though they have not opted-in. Specifically, the court has exercised its authority to set its own time table and directed the district and circuit courts to follow the time limitations for rendering decisions that are given to opt-in states. Consequently, Virginia has been given an ATEDA benefit without having to pay for it with the guarantees that Congress contemplated.

Although it only shortens the time that capital habeas petitions are under consideration, the Fourth Circuit order is curious in light of the holding of a Virginia federal district court. The United States District Court for the Eastern District of Virginia has held that Virginia is not an opt-in state. The decisions of this court warrant review because they illuminate the guarantees that Congress wanted and that the Fourth Circuit deemed unnecessary by virtue of its order. These cases are Satcher v. Netherland and Wright v. Angelone.

In Satcher, the court held that ATEDA required “a formal, institutionalized commitment to the payment of counsel and litigation expenses.” Virginia had no express provision for compensation or payment of litigation expenses for appointed capital habeas counsel. Budget legislation that set aside funds for payment of appointed counsel did not constitute the “mechanism” for payment that ATEDA contemplated. At best, this reservation, in addition to statutory provision of counsel and evidence of past payment, amounted only to substantial compliance with ATEDA. The court ruled that § 2261 required absolute...
deficiencies identified by the court in they do not address qualifications. Consequently, they retain many of the and waivable. They do not require appointment of two attorneys, and Their adequacy, however, remains questionable. They are generalized pursuant to Va. Code were established on July 1992 by the Public Defender Commission were guidelines containing criteria that the Commission could consider, but that consideration must have been undertaken “only to the extent practicable.” There was no requirement that court-appointed counsel have any habeas experience; instead counsel needed only to be “familiar“ with habeas practice. The degree of “familiarity” was not defined. Also, there was no mechanism that ensured appointed counsel in fact met the criteria that was in place. Those provisions were “grossly inadequate,” according to the court. Like the other courts, the district court explained that standards of competency were “crucial” to ensure that state habeas petitioners had qualified, competent counsel, particularly because § 2261(e) barred ineffective assistance claims. The court concluded, “Until Virginia establishes a mechanism which clearly and succinctly defines how counsel are to be appointed and the method by which they are to be compensated, as well as imposes mandatory standards of competency, it will not enjoy the habeas benefits of Section 107 of the AEDPA.”

Taken together, all of the above holdings reflect a common point of view. Each court has ruled that § 2261 is an “insurance policy“ of sorts, interpreting it as an expression of a serious congressional concern over the quality of state habeas proceedings. Congress was unwilling to shorten the time in which prisoners could file their claims or limit the types of claims they may file unless a state ensured by law and rule of court that those prisoners would be adequately and competently represented. While one may argue that ATEDA codifies the current congressional sentiment that calls for less intrusion into the states’ affairs by the federal system, these courts found that this ideal was shadowed by a contemporaneous reluctance to vest complete trust in the states. Congress has provided some federal control over what process is due, according to these courts. In order to reap the benefits ATEDA offers, the legislatures of California, Ohio, Tennessee and Texas will have to act. Habeas counsel in those states have been afforded some relief from the retroactive application of § 2261. Habeas counsel in Virginia, on the other hand, face part of the time constraints that Chapter 154 imposes because the Fourth Circuit has ordered the district and circuit courts to follow the time constraints for court decisions that are codified in § 2266.51

B. 28 U.S.C. § 2266: Limitations on Time for Decision

By order, the Court of Appeals for the Fourth Circuit has stated:

The limitations on time for decision set for in 28 U.S.C.A. Section 2266 shall apply at the district and circuit court levels and the Circuit Executive is authorized to inquire into the reasons for any noncompliance with the limitations.52

Consequently, Virginia capital habeas counsel are now burdened by the accelerated schedule contemplated by ATEDA. Under § 2266, the district court is required to render a final judgment within 180 days of the date on which the petition is filed. This time period may be extended by 30 days if the district court determines that the ends of justice would be best served by such a delay.53 The court of appeals must render its final decision within 120 days of the date on which the reply brief is filed and must rule on any petition for rehearing or suggestion for rehearing in banc within 30 days of the date the petition/suggestion is filed or the date a response is filed, whichever is later.54 Counsel should note that the Fourth Circuit, like all such courts, possesses the authority to set a time table for decision-making with which it and the courts under its administration must comply. More important is the recognition that the court has not ruled that Virginia is an opt-in state. Thus, ATEDA’s provisions for shorter filing deadlines and limited types of claims have not been imposed upon Virginia.


