

Harmonizing Equitable Exceptions: Why Courts Should Recognize an “Actual Innocence” Exception to the AEDPA’s Statute of Limitations

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I. INTRODUCTION

Five days—*only* five days—cost George Souliotes, a California state prisoner serving a life sentence without the possibility of parole, his last chance at freedom.¹ A federal habeas petition was the last resort for Souliotes, who had been incarcerated for ten years for three murders committed by arson.² At Souliotes’s second trial, a prosecution witness testified that the residue found on Souliotes’s shoes was linked to the accelerant that ignited the fire.³ However, eight years later, after Souliotes was convicted and sentenced to life without the possibility of parole, an arson investigator reexamined the evidence and found chemical differences between the residue on Souliotes’s shoes and the residue on the carpet from the scene of the crime.⁴ This new evidence prompted Souliotes to challenge his conviction by filing a federal habeas petition based on his substantive actual innocence claim.⁵ Although the new evidence supported his claim of innocence, the Ninth Circuit dismissed Souliotes’s federal habeas petition as untimely because Souliotes filed his habeas petition five days after the one-year limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA),⁶ which restricts the time within

1. *Souliotes v. Evans*, 622 F.3d 1173, 1175–76 (9th Cir. 2010), *vacated*, 654 F.3d 902 (9th Cir. 2011).

2. *Id.*

3. *Id.* at 1176. The government prosecuted Souliotes twice. *Id.* At the first trial, Souliotes’s attorney called fourteen witnesses to testify that the fire was an accident and to undermine the credibility of the prosecution’s witnesses. *Id.* After the first trial resulted in a hung jury, the prosecution tried Souliotes again. *Id.* At the second trial, the same attorney called only one witness who had served as a prosecution witness at the first trial. *Id.* The government relied heavily on scientific evidence indicating that a liquid used to ignite the fire left residues of medium petroleum distillates (MPDs) at the scene. *Id.* A prosecution witness testified that Souliotes’s shoes also contained MPDs. *Id.*

4. *Id.* at 1176–77. In chemical testing before Souliotes’s trials, the same investigator had concluded that the residue on Souliotes’s shoes and carpet residue likely came from the same source. *Id.*

5. *Id.* at 1177. In addition to claiming actual innocence, Souliotes claimed ineffective assistance of counsel, violation of the Vienna Convention, and juror misconduct. *Id.* at 1176. This Comment, however, will not address these claims.

6. *Id.* at 1175.

which prisoners may file their habeas petitions in federal court asserting constitutional violations.⁷

Because Souliotes failed to present his constitutional claims in state court within the statutory time frame, he procedurally defaulted his claim to federal habeas corpus relief.⁸ To overcome this procedural defect in his petition, Souliotes sought to invoke the innocence gateway under *Schlup v. Delo*,⁹ arguing that despite his untimely filing, he could still pursue his claims because his actual innocence overcame the AEDPA one-year limitations period.¹⁰ *Schlup* created an actual innocence exception to the limitations on state procedural defaults.¹¹ Under this exception, a habeas

7. 28 U.S.C. § 2244(d)(1) (2006) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

8. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (“In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the . . . name of procedural default . . .”). An inmate must first exhaust all state remedies within the statute of limitations period established by the state before seeking any federal judicial remedies. If the individual procedurally defaults a claim, a federal court will not usually consider the petitioner’s claims. *See infra* notes 47–48 and accompanying text.

9. 513 U.S. 298 (1995). *Schlup*, a Missouri prisoner, was convicted of participating in the murder of a fellow inmate and was sentenced to death. *Id.* at 301–02. In his second federal habeas petition, *Schlup* claimed that he was actually innocent of the crime and therefore should be allowed to present his otherwise procedurally barred constitutional claims—ineffective assistance of trial counsel and failure to disclose exculpatory evidence by the State. *Id.* at 307. The Court held that if a petitioner brings forth new evidence and establishes that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence,” he may overcome the procedural barriers that would otherwise bar his path and have a federal court consider his habeas petition on the merits. *Id.* at 327–28.

