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**ATTORNEY GENERAL'S REPORT  
SUPPORTING SENATE BILL 435**

April 2, 2003

## **Introduction**

Senate Bill 435, if passed into law, will reform the Nevada habeas corpus procedures in a manner designed to save public funds and to increase the efficiency of the process by creating a simple and straightforward process to regulate repeat habeas corpus filings. These positive changes are long overdue. The bill is designed to effect these changes by creating a logical and efficient process by which the Nevada district courts can make rulings on the legality of repeat habeas filings, prior to the expenditure of potentially expensive, time-consuming, and unnecessary resources in the litigation of an unlawful habeas corpus petition.

These common-sense reforms follow the same logic and rationale of the reforms enacted into federal law by Congress in 1996, codified at 28 U.S.C. § 2244(b)(3)(A), and those adopted by other states as rules of court, such as Indiana Supreme Court Rule P.C. 12. The provisions of the reform bill adopt and reinforce the existing legal standards under Nevada law that apply to repeat petitions.

These reforms have the wholehearted support of the Office of the Attorney General, the Nevada District Attorneys Association, the Clark County District Attorney, the Washoe County District Attorney, and victims of crime and their advocates.

## **Legal Role of Habeas Corpus.**

Habeas corpus is a legal remedy that a person convicted of a crime can invoke to challenge the legality of his conviction. It is similar to a direct appeal of a conviction, but it concerns a different category of claims than the direct appeal does. In the direct appeal, the convicted person can challenge the legality of legal issue that are "of record", such as the propriety of the trial court's rulings on evidence, rulings on objections, jury instructions, and the sufficiency of the evidence on which the defendant was convicted.

In a state court habeas corpus petition, a convicted person can raise legal challenges, or claims, to issues that are referred to as being "not of record" or "beyond the record". These claims concern issues that do not appear in the actual record of the pre-trial and trial proceedings, and usually focus on the quality of the work done by the defense attorney. These claims typically challenge what is referred to as the trial attorney's "effectiveness", and they generally allege that, but for the attorney's ineffectiveness, the defendant would not have been convicted of the charged crime, in spite of the evidence against him.

## **The Contemporary Effects of the Historical Development of Habeas Corpus.**

Habeas corpus can be a lengthy and time-consuming process. Almost all habeas corpus litigation is paid for with public funds. It is not unheard of that a petitioner will spend tens of thousands of dollars in litigating a habeas corpus petition through discovery, investigation, and attorneys fees. In one federal habeas corpus case several years ago, the court allowed the petitioner's attorney to spend approximately \$60,000 in the litigation process, and in another case a petitioner was given more than \$200,000. In a number of cases, courts have been known to hand out these large sums of public money even when the petition before the court is a repeat petition, the petitioner's second or third petition challenging his conviction, and in spite of the fact that the case had already been investigated by the defense side on at least two separate occasions at public expense.

While a defendant only has the opportunity to file one direct appeal, the law traditionally permitted a defendant to file an unlimited number of habeas corpus petitions over any number of years. This situation resulted from the flukes of ancient habeas corpus law and historic accident. Hundreds of years ago in the English legal system, out of which our law derived, there were no limits to the number of petitions a convict could file, and our American legal system adopted this same process.

Because of mounting evidence of serious abuse of this process by convicted offenders, virtually every state, and the federal government, which also has its own habeas corpus process in the federal court system, has reformed the law to stem the abuse which occurs when a defendant files not one, but two, three, four, or more habeas corpus petitions in succession over a period of many years. Because each of these petitions must be addressed individually by the courts and by the prosecutor's office, the legal system has been overburdened by this abuse.

### **The Reform Effort Nationwide.**

During the past thirty years, the Nevada legislature, along with the other states and the federal government, has put in place a number of provisions that seek to stop this abuse which derived from the ancient common law:

- One of the statutes passed by this legislature states that if a court rules against a petitioner on a claim, the petitioner cannot refile that same claim again. That statute is NRS 34.810(2).
- A second statutory rule states that if a petitioner had a claim that he could have filed in his first petition, but withheld the claim and failed

to include it in the first proceeding, he cannot file the claim in a second or third petition. That statute is NRS 34.810(2) and (3).

- Because under the old law there were no time limits as to when a petition could be filed, a third statute was passed requiring the petitioner to file his petition within 1 year after the conclusion of his direct appeal. That statute is NRS 34.726.

These reform statutes were the result of a complex set of interactions between federal and state court decisions, and the actions of state and federal legislation that has been on-going for many years, in a process described by the United States Supreme Court as "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." This complex reform process has been designed to bring a character of rationality and common sense to the habeas corpus process, and to foster the all-important policy of respect for the finality of criminal judgments of conviction.

The United States Supreme Court has repeatedly said that habeas corpus exacts high costs and is subject to abuse and manipulation. Challenges to convictions strike at the finality of criminal judgments. Without finality, the criminal law is deprived of much of its deterrent effect. Finality has special importance in the context of a federal attack on a state conviction; the re-examination of state convictions on federal habeas corpus frustrates both the states' sovereign power to punish offenders, and their good faith attempts to honor constitutional rights. The power of a state to articulate societal norms through the criminal law means little if the state cannot enforce those laws. Habeas review further extracts costs in the heavy burden it places on scarce judicial resources, and can give inmates the incentive to withhold claims for manipulative purposes by establishing disincentives to present claims fully when the evidence is fresh. (McCleskey v. Zant, 499 U.S. 467 (1991)).