For non-opt-in states, the filing deadline for a federal habeas petition 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 review.”55 This language was ambiguous as to whether a judgment became final upon decision by a state court on direct review or upon the conclusion of certiorari proceedings. The Second Circuit is the only court that has indicated which date is controlling. In Peterson v. Denskie56

43 Id. at 1245.
44 Id. Virginia did provide adequate standards of competency which were established on July 1992 by the Public Defender Commission pursuant to Va. Code § 19.2-163.8(B).
45 944 F. Supp. at 464.
46 Pursuant to this statute, Virginia now has standards in place. Their adequacy, however, remains questionable. They are generalized and waivable. They do not require appointment of two attorneys, and they do not address qualifications. Consequently, they retain many of the deficiencies identified by the court in Wright.
47 Wright, 944 F. Supp. at 466.
48 Id. at 467.
49 Id.
50 Id. at 468.
51 This decision can be important to defense counsel. The accelerated time schedule can prevent counsel from conducting a fruitful investigation after filing. Often counsel find new evidence mitigating guilt after filing a federal habeas petition. See, e.g., case summary of Schulp v. Delo, Capital Defense Digest, Vol. 7, No. 2, p. 4 (1993).
52 Order, In the Matter of Death Penalty Representation, (4th Cir. 1996)(No. 113). This order resulted from a recommendation made by the Death Penalty Committee. The Committee merely stated that “[t]ime constraints are sorely needed at present” and cited to Correll v. Thompson to exemplify. In Correll, the petition for habeas was pending in the district court in excess of three years before a final decision was rendered.
54 28 U.S.C. § 2266(c).
56 107 F.3d 92, 93 (2d Cir.1997).
and in *Reyes v. Keane*, the court applied § 2244(d)(1)(A) by looking to the date on which the state court of last resort denied relief on direct review. Absent some indication from other courts, it remains uncertain whether the last state court denial on direct review will be the relevant date or whether the denial of certiorari by the United States Supreme Court will be adopted as the trigger.

Virginia counsel should note how ATEDA’s filing deadlines would work in combination with Virginia law. Currently Virginia is not an opt-in state. Therefore, § 2254(d)(1)(A) requires filing a federal petition within a year of either the denial on direct review by the Supreme Court of Virginia or the denial of certiorari. Two other rules affect the burden that counsel will bear. First, a prisoner has 90 days to petition for certiorari to the Supreme Court, after ATEDA, habeas petitioners are limited not to seek certiorari and relief in state habeas.

**D. 28 U.S.C. § 2254(d): Deference to State Court Conclusions of Law**

Depending upon how it is interpreted, the new language of this statute could operate to seriously curtail the substantive scope of federal habeas review. New section 2254(d) mandates a degree of deference to state court conclusions of law, not just factual determinations. If it is interpreted as requiring virtually complete capitulation to state interpretation of federal law, constitutional law, including suspension of the writ, are raised. This provision has been directly interpreted by two circuit courts of appeals and one district court, and applied, without express interpretation, by another federal circuit court.

In *Lindh v. Murray*, the Court of Appeals for the Seventh Circuit concluded that section 2254(d)(1) extended the *Teague v. Lane* doctrine in two ways. First, the court addressed the section’s limitation of federal review to claims adjudicated on the merits in State court proceedings. This language expanded *Teague’s* limitation on the universe of doctrine available to a petitioner to decisions rendered by the United States Supreme Court. *Teague* held that new rules of constitutional criminal procedure should not be applied retroactively to cases in which a final judgment had been rendered. Thus, if a decision by the United States Supreme Court beneficial to a death-sentenced prisoner is decided in a final judgment had been rendered. Thus, if a decision by the United States Supreme Court beneficial to a death-sentenced prisoner is decided after ATEDA, habeas petitioners are limited not to “old rules” of constitutional criminal procedure but also to only those decisions rendered by the Supreme Court. Favorable federal circuit court jurisprudence is off limits. Thus, ATEDA did not remove the power of the federal judiciary to render an independent decision on all questions of law in a habeas petition; it only imposed a limit upon the source of law from which a petitioner can draw to argue that the state court violated his or her constitutional rights.

The court also found that the second clause of § 2254(d)(1), which limits federal review to those cases where the state court made an “unreasonable application of clearly established federal law, as determined by the United States Supreme Court,” was an extension of *Teague*. *Teague* precludes relief in cases where the state court ruled and subsequently the Supreme Court announced a new rule of constitutional law that made the state decision incorrect. As a result, *Teague* functions in a manner that “validate[s] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.” The *Lindh* court found that the second clause of § 2254(d)(1) generalized this principle by removing the “later decisions” proviso. This language tells the federal courts: “Hands off, unless the judgment in place is based on an error grave enough to be called ‘unreasonable.’”

This rationale reflects a long-held principle of comity: the assumption that state courts are just as capable as the federal courts of making sound decisions that abide by the federal constitution. According to the Seventh Circuit, ATEDA codified this principle and gave the states the degree of deference that the federal courts had always claimed to have given but perhaps a degree that was not actually conferred:

The Supreme Court of the United States sets the bounds of what is “reasonable”; a state decision within those bounds must be respected — not because it is right, or because federal courts must abandon their independent decision making, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1).