10. *Souliotes*, 622 F.3d at 1177. Souliotes additionally argued that his petition was entitled to tolling under § 2244(d)(1)(D), which provides that the one-year limitation period shall run from “the date on which the factual predicate of the . . . claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D); *Souliotes*, 622 F.3d at 1177. Based on a docket entry at the California Court of Appeal, Souliotes’s counsel miscalculated the number of days remaining for Souliotes to file his habeas petition. *Souliotes*, 622 F.3d at 1177. Souliotes therefore sought equitable tolling based on the newly discovered evidence of his innocence, or alternatively, based on exceptional circumstances that caused his tardiness. *Id.*

11. *Schlup*, 513 U.S. at 327–28. The Supreme Court defined the scope of the “fundamental miscarriage of justice” doctrine in *Schlup*, enabling a court to overcome procedural barriers and consider the merits of a petitioner’s habeas corpus claims. *Id.* at 327–28. The fundamental miscarriage of justice doctrine holds that if a habeas petitioner establishes that he is actually innocent of the crime for which he was convicted, his wrongful conviction and imprisonment constitute a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The actual innocence exception has also gained recognition in situations where a procedural default resulted from untimely filing in state postconviction proceedings. *See Souter v. Jones*, 395 F.3d 577,

petitioner's otherwise barred constitutional claims may be considered on the merits if the petitioner demonstrates with new evidence that "more likely than not . . . no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt."¹² Prisoners rarely meet this extremely high burden because the standard for proving innocence is so high.¹³ Nevertheless, if a petitioner whose petition for habeas corpus is procedurally barred makes a sufficient showing of actual innocence, a federal court may *consider* the merits of the habeas petition on remand.¹⁴ Therefore, a showing of actual innocence under *Schlup* is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."¹⁵

Prior to its en banc decision in *Lee v. Lampert*,¹⁶ the Ninth Circuit narrowly construed the AEDPA's limitations period, finding that an

599 (6th Cir. 2005) (citing *Coleman*, 501 U.S. at 750). Additionally, following the passage of the AEDPA, the courts of appeals continued to apply the *Schlup* actual innocence exception to cases involving other types of procedural default, such as where the default is based on adequate and independent state-law grounds. *See, e.g.*, *Williams v. Bagley*, 380 F.3d 932, 973 (6th Cir. 2004) (recognizing availability of fundamental miscarriage of justice doctrine after passage of the AEDPA but concluding appellant failed to meet the actual innocence standard); *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004) (same); *Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003) (determining that appellant presented enough evidence to demonstrate that he was actually innocent).

12. *Schlup*, 513 U.S. at 327; *see also* *House v. Bell*, 547 U.S. 518, 537 (2006) (quoting *Schlup*, 513 U.S. at 327); *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011) (en banc) (quoting *Schlup*, 513 U.S. at 327).

13. *Schlup*, 513 U.S. at 321 (stating that habeas petitions advancing a substantial claim of actual innocence are "extremely rare"); *see also* *Herrera v. Collins*, 506 U.S. 390, 426–27 (1993) (O'Connor, J., concurring) ("[C]laims of actual innocence . . . must be reserved for the truly extraordinary case . . ."); *Houck v. Stickman*, 625 F.3d 88, 96 (3d Cir. 2010) (describing *Schlup* as a "'rare' remedy that is only available in an 'extraordinary' case" (quoting *Schlup*, 513 U.S. at 321)); *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) ("[W]e conclude that the miscarriage of justice exception is limited to those *extraordinary* cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt.>").