In spite of these reform efforts, the habeas corpus process is still abused by petitioners. As each former point of abuse was foreclosed by court decisions and legislation, petitioners found new ways to manipulate and abuse the system. Because the federal court system also has its own habeas corpus system that state inmates can invoke to challenge their convictions on federal Constitutional grounds, most often as alleged Due Process violations under the Fifth Amendment or ineffective assistance of counsel claims under the Sixth Amendment, one method of successfully manipulating the system is to bounce between the federal court system and the state court system, because of the requirement in federal law that the federal court cannot consider any claim until the state courts have had a chance to rule on that claim.

If a petitioner wants to prolong the habeas process, he can easily do so; after the completion of his direct appeal and his state habeas corpus proceeding,

if the petitioner then files a habeas petition in the federal district court that contains a claim not previously presented to the state courts, the federal court, under what is termed the "exhaustion requirement", must generally dismiss the petition. In these cases, the petitioner will then return to state court a file another state court habeas petition containing this claim, along with others he has thought of. This process can then be repeated over and over again, allowing the inmate to manipulate both court systems, and to play one off of the other.

### Plugging the Loophole.

Senate Bill 435 is an attempt to close this loophole. It is an attempt to add a measure of rationality and common sense to the state habeas corpus process. In so doing, these reforms will have a number of significant benefits:

- This reform will save significant taxpayer dollars in bringing efficiency to the habeas corpus system in the state;
- It will save significant amounts of time in the process by shifting to the repeat petitioner the burden of demonstrating that his presumptively illegal petition is, in fact, legal under one of the very narrow exceptions to the general rule against the filing of repeat petitions;
- These reforms will help to ensure the sanctity and finality of judgments of conviction so valued by the Supreme Court by better and more rational enforcement of existing standards that establish the strong presumption against repeat petitions.
- The reforms will support and strengthen the relevant and governing decisions handed down by the Nevada Supreme Court regarding abuse of the writ and the untimely filing of petitions.
- The reforms will reduce the burden on the scarce judicial resources of the state's district courts and the Nevada Supreme Court by creating a simple and efficient process wherein the legality of repeat habeas petitions can be determined.
- And the reforms will accomplish all of these important goals without restricting the remedy of habeas corpus to any petitioner, without taking away any rights that currently exist, and without changing any of the existing legal standards that govern abuse of the writ or the timeliness requirements for filing. The reforms are simple, straightforward, and in complete consonance with existing law.

## The Mechanics of the Proposed Process.

Currently, if a convict wants to file a second, third, or fourth habeas petition, even though the law presumes that the petition would be unlawful, he can still file it. In order to inform the court that the petitioner has filed an improper successive or untimely petition, the prosecutor must pull out all of the old records on the petitioner, pour through those old records, and research and draft a response to be filed with the court, explaining why the new petition is unlawful. The court is then obligated to pull out all of its old files and engage in a lengthy study of all of the former habeas litigation. This process is time consuming and expensive, and results from the abusive practice of a petitioner's filing repeated petitions.

The current process still reflects the irrationality of the ancient common law in that it permits a petitioner to file a presumptively illegal petition, and it allows petitioners to file such presumptively illegal petitions before a ruling can be made by the court that the filing of the petition is, in fact, illegal. The irony is that none of this abuse is necessary.

Senate Bill 435 provides that, before a convict is permitted to file a second, third, or fourth habeas petition, he must seek permission from the court in order to do so. This simple idea is the heart and soul of the reform.

The inmate can seek this leave of court in a straightforward process set out in the bill:

- He does so by filing a document with the court entitled "Application for Leave to File Subsequent Habeas Corpus Petition".
- He attaches a copy of the proposed petition as an exhibit to the Application.
- It is the burden of the petitioner under S.B. 435 to explain to the court and the prosecutor why the untimely and/or successive petition is legal; this burden should be on the petitioner because the law already presumes that such petitions are illegal and improper.
- The inmate names his custodian as the Respondent on the Application, and serves the Application on the district attorney and the Attorney General;
- The Respondent responds to the Application forthwith, and the district court must make its decision on the legality of the filing without undue delay.

- This process ensures that the important and preliminary issue of the propriety of the filing of the petition will be addressed first, before any unnecessary and expensive litigation is erroneously begun, only to be halted or ruled improper by the Nevada Supreme Court in a mandamus writ proceeding, or in the habeas appeal.

The reforms of S.B. 435 do not change any of the standards that were developed by the federal or state courts, or Congress, or this legislature, that govern untimely petitions, or abusive petitions. The bill will provide efficiency to the habeas corpus system, it will speed the resolution of questions surrounding these abusive and untimely petitions, and it will save significant taxpayer funds by reducing the burdens on our courts and prosecutors that derive from these illegal filings. These reforms will benefit habeas corpus petitioners themselves by providing a simple and straightforward statutory process to be followed when the inmate decides that he would like to file a subsequent habeas corpus petition. Under the current statutory scheme, there is no statutorily-described process for the filing of subsequent petitions. These reforms would provide that structure, save public funds, and promote efficiency.