The court’s application of this new limitation shows that absent an egregious, apparent transgression by a state court, habeas relief will not be available from a federal court.

In *Lindh*, at the time of trial, an expert psychological witness for the prosecution was under investigation for alleged sexual misconduct. The state court refused to allow Lindh to cross examine the expert with regard to this conduct. On appeal, Lindh argued that this refusal violated the Confrontation Clause. He asserted that the questioning should have been allowed to establish bias, i.e. the expert would say what the State wanted the court to believe. The court therefore held that the Supreme Court precedent interpreting the Confrontation Clause entitled established Federal law, as determined by the Supreme Court of the United States...
defendants to cross-examine witnesses to expose bias, but that the proper scope of that cross-examination was left to the discretion of the state courts. Thus, a state habeas court was obligated to conduct review of a trial court’s decision to limit that scope under an abuse of discretion standard. For Lindh, this conclusion meant denial of relief.

The state habeas court did exactly what Supreme Court precedent required; it conducted an abuse of discretion analysis, finding no abuse. Even if its finding were incorrect, it had not unreasonably applied “clearly established Federal law, as determined by the Supreme Court of the United States.” The key distinction to recognize, explained the Seventh Circuit, was that the state habeas court was rendering a decision that required it to decide a “matter of degree” as opposed to whether a finite right had been violated. In other words, the trial court had not precluded Lindh from cross examining this witness; it had only limited that examination. Whether that limitation was an abuse of discretion was a question about which reasonable people “can, and do, differ.” According to the Seventh Circuit, where this type of decision was required and where it was reached through “thoughtful” reasoning, it should not be disturbed. Deciding whether the state court struck the wrong balance within the limits of Supreme Court precedent was no longer within the federal courts’ power; ATEDA had eliminated this sort of “fine tuning.”

It seems that the court applied Teague principles to this discrete issue as well. Teague rested on the idea that a careful, reasoned decision by a state court should not be disturbed by a subsequent Supreme Court decision—even if that decision meant that the state court ruling violated a defendant’s constitutional rights. Here, the Seventh Circuit ruled that mere disagreement with a state court as to its application of Supreme Court precedent no longer entitles a petitioner to relief. Unless the state court has clearly transgressed what Supreme Court precedent requires, habeas relief is not warranted—even if the federal court believes a petitioner’s constitutional rights were violated through the state court’s application of federal law.

Finally, the court rejected Lindh’s argument under the first clause of § 2254(d)(1) because no United States Supreme Court precedent entitled Lindh to cross examine as to the alleged sexual misconduct of the witness. Thus, the state court’s decision was not “contrary to” Supreme Court precedent. In sum, the Seventh Circuit has interpreted § 2254(d)(1) as an expansion of Teague v. Lane. ATEDA denies habeas petitioners the benefit of any federal circuit court decisions that contravene a state habeas court decision, limiting the universe of available beneficial law beyond the limitation imposed by Teague. Also, ATEDA requires the federal courts to reserve relief for “grave occasions,” which apparently are those where the state habeas court has rendered a careless decision that clearly transgresses the “bounds” of Supreme Court precedent.

Two decisions by the Third Circuit suggest that it agrees with the Seventh Circuit’s interpretation of “unreasonable application of clearly established federal law” but that it disagrees with that court’s explanation of “contrary to clearly established federal law.” In Berryman v. Morton, the court announced that it was not reaching a decision as to the meaning of § 2254(d)(1); nonetheless, it conducted an analysis under ATEDA and stated that the Lindh rationale supported its conclusion.

Berryman was convicted of rape. On appeal, he raised an ineffective assistance of counsel claim, alleging several errors made by trial counsel. These mistakes were (1) counsel failed to use the victim’s inconsistent identification testimony to mitigate guilt; (2) counsel prejudiced the jury by unnecessarily opening the door to a homicide and bank robbery investigation undertaken with respect to Berryman’s codefendant; and (3) counsel failed to investigate potential defense witnesses. The state court determined that trial counsel’s actions did not violate the standard established in Strickland v. Washington. The federal district court affirmed. The Third Circuit disagreed and granted Berryman relief: “[W]e are convinced that the state court’s determination that trial counsel had a reasonable trial strategy is an ‘error grave enough to be called unreasonable.’” While the court stated that it believed the Lindh rationale supported this finding, this conclusion remains questionable.