14. *See, e.g.*, *House*, 547 U.S. at 555 (finding that House satisfied "the gateway standard set forth in *Schlup*" and allowing him to proceed on remand with procedurally defaulted constitutional claims); *Souter*, 395 F.3d at 602 (finding that Souter had satisfied *Schlup*'s actual innocence requirement and instructing the district court to consider the merits of his habeas petition on remand); *Silva v. Wood*, 14 F. App'x 803, 805 (9th Cir. 2001) (concluding that the totality of the evidence before the court was sufficient to establish a gateway showing of innocence); *Carriger v. Stewart*, 132 F.3d 463, 478–79 (9th Cir. 1997) (finding that Carriger satisfied the *Schlup* gateway standard to permit consideration of his constitutional claims).

15. *Schlup*, 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404). *Schlup*'s claim of innocence did not by itself provide a basis for any substantive relief, such as a new trial or having his conviction vacated. *Id.*; *cf. Herrera*, 506 U.S. at 417 (considering, without accepting or rejecting, a petitioner's argument that innocence may alone constitute grounds for federal habeas relief).

16. 653 F.3d at 929.

actual innocence exception does not exist.¹⁷ In holding that a credible claim of actual innocence is not an equitable exception to the AEDPA's one-year statute of limitations, the court would inevitably force an actually innocent person who files a habeas petition even one day past the one-year limitations period to remain incarcerated or to even be executed.¹⁸ The Ninth Circuit maintained this position until August 2, 2011.¹⁹

17. *See Souliotes v. Evans*, 622 F.3d 1173, 1181 (9th Cir. 2010), *vacated*, 654 F.3d 902 (9th Cir. 2011). Prior to its en banc decision, the Ninth Circuit found that the omission of actual innocence from the enumerated list of exceptions in the statutory text was significant:

Since section 2244(d) comprises six paragraphs defining its one-year limitations period *in detail* and *adopting very specific exceptions . . .*, Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face

Id. (alterations in original) (quoting *Lee v. Lampert*, 610 F.3d 1125, 1129–30 (9th Cir. 2010) (citations and internal quotation marks omitted), *rev'd en banc*, 653 F.3d at 929).

18. *See, e.g., Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. 2010) (exemplifying the critical importance of preserving the actual innocence gateway with regard to the AEDPA's one-year statute of limitations period). Larsen was convicted of possessing a dagger after a police officer testified that Larsen threw a dagger under a car as the officer arrived on the scene. *Id.* at 1206–08. The prosecution charged Larsen's possession as a felony instead of a misdemeanor. *Id.* at 1206. Because Larsen admitted to three prior felony convictions, the conviction of possession of a dagger triggered California's Three Strikes Law, which resulted in a sentence of twenty-eight years to life imprisonment. *Id.* at 1207. Larsen claimed that his trial attorney failed to locate, investigate, and bring to trial exculpatory witnesses who had seen someone other than Larsen throw the dagger under the car and failed to present evidence of third-party culpability. *Id.* at 1206, 1221. Specifically, Larsen had informed his counsel that William Hewitt was the person with the knife and that two persons, Mr. and Mrs. McNutt, were in the parking lot and "saw everything." *Id.* at 1231. However, Larsen's attorney did not investigate this information. *Id.* The district court held that because the trial attorney's failure to investigate "severely prejudiced [Larsen's] defense" and the newly identified witnesses provided strong evidence contradicting the allegations made against Larsen, "no reasonable juror [having heard this exculpatory evidence] would have found Petitioner guilty beyond a reasonable doubt." *Id.* at 1232; *see also Schlup*, 513 U.S. at 324 (articulating actual innocence standard for overcoming procedural bar). The district court found Larsen's federal habeas petition meritorious and granted his release. *Larsen*, 718 F. Supp. 2d at 1232. However, if Larsen had filed his habeas petition before the Ninth Circuit's en banc decision in *Lee v. Lampert*, Larsen would never have been released, regardless of the compelling evidence of his actual innocence.

