

109TH CONGRESS  
1ST SESSION

# S. 1088

To establish streamlined procedures for collateral review of mixed petitions, amendments, and defaulted claims, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

MAY 19, 2005

Mr. KYL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To establish streamlined procedures for collateral review of mixed petitions, amendments, and defaulted claims, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) SHORT TITLE.—This Act may be cited as the  
5       “Streamlined Procedures Act of 2005”.

6       (b) TABLE OF CONTENTS.—The table of contents for  
7       this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Mixed petitions.
- Sec. 3. Amendments to petitions.
- Sec. 4. Procedurally defaulted claims.
- Sec. 5. Tolling of limitation period.

Sec. 6. Harmless error in sentencing.  
 Sec. 7. Unified review standard.  
 Sec. 8. Appeals.  
 Sec. 9. Capital cases.  
 Sec. 10. Clemency and pardon decisions.  
 Sec. 11. Ex parte funding requests.  
 Sec. 12. Crime victims' rights.  
 Sec. 13. Technical corrections.  
 Sec. 14. Application to pending cases.

1 **SEC. 2. MIXED PETITIONS.**

2 Section 2254(b) of title 28, United States Code, is  
 3 amended—

4 (1) in paragraph (1), by striking subparagraphs  
 5 (A) and (B) and inserting the following:

6 “(A) the applicant—

7 “(i) has exhausted the remedies available  
 8 in the courts of the State by fairly presenting  
 9 and arguing the specific Federal basis for each  
 10 claim in the State courts; and

11 “(ii) has described in the application how  
 12 the applicant has exhausted each claim in the  
 13 State courts; or

14 “(B)(i) the application presents a claim for re-  
 15 lief that would qualify for consideration on the  
 16 grounds described in subsection (e)(2); and

17 “(ii) the denial of such relief is contrary to, or  
 18 would entail an unreasonable application of, clearly  
 19 established Federal law, as determined by the Su-  
 20 preme Court of the United States.”; and

21 (2) by adding at the end the following:

1 “(4) Any unexhausted claim that does not qualify for  
 2 consideration on the grounds described in this subsection  
 3 shall be dismissed with prejudice.”.

4 **SEC. 3. AMENDMENTS TO PETITIONS.**

5 (a) IN GENERAL.—Section 2244 of title 28, United  
 6 States Code, is amended by adding at the end the fol-  
 7 lowing:

8 “(e)(1) An application for a writ of habeas corpus  
 9 may be amended once as a matter of course before the  
 10 earlier of the date on which an answer to the application  
 11 is filed or the expiration of the 1-year period described  
 12 in subsection (d).

13 “(2) Except as provided under paragraph (1), an ap-  
 14 plication may not be amended to modify existing claims  
 15 or to present additional claims, unless the modified or  
 16 newly presented claims would qualify for consideration on  
 17 the grounds described in subsection (b)(2).”.

18 (b) CONFORMING AMENDMENT.—Section 2242 of  
 19 title 28, United States Code, is amended in the third un-  
 20 designated paragraph by striking “in the rules of proce-  
 21 dure applicable to civil actions” and inserting “under sec-  
 22 tion 2244(e)”.

23 **SEC. 4. PROCEDURALLY DEFAULTED CLAIMS.**

24 (a) IN GENERAL.—Section 2254 of title 28, United  
 25 States Code, is amended—

1           (1) by redesignating subsections (h) and (i) as  
2       subsections (i) and (j), respectively; and

3           (2) by adding after subsection (g) the following:

4       “(h)(1) A court, justice, or judge shall not have juris-  
5       diction to consider an application for a writ of habeas cor-  
6       pus on behalf of a person in custody pursuant to the judg-  
7       ment of a State court with respect to any claim that was  
8       found by the State court to be procedurally barred, or any  
9       claim of ineffective assistance of counsel related to such  
10      claim, unless—

11           “(A) the claim would qualify for consideration  
12      on the grounds described in subsection (e)(2); or

13           “(B) the State, through counsel, expressly  
14      waives the provisions of this paragraph.

15       “(2)(A) A court, justice, or judge shall not have juris-  
16       diction to consider any claim that the State court denies  
17       on the merits and on the ground that the claim was not  
18       properly raised under State procedural law, or any claim  
19       of ineffective assistance of counsel related to such claim,  
20       unless the claim would qualify for consideration on the  
21       grounds described in subsection (e)(2).

