TO: Criminal Justice Section of the American Bar Association

FROM: The Attorneys General for Alabama, Hawaii, Louisiana, Mississippi, and Rhode Island

DATE: July 5, 2017

RE: Comments on Proposed Standards Relating to Postconviction Remedies

The undersigned members of the Criminal Law Committee of the National Association of Attorneys General are writing to respond to the proposed Standards Relating to Postconviction Remedies (“Standards”) issued by your Standards Committee on September 27, 2016. The proposed Standards advocate far-reaching changes to habeas corpus law that, among other things, would eliminate defenses states routinely assert and reduce the deference federal courts owe to state-court determinations of law and fact. As the chief law enforcement officers of our respective states, we are deeply concerned about the impact these Standards would have on the finality of criminal convictions and the interests of crime victims. We believe your Committee should revisit these Standards and not forward them, in their current form, to the full Association.

To assist you in understanding our concerns, we have analyzed the specific Standards that propose the most important changes to habeas corpus law. That analysis is attached. As you will see, virtually all of these Standards conflict with current state and federal law and with habeas corpus principles announced by the U.S. Supreme Court over the past 40 years. In every instance, the change in the law operates to the benefit of the habeas petitioner. Among other things, the proposed Standards would:
Weaken *Teague v. Lane*, 489 U.S. 288 (1989), to greatly expand the class of new procedural rules that would apply retroactively to cases on collateral review. *See* Standard 22.6.


Eliminate the deference that 28 U.S.C. § 2254(d)—enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—requires federal courts to give state-court judgments based on reasonable determinations of law and fact. *See* Standard 22.21(C). Indeed, the standard openly says that a “federal court should treat a state court interpretation of federal law as . . . a nonbinding judicial determination of a federal question rendered by a court in another jurisdiction.”

Eliminate the limits on federal evidentiary hearings imposed by AEDPA and pre-AEDPA case law. *See* Standard 22.17(A).

Eliminate the long-standing deference federal habeas courts must give state-court findings of historical fact. *See* Standard 22.17(A).

On top of that, the Standards would eliminate or weaken the verification requirement, the custody requirement, courts’ preliminary screening obligation, the standard for issuing stays of execution, and the harmless-error standard.

We would not have been surprised to see Standards of this sort proposed by the National Association of Criminal Defense Lawyers. We are extremely surprised to see them emerge from the ABA’s Criminal Justice Section, which is supposed to represent the entire criminal bar. We are not suggesting that current law is, or should be, immune to change. And we welcome participating in a dialogue about improving the post-conviction process. But we believe the ABA should be very hesitant before advocating a wholesale revision that would sweep away decades of Supreme Court and congressional efforts and would take habeas law back to where it stood in 1963.

Sincerely,