In Lindh, the Seventh Circuit stated that a weighty deference was to be given state court decisions where the state court had chosen the right standard but that standard required an exercise of discretion to determine a matter of degree. Strickland is exactly that sort of test. What is reasonable conduct on the part of an attorney, even with Strickland as a guide, is a matter about which reasonable people can and do differ. Here, it appears that the Third Circuit has merely disagreed with the state court decision. The Seventh Circuit has explained that mere disagreement is not enough to grant relief where a state habeas court decision on a “matter of degree” was rendered with careful thought. At the same time, that court implied that egregiosity was the appropriate focus. The Berryman court does not mention the carefulness or thoughtfulness with which the state habeas court came to its conclusion. Instead, it appears that the Third Circuit’s decision rests on what it believes constitutes “grave” error. What the Berryman holding reveals is that despite the Seventh Circuit’s insistence that a greater deference is now in place, ATEDA allows a federal court nevertheless to grant relief where it disagrees significantly with a state habeas court’s conclusion of federal law, even on a matter of degree.

In Dickerson v. Vaughn, the Third Circuit again departed from the rationale of Lindh. The court applied its own precedent to determine whether the state habeas court had made a decision that was “contrary to clearly established federal law.” In Dickerson, the petitioners had pleaded nolo contendere to various criminal charges connected to drug

73 Id.
74 Id. at 876. Notably, after concluding that the correctness of the trial court ruling was irrelevant, the court spent two full paragraphs explaining how the factual determination by the trial court could have been correct.
75 Id. at 871, 877.
76 Id. at 877.
77 Id. The court also stated that the deference owed to the state court’s determination should be the same as that established by the Seventh Circuit for similar federal district court findings—ignoring their previous conclusion that the correctness of state court decisions is now to be measured only by United States Supreme Court jurisprudence. There is no mention of that Court’s decisions as to the deference owed to a state court in like circumstances. Id.
79 96 F.3d at 876. See also Perez v. Marshall, 946 F. Supp. 1521 (S.D. Cal. 1996) (finding that ATEDA limited the universe of law which a state decision can contravene to Supreme Court precedent).
80 100 F.3d 1089 (3rd Cir. 1996).
81 Id. at 1104.
82 Id. at 1097-1101.
84 Berryman, 100 F.3d at 1104. (quoting Lindh, 96 F.3d at 870).
85 90 F.3d 87 (3rd Cir. 1996).
86 Id. at 90-93.
transactions. They wanted to challenge the voluntariness of those pleas. Specifically, they asserted that had their attorneys told them nolo pleas barred appeal on the ground of double jeopardy, they would not have entered those pleas. The state habeas court ruled that such a challenge was precluded by statements made during the plea colloquies because they included an admonition by the court that nolo pleas were the equivalent of guilty pleas and that a plea of guilty relinquished rights to appeal.\(^87\) The Third Circuit, citing its own precedent, held that "established federal law prohibits giving such preclusive effect to plea colloquies."\(^88\)

Although it appears as if the Third Circuit and the Seventh Circuit are in conflict, the Third Circuit has not directly ruled on the meaning of § 2254(d)(1), so at the time of this writing, a grant of certiorari is unlikely on this issue. Furthermore, while the Court of Appeals for the Fifth Circuit has also interpreted § 2254(d)(1) using different language, its substantive result is the same as that of the Seventh Circuit in *Drinkard*. Hence, there is no present direct conflict among the circuits that would suggest the likelihood of an early hearing by the United States Supreme Court. In *Drinkard v. Johnson*,\(^89\) the Fifth Circuit concluded that the two clauses of section 2254(d)(1) concerned two different types of questions: the first addressed questions of law and the second addressed mixed questions of law and fact.\(^90\) This distinction was not drawn by the Seventh Circuit; nonetheless, the Fifth Circuit’s application of the language of each clause comports with that of the *Lindh* court. First, the Fifth Circuit found that absent United States Supreme Court precedent that directly governed the case, there was no “clearly established federal law” that the state habeas court could have contravened. Second, the Fifth Circuit found that because reasonable jurists could differ as to whether the state habeas court’s application of the correct federal standard was itself reasonable, the state decision should not be disturbed. Drinkard, like Lindh, was not entitled to relief under ATEDA.

Drinkard’s case presents an intricate issue that requires some explanation. Drinkard was convicted of capital murder for the killings of three persons. There was evidence that he was intoxicated at the time of the killings. This evidence was presented at both the guilt phase and the sentencing phase of his trial. At sentencing, the court gave the jury a special instruction with regard to evidence of intoxication in mitigation of death as a penalty. That instruction included a definition of temporary insanity by means of intoxication, and concluded “[t]herefore, if you find that the defendant at the time of the commission of the offense for which he is on trial was temporarily insane as a result of intoxication, then you may take such condition into consideration in mitigation” of death as a penalty.\(^91\) Drinkard argued that if the jury found that he was intoxicated but not to the degree that he was temporarily insane, this instruction would preclude their consideration of that lesser degree of intoxication in mitigation of death as a penalty.\(^92\) Such preclusion would violate *Lockett v. Ohio*\(^93\) and *Eddings v. Oklahoma*\(^94\) which required that the jury be able to consider all relevant evidence in mitigation.\(^95\) The state court identified *Lockett* and *Eddings* as controlling, but decided that the instruction was not a violation of their rule. The Fifth Circuit concluded that because the state habeas court correctly identified the legal standard, its decision was not “contrary to established federal law, as determined by the United States Supreme Court.”\(^96\) Apparently, the state habeas court decision would have been reviewable under this language only if the court had found that *Lockett* and *Eddings* did not apply, or perhaps, had misstated their holdings.