22       “(B) A court, justice, or judge shall not have jurisdic-  
23       tion to consider any claim that is otherwise subject to  
24       paragraph (1) and that was reviewed by the State court  
25       for plain error, fundamental error, or under a similarly

1 heightened standard of review, unless the claim would  
2 qualify for consideration on the grounds described in sub-  
3 section (e)(2).

4 “(3) The State shall not be required to answer any  
5 claim described in paragraph (1) or (2) unless the court  
6 first determines that the claim would qualify for consider-  
7 ation on the grounds described in subsection (e)(2).

8 “(4) If a court determines that a State court order  
9 denying relief on procedural grounds is ambiguous as to  
10 which claims were found to be procedurally barred, the  
11 court shall resolve any perceived ambiguity, if necessary,  
12 by examining the full record in the State court.

13 “(5) An application for a writ of habeas corpus on  
14 behalf of a person in custody pursuant to the judgment  
15 of a State court shall not be granted with respect to any  
16 claim under paragraph (1) or (2) unless the denial of such  
17 relief is contrary to, or would entail an unreasonable appli-  
18 cation of, clearly established Federal law, as determined  
19 by the Supreme Court of the United States.”.

20 (b) LIMITATION.—Section 2244(d)(2) of title 28,  
21 United States Code, as amended by section 3, is amended  
22 by adding at the end the following: “An application that  
23 was otherwise improperly filed in State court shall not be  
24 deemed to have been properly filed because the State court

1 exercises discretion in applying a rule or recognizes excep-  
2 tions to that rule.”.

3 **SEC. 5. TOLLING OF LIMITATION PERIOD.**

4 Section 2244(d) of title 28, United States Code, is  
5 amended—

6 (1) in paragraph (2), by striking “judgment  
7 or”; and

8 (2) by adding at the end the following:

9 “(3) In this section, an application for State post-  
10 conviction or other collateral review—

11 “(A) is pending from the date on which the ap-  
12 plication is filed with a State court until the date on  
13 which the same State court rules on that applica-  
14 tion; and

15 “(B) is not pending during any period of time  
16 between the date on which a State court rules on  
17 that application and the date on which the applica-  
18 tion or a related application is filed, or is otherwise  
19 presented, for adjudication to such State court on  
20 rehearing authorized by State law or to a higher  
21 State court.

22 “(4) The period of limitation under paragraph (1)  
23 may be tolled, suspended, or extended only as provided  
24 under this subsection.”.

1 **SEC. 6. HARMLESS ERROR IN SENTENCING.**

2 Section 2254 of title 28, United States Code, as  
3 amended by section 4, is amended by adding at the end  
4 the following:

5 “(k) A court, justice, or judge shall not have jurisdic-  
6 tion to consider an application with respect to an error  
7 relating to the applicant’s sentence or sentencing that has  
8 been found to be harmless or not prejudicial in State court  
9 proceedings, unless a determination that the error is not  
10 structural is contrary to clearly established Federal law,  
11 as determined by the Supreme Court of the United  
12 States.”.

13 **SEC. 7. UNIFIED REVIEW STANDARD.**

14 Section 107(c) of the Antiterrorism and Effective  
15 Death Penalty Act of 1996 (28 U.S.C. 2261 note) is  
16 amended by striking “Chapter 154 of title 28, United  
17 States Code (as amended by subsection (a))” and insert-  
18 ing “This title and the amendments made by this title”.

19 **SEC. 8. APPEALS.**

20 (a) APPELLATE TIME LIMITS.—Section 2254 of title  
21 28, United States Code, as amended by sections 4 and  
22 6, is further amended by adding at the end the following:

23 “(l) In review by a court of appeals of a district  
24 court’s determination of an application for a writ of ha-  
25 beas corpus on behalf of a person in custody pursuant to  
26 the judgment of a State court, the following shall apply:

1           “(1) A timely filed notice of appeal from an  
2           order issuing a writ of habeas corpus shall operate  
3           as a stay of that order, pending final disposition of  
4           the appeal.