19. *Lee*, 653 F.3d at 934 (recognizing an actual innocence exception to the AEDPA's statute of limitations). Since its en banc decision in *Lee*, the Ninth Circuit has maintained the position that a credible showing of actual innocence under *Schlup* excuses the one-year statute of limitations period set forth by the AEDPA. *See, e.g., Allen v. Gipson*, No. CV 11 09261 SJO (SS), 2012 WL 601871, at *4–5 (C.D. Cal. Jan.

In its en banc decision in *Lee v. Lampert*, the Ninth Circuit effectively changed the circuit's rules by holding that a credible showing of actual innocence under *Schlup v. Delo* excuses the AEDPA's one-year statute of limitations period.²⁰ The court's holding not only altered the course of federal habeas petitions within the Ninth Circuit but also tipped the scale in favor of recognizing the exception for the first time among federal circuit courts that have considered this question.²¹ Specifically, the court held that "a petitioner is not barred by the AEDPA statute of

25, 2012) (applying the *Schlup* actual innocence standard but finding that the petitioner's allegations were insufficient to meet the gateway standard); *Fernandez v. McEwen*, No. 1:10 cv 00626 AWI SKO HC, 2012 WL 15059, at *6 (E.D. Cal. Jan. 4, 2012) ("[T]he Petitioner has not presented new, reliable evidence that renders it more likely than not that no reasonable juror would have convicted him in light of the new evidence."); *United States v. Tsosie*, Nos. CV 10 8095 PCT PGR (JRI), CR 94 0031 PCT PGR, 2011 WL 5519932, at *2 (D. Ariz. Nov. 14, 2011) (finding that the movant was "not entitled to the equitable exception for actual innocence because he failed to proffer, much less produce, any post-conviction evidence that would permit him to pass through the *Schlup* gateway").

20. *Lee*, 653 F.3d at 945. The district court held that a showing of actual innocence tolls the AEDPA's limitations period and concluded that Lee made the requisite showing. *Lee v. Lampert*, 607 F. Supp. 2d 1204, 1216–21 (D. Or. 2009), *rev'd*, 610 F.3d 1125 (9th Cir. 2010), *rev'd en banc*, 653 F.3d at 929. After finding that Lee established his claim of ineffective assistance of counsel, the district court vacated Lee's conviction and sentence and allowed the State of Oregon to retry the case in 120 days or release him. *Id.* at 1226. The State appealed, and the Ninth Circuit reversed the district court. *Lee*, 610 F.3d at 1136. As a matter of first impression, the Ninth Circuit panel held that there is no actual innocence exception to override the AEDPA's statute of limitations and dismissed Lee's petition as time barred. *Id.* at 1133–34, 1136. The Ninth Circuit granted rehearing en banc. *Lee v. Lampert*, 633 F.3d 1176, 1177 (9th Cir. 2011). The en banc court held that a credible claim of actual innocence constitutes an equitable exception to the AEDPA's statute of limitations. *Lee*, 653 F.3d at 931. Nevertheless, because the Ninth Circuit found that the petitioner failed to present sufficient evidence of actual innocence to permit review of his constitutional claims on the merits, the court reversed the judgment of the trial court and remanded with instructions to dismiss Lee's petition as untimely. *Id.* at 945.

21. *See id.* Until August 2011, the majority of circuit courts that considered this question declined to recognize an actual innocence exception. *See, e.g., Lee*, 610 F.3d at 1136; *Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005); *David v. Hall*, 318 F.3d 343, 347–48 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002). After the Ninth Circuit's holding in *Lee*, four circuits have expressly recognized that actual innocence is a valid argument for equitable tolling of time-barred habeas petitions. *See San Martin v. McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011); *Lopez v. Trani*, 628 F.3d 1228, 1230 (10th Cir. 2010); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). Four other circuits have refused to decide the issue, finding that the petitioner would not have met the burden of proof of actual innocence in that specific case, but not reaching whether the statute of limitations is entitled to equitable tolling. *See Horning v. Lavan*, 197 F. App'x 90, 93 (3d Cir. 2006); *Doe v. Menefee*, 391 F.3d 147, 160–61 (2d Cir. 2004); *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002); *Fields v. Johnson*, No. 7:06-CV-00701, 2007 WL 45641, at *3 (W.D. Va. Jan. 5, 2007) (stating that the U.S. Court of Appeals for the Fourth Circuit has not held that actual innocence is a ground for equitable tolling of the AEDPA's limitations period), *appeal dismissed*, 225 F. App'x 108 (4th Cir. 2007).