Following through, the court addressed whether the state court’s application of *Lockett* and *Eddings* was “unreasonable,” that is whether the decision could be reviewed pursuant to the second clause of § 2254(d)(1). The court concluded that this language required more than mere disagreement with the state court because mere disagreement constituted de novo review, and ATEDA’s language coupled with legislative history required greater deference.\(^97\) Accordingly, the court held:

\[\text{An application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.}\]

Drinkard did not satisfy this standard. Like the *Lindh* court, the Fifth Circuit adopted a *Teague*-like rationale and refused to disturb a state court holding where it was not clearly unreasonable in light of the precedent under which it was decided.\(^98\) Further, the reasonableness of the state decision was evidenced by the fact that “reasonable jurists” had found differently on the issue. Those reasonable, yet differing, jurists were the Drinkard panel itself.\(^100\) Judge Garza had dissented.

Judge Garza asserted that § 2254(d)(1) required that the reviewing court look for more than just whether the state court identified the correct standard of review. He thought that ATEDA’s plain language required, at minimum, that the state court’s decision “accord with the Supreme Court’s interpretation of the Constitution.”\(^101\) He also disagreed with the majority’s interpretation of “unreasonable application of clearly established federal law.” He argued that this language did not warrant a departure from Supreme Court precedent that established de novo review for mixed questions of law and fact.\(^102\) Moreover, “reasonable jurists would be of one view” was not a sensible standard of review:

\[\text{stated that ATEDA codified the Supreme Court’s position on federal habeas in that “a reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that view of applicable precedent.” Id. at 1268.}\]

\[\text{But see Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (applying ATEDA and disagreeing with state court’s conclusion that the measure of counsel’s assistance provided by Texas procedural law at a plea hearing satisfied Strickland where counsel merely stood by in case the court needed his assistance or the accused did not understand the proceeding).}\]

\[\text{Drinkard, 97 F.3d at 759.}\]

\[\text{Id. at 778 (Garska, J., dissenting).}\]

\[\text{Id. at 778-79 (citing Wright v. West, 505 U.S. 277, 301-03 (1992)).}\]
Where a federal court of appeals determines that a state criminal decision is contrary to federal law, § 2254(d)(1) does not require the unanimous consent of the federal bench for habeas relief. Indeed, it does not even require unanimity among a panel of judges considering the case. The determination of reasonableness must consider only the propriety and correctness of the state court’s actions in the context of federal guarantees established by the Supreme Court.103

Judge Garza concluded that where the federal court disagrees with the state, the federal court’s interpretation must prevail.104 In other words, ATEDA merely codified existing federal habeas jurisprudence. As to § 2254(d)(1), this conclusion stands alone.105 More significantly, the Fifth Circuit has expanded its interpretation of “contrary to clearly established federal law” by ruling that where Supreme Court precedent directly on point is lacking, a petitioner cannot establish that a state habeas court decision contravened the law as determined by the Supreme Court.

In Blankenship v. Johnson,106 the Fifth Circuit faced a question of first impression. Specifically, it had to determine if an indigent person was entitled to counsel when the State seeks discretionary review of his successful appeal. Blankenship was convicted of aggravated robbery in 1988. He appealed that conviction, alleging that the indictment was faulty because it misnamed his victim. The appellate court reversed his conviction and ordered an acquittal. Subsequently, his attorney was elected county attorney but failed to inform Blankenship or withdraw as counsel of record. In January 1989, the state petitioned the Texas Court of Criminal Appeals, seeking discretionary review of the reversal. The petitions were served on Blankenship’s attorney, but he took no action. The court granted the petition and in March 1990 found for the state. Blankenship remained ignorant of these events. He was arrested in April 1990.107

Subsequent efforts by Blankenship to contact his attorney were met by silence until November 1991 when he replied: “I have not withdrawn, I was elected County Attorney and by law I cannot represent a defendant in a criminal matter and also be a prosecutor for the State of Texas.”108 The state habeas court denied Blankenship relief. He petitioned the federal district court, alleging ineffective assistance of counsel based on his attorney’s complete inactivity and conflict of interest. The district court denied relief.109