5           “(2) A court of appeals shall decide the appeal  
6           from an order granting or denying a writ of habeas  
7           corpus—

8                   “(A) not later than 300 days after the date  
9                   on which the brief of the appellee is filed or, if  
10                  no timely brief is filed, the date on which such  
11                  brief is due; or

12                  “(B) if a cross-appeal is filed, not later  
13                  than 300 days after the date on which the ap-  
14                  pellant files a brief in response to the issues  
15                  presented by the cross-appeal or, if no timely  
16                  brief is filed, the date on which such brief is  
17                  due.

18           “(3)(A) If a petition is filed for a panel rehear-  
19           ing or rehearing by the court of appeals en banc fol-  
20           lowing a decision by a panel of a court of appeals  
21           under paragraph (2), the court of appeals shall de-  
22           cide whether to grant the petition not later than 90  
23           days after the date on which the petition is filed, un-  
24           less a response is required.



1           “(B) If a response to a petition is required  
2           under subparagraph (A), a court of appeals shall de-  
3           cide whether to grant the petition not later than 90  
4           days after the date on which the response is filed or,  
5           if no timely response is filed, the date on which the  
6           response is due.

7           “(C) If a panel rehearing is granted, the panel  
8           shall make a determination of the appeal on rehear-  
9           ing not later than 120 days after the date on which  
10          the order granting a panel rehearing is entered. No  
11          second or successive petition for panel rehearing  
12          shall be allowed.

13          “(D) If rehearing en banc is granted, the court  
14          of appeals shall make a final determination of the  
15          appeal not later than 180 days after the date on  
16          which the order granting rehearing en banc is en-  
17          tered.

18          “(4) If a court of appeals fails to comply with  
19          the requirements of this subsection, the State may  
20          petition the Supreme Court, or a justice thereof, for  
21          a writ of mandamus to enforce the requirements of  
22          this subsection.

23          “(5) The time limitations in this subsection  
24          shall apply in all proceedings in a court of appeals  
25          on review of a district court’s determination of an

1 application for a writ of habeas corpus, including  
2 any such proceedings in a court of appeals following  
3 a remand by the Supreme Court for further pro-  
4 ceedings.

5 “(6) In proceedings following remand in a court  
6 of appeals, the time limit specified in paragraph (2)  
7 shall begin on the date the remand is ordered if fur-  
8 ther briefing is not required in the court of appeals.  
9 If there is further briefing in the court of appeals,  
10 the time limit specified in paragraph (2) shall begin  
11 on the date on which a responsive brief is filed or,  
12 if no timely responsive brief is filed, from the date  
13 on which such brief is due.

14 “(7) The failure of a court to meet or comply  
15 with a time limitation under this subsection shall not  
16 be a ground for granting relief from a judgment of  
17 conviction or sentence, nor shall the time limitations  
18 under this subsection be construed to entitle a cap-  
19 ital applicant to a stay of execution, to which the ap-  
20 plicant would otherwise not be entitled, for the pur-  
21 pose of litigating any application or appeal.”.

22 (b) FINALITY OF DETERMINATION.—Section  
23 2244(b)(3)(E) of title 28, United States Code, is amended  
24 by striking “the subject of a petition” and all that follows

1 and inserting the following: “reheard in the court of ap-  
 2 peals or reviewed by writ of certiorari.”.

3 **SEC. 9. CAPITAL CASES.**

4 (a) SCOPE OF REVIEW.—Chapter 154 of title 28,  
 5 United States Code, is amended by striking section 2264  
 6 and inserting the following:

7 **“§ 2264. Scope of Federal review**

8 “(a) IN GENERAL.—Except as provided in subsection  
 9 (b), a court, justice, or judge shall not have jurisdiction  
 10 to consider any claim relating to the judgment or sentence  
 11 in an application covered under this chapter.

12 “(b) EXCEPTION.—A court, justice, or judge has ju-  
 13 risdiction to consider an application under this chapter  
 14 if—

15 “(1) the applicant shows that the claim relies  
 16 on a new rule of constitutional law, made retroactive  
 17 to cases on collateral review by the Supreme Court,  
 18 that was previously unavailable; or

19 “(2) both—

20 “(A) the factual predicate for the claim  
 21 could not have been discovered previously  
 22 through the exercise of due diligence; and

23 “(B) the facts underlying the claim, if  
 24 proven and viewed in light of the evidence as a  
 25 whole, would be sufficient to establish by clear

1           and convincing evidence that, but for constitu-  
 2           tional error, no reasonable fact finder would  
 3           have found the applicant guilty of the under-  
 4           lying offense.”.