limitations from filing an otherwise untimely habeas petition if the petitioner makes a credible showing of ‘actual innocence’ under *Schlup v. Delo*.²² In light of the intervening en banc decision in *Lee*, the Ninth Circuit reopened the possibility that Souliotes could, by way of the actual innocence gateway under *Schlup*, present his otherwise time-barred claims.²³ On remand, the district court granted an evidentiary hearing on Souliotes’s admission of new scientific evidence that refuted the key evidence linking him to the residential fire that killed three people.²⁴ The district court subsequently found that Souliotes had made a sufficient showing of actual innocence to serve as an equitable exception to the AEDPA’s statute of limitations.²⁵

The en banc court’s decision in *Lee* addressed the core objective of our criminal judicial system—protect the innocent and convict the guilty.²⁶

22. *Lee*, 653 F.3d at 945. The Ninth Circuit reasoned that “[a]t the time of AEDPA’s passage, federal courts had equitable discretion to hear the merits of procedurally-defaulted habeas claims where the failure to do so would result in a ‘fundamental miscarriage of justice,’ such as the conviction of an actually innocent person.” *Id.* at 933–34 (citing *McCleskey v. Zant*, 499 U.S. 467, 502 (1991)). Thus, the court held that Congress did not remove the equitable power of federal courts in habeas proceedings in passing AEDPA. *Id.* at 936. Additionally, the court found that an actual innocence exception to the limitations period is consistent with the AEDPA’s underlying principles of finality, comity, and judicial conservation. *Id.* at 935. Finally, the Ninth Circuit relied on the doctrine of constitutional avoidance to support its conclusion. *Id.* at 936 (explaining that denying federal habeas relief from an actually innocent petitioner would be “constitutionally problematic” (quoting *Souter*, 395 F.3d at 601)).

23. *Souliotes v. Evans*, 654 F.3d 902, 902 (9th Cir. 2011). Specifically, the Ninth Circuit vacated its opinion in *Souliotes*, reversed the district court’s dismissal of Souliotes’s habeas petition as untimely, and remanded for proceedings consistent with the en banc decision in *Lee v. Lampert*. *Id.*

24. *Souliotes v. Hedgpeth*, No. 1:06-cv-00667 AWI MJS HC, 2011 WL 4433098, at *6 (E.D. Cal. Sept. 21, 2011). The court held a three-day evidentiary hearing in January 2012 on Souliotes’s actual innocence gateway claim under *Schlup* and his claims of statutory tolling based on diligence. Petitioner’s Opening Post-Hearing Brief at 6 n.1, *Souliotes v. Hedgpeth*, No. 1:06-cv-00667 AWI MJS HC, 2012 WL 2684972 (E.D. Cal. July 6, 2012), ECF No. 138. After the hearing, the parties filed posthearing briefs. *See, e.g.*, Petitioner’s Opening Post-Hearing Brief, *supra*.

25. *Souliotes*, 2012 WL 2684972, at *4 (adopting the magistrate judge’s Findings and Recommendation and determining that the new scientific evidence and the unreliability of the prosecution’s eyewitness constituted a sufficient showing of actual innocence); *see also* *Souliotes v. Hedgpeth*, No. 1:06-cv-00667 AWI MJS HC, 2012 WL 1458087, at *64 (E.D. Cal. Apr. 26, 2012) (magistrate judge’s Findings and Recommendation).