Because an ineffective assistance of counsel claim must be predicated on the right to counsel, the Fifth Circuit had to decide if Blankenship had a right to counsel when the State seeks discretionary review. The court found that ATEDA barred relief. The majority first held that because no Supreme Court precedent addressed this question, there was nothing that the state decision could contravene. The plain language of § 2254(d)(1) barred relief.110 The court then reviewed the state decision under the “reasonableness” clause of § 2254(d)(1). The court identified Ross v. Moffit111 as the governing Supreme Court precedent.112 Moffit held that a defendant has no right to counsel when he seeks discretionary review.113 The Fifth Circuit concluded that a reasonable jurist could have concluded that Moffit stood for the broader proposition that “a defendant who once enjoyed the benefit of counsel to review the record, prepare a brief, and muster the evidence was not entitled to counsel on discretionary review, regardless of who requested that review.”114 The court concluded that given the language in Moffit that supported this conclusion, “one cannot reasonably conclude that the state court decision was directly contrary to Moffit, and certainly not that what Blankenship argues for now was clearly established.”115 Further, the majority refused to interpret Supreme Court silence as an affirmation of the opposing view. Instead, § 2254(d)(1) required that the federal reviewing court look only to positive pronouncements by the Supreme Court to meet the “clearly established” standard.116 Because there was no positive pronouncement by the Supreme Court which contravened the state court decision, ATEDA barred relief.

Judge Parker dissented. He concluded that the majority’s insistence upon the existence of Supreme Court precedent “on all fours” with the facts of the case in question was an erroneous interpretation of § 2254(d)(1).117 Instead, section 2254(d)(1) “instructs the federal courts to examine a state court’s decision in relation to the Supreme Court’s body of law” in its entirety.118 ATEDA did not preclude granting relief on a petition simply because its facts did not track the facts of any Supreme Court precedent. Section 2254(d)(1) should be interpreted to have the same purpose as Teague: “ensur[ing] that state judgments are not affected by legal rules established after a conviction becomes final. A legal rule or right is ‘clearly established’ if it was ‘compelled by existing precedent.’”119

The Blankenship majority’s rationale follows Lindh in one respect. Lindh requires Supreme Court precedent directly on point before it will find that a federal court can determine that a state court decision was “contrary to clearly established federal law.” The dissent in Blankenship seems to hold the more logical view that the federal court’s review should be based on Supreme Court jurisprudence in its entirety. The Third Circuit apparently agrees in so far that its application of ATEDA has included looking to a broader body of federal law. That court has gone beyond Judge Parker’s suggestion, however, by looking to its own precedent as well to determine if the state court decision was “contrary to clearly established federal law.” At the same time, that court has not directly interpreted § 2254. Also, while the Fifth Circuit and the Seventh Circuit have taken different approaches to ATEDA, their results accord with one another.

103 Id. at 779.
104 Id.
105 With respect to § 2254(e)(2) which sets standards for granting evidentiary hearings, more than one court has found that ATEDA codifies existing federal habeas jurisprudence. See Section E, infra.
106 106 F.3d 1202 (5th Cir. 1997).
107 Id. at 1203.
108 Id.
109 Id. at 1203-04.
110 Id. at 1205.
111 417 U.S. 600 (174).
112 Blankenship, 106 F.3d at 1205. Apparently, the court conducted an analysis under the “unreasonable application” language in the alternative to its first holding. There is no other apparent reason why the court would conclude there was no Supreme Court precedent that could be contravened and then analyze the case for a reasonable application of Moffit.
113 417 U.S. at 610.
114 Blankenship, 106 F.3d at 1206.
115 Id. at 1205.
116 The court explained further that it was “instructive” that instead of adopting language from habeas jurisprudence, Congress chose language that echoed the test for qualified immunity under § 1983 which has a well-settled meaning. In other words, “contrary to clearly established law” could be understood to mean that a state habeas court’s ruling must be apparently unlawful before relief was warranted. Id. at 1206.
117 Id. at 1211.
118 Id.
119 Id. at 1212 (emphasis in original).
These early decisions do not discuss one important distinction between claims evaluated under the new 2254(d)(1) and those subjected to Teague analysis. That distinction suggests that the Lindh approach is flawed. Teague doctrine defers to possibly erroneous state law conclusions of federal law that were reached without the benefit of later Supreme Court holdings identifying the error. Identical Teague-type deference under new 2254(d)(1) arguably makes much less sense, given that both state and federal courts have access to the same universe of constitutional law at the time of decision. Other factors, including the language of § 2254 itself, may call for a degree of deference, but it is to be hoped that the ultimate resolution of the issue does not ignore the absence, in § 2254 situations, of a bedrock justification for Teague.