5           (b) TIME LIMITS.—Section 2266(b)(1)(A) of title 28,  
 6   United States Code, is amended by striking “180 days”  
 7   and inserting “15 months”.

8           (c) REVIEW BY ATTORNEY GENERAL.—

9           (1) IN GENERAL.—Section 2261(b) of title 28,  
 10   United States Code, is amended—

11                   (A) by striking “(b) This chapter is appli-  
 12                   cable if a State establishes” and inserting the  
 13                   following:

14                   “(b) This chapter is applicable if—

15                           “(1) the Attorney General of the United States  
 16                   certifies that a State has established”;

17                           (B) in the first sentence, by striking the  
 18                   period at the end and inserting a semicolon;

19                           (C) by striking “The rule of court or stat-  
 20                   ute must provide standards” and inserting the  
 21                   following:

22                           “(2) the court, statute, or other agency provides  
 23                   standards”;

24                           (D) by striking the period at the end and  
 25                   inserting “; and”; and

1 (E) by adding at the end the following:

2 “(3) the order required under subsection (c) is  
3 entered on or after the effective date of the Attorney  
4 General’s certification under section 2267.”.

5 (2) TECHNICAL AND CONFORMING AMEND-  
6 MENTS.—Section 2265(a) of title 28, United States  
7 Code, is amended—

8 (A) by striking “(a) For purposes” and in-  
9 serting the following:

10 “(a)(1) For purposes”;

11 (B) by striking “This chapter shall apply,  
12 as provided in this section, in relation to a  
13 State unitary review procedure if the State es-  
14 tablishes” and inserting the following:

15 “(2) This chapter shall apply, as provided in this sec-  
16 tion, in relation to a State unitary review procedure if—

17 “(A) the Attorney General of the United States  
18 certifies that a State has established”;

19 (C) by striking “or by statute” and insert-  
20 ing “, by statute, or by agency rule”;

21 (D) by striking the period after “pro-  
22 ceedings” and inserting a semicolon;

23 (E) by striking “The rule of court or stat-  
24 ute must provide” and inserting the following:

1           “(B) the rule of the court, the statute, or the  
2           agency rule provides”;

3           (F) by striking the period at the end and  
4           inserting “; and”; and

5           (G) by adding at the end the following:

6           “(C) the order required under subsection (b) is  
7           entered on or after the effective date of the Attorney  
8           General’s certification under section 2267.”.

9           (d) JUDICIAL REVIEW.—Chapter 154 of title 28,  
10          United States Code, is amended by adding at the end the  
11          following:

12       **“§ 2267. Judicial Review**

13           “(a) IN GENERAL.—If requested by the chief law en-  
14          forcement officer of a State, the Attorney General of the  
15          United States shall determine whether the State has es-  
16          tablished a qualifying mechanism for the purpose of sec-  
17          tion 2261(b)(3) or 2265(a)(2)(C), and, if so, the date on  
18          which the mechanism was established. The date the mech-  
19          anism was established shall be the effective date of the  
20          certification.

21           “(b) REGULATIONS.—The Attorney General shall  
22          promulgate regulations to implement the certification pro-  
23          cedure under subsection (a).

24           “(c) REVIEW OF CERTIFICATION.—

1 “(1) IN GENERAL.—The Attorney General’s de-  
 2 termination of whether to certify a State under this  
 3 section is subject to review exclusively as provided  
 4 under chapter 158.

5 “(2) VENUE.—The Court of Appeals for the  
 6 District of Columbia Circuit shall have exclusive ju-  
 7 risdiction over matters under paragraph (1), subject  
 8 to review by the Supreme Court under section 2350.

9 “(3) STANDARD OF REVIEW.—The Attorney  
 10 General’s determination of whether to certify a State  
 11 under this section shall be conclusive unless mani-  
 12 festly contrary to the law and an abuse of discre-  
 13 tion.”.