26. *See, e.g.*, *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”). This basic value is embodied in several provisions of the U.S. Constitution, such as the right to remain silent, the right

However, several circuits disagree with the Ninth Circuit's conclusion in *Lee*, maintaining that a credible claim of actual innocence does not constitute an exception, under *any* circumstances, to the AEDPA's one-year limitations period.²⁷ This active circuit split illustrates the struggle inmates continue to face when attempting to overcome procedural barriers preventing federal courts from considering their habeas petitions on the merits.²⁸

Since the enactment of the AEDPA in 1996, the Supreme Court has affirmed that *Schlup* remains the standard to review gateway innocence claims.²⁹ Furthermore, the Court recently held in *Holland v. Florida* that the one-year statute of limitations regarding a petition for federal habeas relief by state prisoners is subject to equitable tolling in appropriate cases.³⁰ However, the Supreme Court has yet to address whether "actual innocence" is an exception to the AEDPA's statute of limitations period.³¹

to counsel, and the right to a jury in criminal prosecutions. See U.S. CONST. amends. V, VI.

27. See, e.g., *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005) ("The legal shortcoming is that 'actual innocence' is unrelated to the statutory timeliness rules."); *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003) ("In particular, the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch."); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) ("The one-year limitation period established by § 2244(d) contains no explicit exemption for petitioners claiming actual innocence of the crimes of which they have been convicted.")

28. See *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.")

29. See *House v. Bell*, 547 U.S. 518, 537–39 (2006). The Supreme Court held that for a death row inmate to obtain review of his procedurally barred claims, he must meet the *Schlup* gateway standard by introducing new and substantial evidence that the jury was not able to examine at trial. *Id.*

30. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). In *Holland*, the Supreme Court held that the AEDPA is subject to equitable tolling because it is nonjurisdictional and therefore "subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" *Id.* (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)). The Court concluded that although the AEDPA was enacted with the purpose of eliminating delays in the process of federal habeas review, the statute can still achieve its purpose without undermining the basic equitable principle of habeas corpus, under which a petition's timeliness has historically been determined by equitable standards. *Id.* at 2562.

31. At first blush, one might think an actual innocence exception would be subsumed within the equitable tolling doctrine. Although both equitable exceptions can often be blurred together, an actual innocence exception is separate and distinct from the equitable tolling doctrine. Under the *Schlup* gateway exception, petitioners must supplement their claims of actual innocence with claims of an independent constitutional violation of federal law occurring in the state criminal proceeding to pass through the gateway and argue the merits of their underlying claims. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). In other words, a petitioner must contend that a constitutional violation has resulted in the conviction of one who is actually innocent. Without any new evidence of innocence, "even the existence of a concededly meritorious constitutional violation is not

Because the federal courts apply equitable principles to the AEDPA's statute of limitations in a variety of contexts,³² it would be inconsistent for courts not to excuse untimely filings by those whose claims invoke the "ultimate equity"—actual innocence.³³ As the Ninth Circuit explained in *Lee*, it would be fundamentally inconsistent that "under *Holland*, a petitioner could receive the benefit of equitable tolling for attorney error and yet be denied habeas review upon making a credible showing of actual innocence."³⁴

This Comment argues that to neutralize this potential inequality, the Supreme Court should affirm the Ninth Circuit's recent decision in *Lee v. Lampert*, finding that a credible claim of actual innocence constitutes an equitable exception to the AEDPA's one-year statute of limitations period. District courts must be able to call on their equitable powers, including both equitable principles already applied to the AEDPA's statute of limitations as well as the actual innocence exception, in determining whether a district court may consider the merits of a criminal defendant's otherwise untimely habeas petition.