F.  28 U.S.C. § 2254(e)(2)\(^2\): Evidentiary Hearings

Before ATEDA, federal grants of evidentiary hearings were governed by Townsend v. Sain\(^{121}\) and Keeney v. Tamayo-Reyes.\(^{122}\) Evidentiary hearings were warranted when the state court failed to afford a petitioner sound process. In Townsend, the Court set down six circumstances where a federal court must grant an evidentiary hearing:

1. the merits of the factual dispute were not resolved in the state hearing;
2. the state factual determination [was] not fairly 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 [was] a substantial allegation of newly discovered evidence;
5. the material facts were not adequately developed at the state court hearing;
6. for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.\(^{123}\)

The Supreme Court modified the fifth factor in Keeney. The Court held that even if a petitioner alleged sufficient facts, an evidentiary hearing was not required unless the petitioner could show cause and prejudice for the failure of adequate development in state court, or unless there was a miscarriage of justice.\(^{124}\)

Additionally, pre-ATEDA petitioners could be granted an evidentiary hearing if they could show that """"a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime""""—the miscarriage of justice exception articulated in Keeney.\(^{125}\)

A petitioner also could get an evidentiary hearing where he could show that but for the constitutional error at trial no reasonable jury would have found him guilty of the death penalty, again a miscarriage of justice showing.\(^{126}\) In Pitsonbarger v. Graham, the Seventh Circuit held that ATEDA has eliminated the innocence of the death penalty claim.\(^{127}\)

In Pitsonbarger, the petitioner was convicted of two counts of murder and two counts of felony murder. The jury sentenced him to death.\(^{128}\) On appeal, Pitsonbarger claimed that his counsel was ineffective for failing to inform the court that Pitsonbarger was taking Librium, a psychotropic drug, prior to his examination for fitness to stand trial. Under Illinois law, if he had been found unfit to stand trial but later found fit provided that he received expert medical assistance, he would have been deemed ineligible for the death penalty.\(^{129}\) The court found that his Librium claim was procedurally defaulted and that he could not show cause for failure to raise this claim earlier. More significantly, the court held that his assertion of actual innocence of the death penalty was no longer available under ATEDA.\(^{130}\) It is not settled, however, that ATEDA has eliminated this claim. Other courts have disagreed with Pitsonbarger, including the United States District Court for the Northern District of Indiana.

In Burris v. Parke, the United States District Court for the Northern District of Indiana, after Pitsonbarger, held that an argument for innocence of the death penalty was available under ATEDA.\(^{131}\) The Seventh Circuit has not overruled this case. In Burris, the petitioner raised ineffective assistance of counsel claims for the first time in state habeas and requested an evidentiary hearing to develop the claims. The state habeas court denied his request.\(^{132}\) The district court found that under Keeney, Burris would have been entitled to an evidentiary hearing because the state failed to provide him a full and fair hearing on his ineffective assistance claims which were before that court for the first time.\(^{133}\) Under ATEDA, however, Burris was not entitled to an evidentiary hearing.

The court explained that the key to interpreting § 2254(e)(2) lay in the meaning of """"the applicant has failed to develop."""" Burris argued that this language codified Keeney so that the section applied only if the petitioner was at fault for the inadequate factual record. The court disagreed, finding that the language applied to the """"non-development of any claim in state proceedings regardless of the fault of the petitioner in not developing the claim which is then in turn subject to two stated conditions 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.

\(^{120}\) 28 U.S.C. § 2254(e)(2) reads:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(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

\(^{121}\) 372 U.S. 293 (1963).
\(^{122}\) 504 U.S. 1 (1992).
\(^{123}\) 372 U.S. at 313.
\(^{124}\) Keeney, 504 U.S. at 7-8.
\(^{127}\) 103 F.3d 1293, 1299-1300 (7th Cir. 1996).
\(^{128}\) Id. at 1297.
\(^{129}\) Id. at 1298.
\(^{130}\) Id. at 1299-1300.
\(^{131}\) 948 F. Supp. 1310 (N.D. Ind. 1996).
\(^{132}\) Id. at 1316-17.
\(^{133}\) Id. at 1323.
exceptions." 134 The court ruled that the language must carry this meaning because if it did not then the language of subsection (A)(ii) was mere surplusage. 135 This interpretation is sound. If the language codified Keeney, the statute would in effect say: where it is petitioner’s fault that the facts are not developed, he does not get an evidentiary hearing unless it is not petitioner’s fault that the facts are not developed. Instead, according to the district court, the language must be interpreted to read: where a claim was not factually developed in the state court, the petitioner is not entitled to an evidentiary hearing unless the petitioner was not at fault for the inadequate record. Thus, despite the apparently plain language, “if the petitioner has failed to develop,” rules of statutory construction require an interpretation that avoids surplusage. The court found that Burris satisfied this test because the state court denied him the opportunity to develop the facts. But he could not satisfy subsection (B) which requires a showing of actual innocence of the crime by clear and convincing evidence. His guilt was not in dispute.