14 (e) CLERICAL AMENDMENTS.—The table of sections  
 15 for chapter 154 of title 28, United States Code, is amend-  
 16 ed—

17 (1) by striking the item related to section 2264  
 18 and inserting the following:

“2264. Scope of Federal review.”;

19 and

20 (2) by adding at the end the following:

“2267. Judicial review.”.

21 **SEC. 10. CLEMENCY AND PARDON DECISIONS.**

22 (a) IN GENERAL.—Chapter 85 of title 28, United  
 23 States Code, is amended by adding at the end the fol-  
 24 lowing:

1 **“§ 1370. State clemency and pardon decisions**

2 “(a) IN GENERAL.—Except as provided under sub-  
3 section (b), and notwithstanding any other provision of  
4 law, no Federal court shall have jurisdiction to hear any  
5 cause or claim arising from the exercise of a State’s execu-  
6 tive clemency or pardon power, or the process or proce-  
7 dures used under such power.

8 “(b) EXCEPTION.—This section does not affect the  
9 jurisdiction of the Supreme Court to review any decision  
10 of the highest court of a State that involves a cause or  
11 claim arising from the exercise of a State’s executive clem-  
12 ency or pardon power, or the process or procedures used  
13 under such power.”.

14 (b) CLERICAL AMENDMENT.—The table of sections  
15 for chapter 85 of title 28, United States Code, is amended  
16 by adding at the end the following:

“1370. State clemency and pardon decisions.”.

17 **SEC. 11. EX PARTE FUNDING REQUESTS.**

18 Section 408(q)(9) of the Controlled Substances Act  
19 (21 U.S.C. 848(q)(9)) is amended—

20 (1) by striking “(9) Upon” and inserting the  
21 following: “(9) (A) Upon”;

22 (2) by striking the last two sentences and in-  
23 serting the following: “An application for services  
24 under this paragraph shall be decided by a judge  
25 other than the judge presiding over the post convic-



1       tion proceeding under section 2254 or 2255 of Title  
2       28, United States Code, seeking to vacate or set  
3       aside a death sentence. Any amounts authorized to  
4       be paid under this paragraph shall be disclosed to  
5       the public immediately.”; and

6               (3) by adding at the end the following:

7               “(B) No ex parte proceeding, communication,  
8       or request may be considered in a post-conviction ac-  
9       tion pursuant to this section, except to the extent  
10      necessary to protect any confidential-communic-  
11      ations privilege between the defendant and post-con-  
12      viction counsel. The court shall not grant an applica-  
13      tion for an ex parte proceeding, communication, or  
14      request unless the application has been served upon  
15      the respondent and the court has allowed the re-  
16      spondent a reasonable opportunity to answer the ap-  
17      plication. All proceedings, communications, or re-  
18      quests conducted pursuant to this section shall be  
19      transcribed and made a part of the record available  
20      for appellate review.”.

21 **SEC. 12. CRIME VICTIMS’ RIGHTS.**

22       Section 3771(b) of title 18, United States Code, is  
23      amended by adding at the end the following: “A crime vic-  
24      tim shall also be afforded the rights established for crime

1 victims by this section in a Federal habeas corpus pro-  
 2 ceeding arising out of a State conviction.”.

3 **SEC. 13. TECHNICAL CORRECTIONS.**

4 (a) APPEAL.—Section 2253(c)(1) of title 28, United  
 5 States Code, is amended by striking “circuit justice or  
 6 judge” and inserting “district or circuit judge”.

7 (b) FEDERAL CUSTODY.—Section 2255 of title 28,  
 8 United States Code, is amended by designating the 8 un-  
 9 designated paragraphs as subsections (a) through (h), re-  
 10 spectively.

11 **SEC. 14. APPLICATION TO PENDING CASES.**

12 (a) IN GENERAL.—This Act and the amendments  
 13 made by this Act shall apply to cases pending on and after  
 14 the date of enactment of this Act.

15 (b) TIME LIMITS.—In a case pending on the date of  
 16 enactment of this Act, if the amendments made by this  
 17 Act establish a time limit for taking certain action the pe-  
 18 riod of which began on the date of an event that occurred  
 19 prior to the date of enactment of this Act, the period of  
 20 such time limit shall instead begin on the date of enact-  
 21 ment of this Act.

○