Nevertheless, the court determined that the unusual circumstances of the case 136 made it inequitable to rule according to a strict interpretation of the statute. Thus, the court ruled that Burris might yet be granted relief if he could show innocence of the death penalty. 137 The court finally ruled, however, that Burris could not establish that the facts underlying his ineffective assistance of counsel claims would be sufficient to show by clear and convincing evidence that no reasonable juror would have recommended the death penalty. 138 The court’s ruling that Burris could raise an innocence of the death penalty claim despite ATEDA’s language is encouraging, but the court also made clear that it was allowing the claim only because disallowing it appeared inequitable under the facts. Thus, Burris may be limited to its facts, but whether it is so limited is not clear.

One court has interpreted Burris to stand for the proposition that ATEDA has not eliminated innocent-of-the-death-penalty arguments. In Housel v. Thomas, 139 the United States District Court for the Northern District of Georgia found the ambiguity of § 2254(e)(2) posed a different question—a threshold question. That court asked: did § 2254(e)(2) apply to penalty phase claims? The court explained that it found the reasoning of Burris persuasive and held that a federal evidentiary hearing on penalty phase claims must be granted where the petitioner satisfied the plain language of section 2254(e)(2)(A) and satisfied subsection (B) by showing that “the facts underlying the claim would be sufficient to show by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have recommended him for the death penalty.” 140 The court rejected the argument that § 2254(e)(2) codified existing law, and it rejected the argument that it was limited to claims of innocence of the crime. 141 The Burris opinion and the Housel holding clearly stand for the proposition that ATEDA has not eliminated innocence of the death penalty claims.

III. Conclusion

Counsel should note that Virginia has not qualified as an opt-in state, but the Fourth Circuit has ordered that the district and circuit courts render their decisions according to the time schedule set forth in § 2266. Whether Virginia will qualify as an opt-in state probably depends upon further action by the legislature. It must provide standards of competency for counsel sufficient to satisfy the courts—even the Fourth Circuit has indicated that Virginia does not yet qualify.

Neither the Fourth Circuit nor any Virginia district court has interpreted § 2254(d). Consequently, the kind and degree of deference owed to Virginia state court decision(s) remains an open question. While ostensibly there is some disagreement among the circuit courts that have rendered interpretations, this discord does not yet suggest early review by the Supreme Court. However, the Lindh and Drinkard opinions are finding support in the district courts and counsel should be familiar with them.

Finally, it appears that the courts do disagree as to whether the standards for evidentiary hearings have been changed by § 2254(e)(2). Some courts maintain that this section codified existing law while others held that it imposed more stringent standards, eliminating the “innocent of the death penalty” basis for the miscarriage of justice exception.

It would appear that the task for Virginia habeas counsel is to adopt, refine, and modify the analysis and arguments found in these cases. Those arguments should reflect the view that the Great Writ should not be subjected to further shrinkage as the provisions of ATEDA are interpreted. Finally, new arguments directed to this goal are solicited by the Virginia Capital Case Clearinghouse and will be disseminated to the widest possible audience.

134 Id. at 1325. (quoting Bean v. Calderon, No. CV 94-063 (GJF/CGH), at 6 (E.D. Cal. May 15, 1996) (emphasis added)). But see Washington v. Mazurkiewicz, 1997 WL 83771, *2 n.1 (E.D. Pa. Feb. 25, 1997) (stating that under ATEDA a procedural default for which the petitioner cannot be blamed does not preclude an evidentiary hearing); Brewer v. Marshall, 941 F. Supp. 216, 228-29 (D. Mass. 1996) (holding that § 2254(e)(2) applies only where the petitioner has failed to develop the factual basis of a claim); Caro v. Vasquez, 1996 WL 478683 (N.D. Cal. Aug. 19, 1996) (finding that where petitioner had failed to adequately develop facts § 2254(e)(2) did not bar granting an evidentiary hearing but that evidentiary hearing was not necessary because claims could be resolved on pleadings and state court record).

135 Id. at 1326.

136 The unique circumstances that the court found inequitable were that, in the complex procedural history of the case, Indiana denied Burris the opportunity to fully litigate his ineffective assistance of counsel claims, as required by Lindh. An important factor in this determination was that the state court rejection of one of his state habeas petitions on that issue was not a “careful and well-reasoned opinion.” Id. at 131-22. Agreeing with Burris on these two points, and considering the Supreme Court law to be Strickland, the court purported to be reviewing under ATEDA’s new standard, but the court gave no deference to the state court’s conclusions. Id.


138 Burris, 948 F. Supp. at 1327. The facts underlying the claim are very lengthy but also very interesting. Apparently, Burris had been shot in the head and was asserting that he suffered from organic brain dysfunction, among other problems. Counsel did not introduce these facts in mitigation. For interested readers, they appear on pages 1327-8.


140 Id. at *3.

141 Id.