Part II discusses the role of federal habeas corpus relief, the emergence of actual innocence in Supreme Court jurisprudence, and the relevant aspects of the AEDPA. Part III explains the purpose and application of statutes of limitations and discusses reasons a court should exercise its power to equitably toll the AEDPA's limitations period. Part IV explores whether an actual innocence exception is necessary. This Part also examines the current split among the circuits and the reasoning and policy behind each circuit's respective decision. Part V recommends that the

itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Id.* On the other hand, the doctrine of equitable tolling does not require a claim of constitutional error. Instead, the doctrine of equitable tolling permits a court to suspend a statutory deadline when, despite due diligence, some external factor beyond the defendant's control prevents the defendant from meeting the strict statutory deadline. *Holland*, 130 S. Ct. at 2562; *see also* *Lawrence v. Florida*, 549 U.S. 327, 336 (2007).

32. *See infra* notes 108–11 and accompanying text.

33. The Supreme Court has consistently supported the principle that "habeas corpus is, at its core, an equitable remedy." *Schlup*, 513 U.S. at 319. Moreover, the Court has emphasized that the interest in avoiding injustice is most significant in the context of actual innocence. *Id.* at 324–25 (proclaiming that the quintessential miscarriage of justice is the execution of an innocent person).

34. *Lee v. Lampert*, 653 F.3d 929, 935 n.10 (9th Cir. 2011) (en banc) (citing *Holland*, 130 S. Ct. at 2564); *see also* *Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) (concluding defense attorney's misconduct justified equitable tolling of AEDPA limitations period).

Supreme Court adopt the gateway standard of actual innocence for equitable tolling of time-barred petitions and thereby harmonize already-applied equitable exceptions and the actual innocence exception to the AEDPA's one-year limitations period. This Part discusses the policy implications of and the most likely counterarguments against recognizing actual innocence as an equitable exception to the AEDPA deadline. This Part then revisits *Souliotes* and other cases to highlight the critical role of the actual innocence gateway under *Schlup* in ensuring the equitable application of the AEDPA to federal habeas petitions. Part VI reiterates that the Supreme Court should recognize both avenues for equitable tolling of the AEDPA's statute of limitations.

II. FEDERAL HABEAS RELIEF AND EQUITABLE EXCEPTIONS

Habeas corpus is the ultimate equitable remedy for individuals unconstitutionally deprived of their liberty.³⁵ For centuries, the “Great Writ” has served as an essential safeguard of a person's legal and constitutional rights.³⁶ As the Supreme Court has recognized, habeas petitions protect innocent defendants against unjust incarcerations that violate fundamental fairness.³⁷

35. *Habeas corpus ad subjiciendum*—also known as the “Great Writ”—literally means “you have the body to submit to.” BLACK'S LAW DICTIONARY 778 (9th ed. 2009). A writ of habeas corpus directs a prison warden to bring a prisoner before a court to ensure that the inmate's imprisonment or detention is lawful. *Id.* The court may order that the prisoner be released from incarceration if the prisoner can successfully prove that the imprisonment violates a constitutional right. See John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 272–73 (1996) (quoting *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled on other grounds* by *Coleman v. Thompson*, 501 U.S. 722 (1991)) (stating that habeas corpus reinforces the principle that an individual is entitled to immediate release if the individual's imprisonment cannot be shown to conform to due process).

36. In seventeenth-century England, the King's high court had discretion to issue writs of habeas corpus to bring forth prisoners to inquire into the legality of their imprisonments. WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 4 (1980). In the United States, the common-law writ of habeas corpus safeguarded the integrity of the criminal justice process. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–02 (1830). The U.S. Constitution recognizes the Great Writ in the Suspension Clause, which provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. Through legislation, Congress provided federal courts the power to grant writs of habeas corpus to “any person,” including federal prisoners and state prisoners, detained “in violation of the constitution, or of any treaty or law of the United States.” Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385; see also Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82. In the Act of June 25, 1948, Congress codified existing federal habeas corpus statutes and judicial habeas practice at 28 U.S.C. §§ 2241 to 2255. Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 964–67 (codified as amended at 28 U.S.C. §§ 2241–2255 (2006)).

37. See *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)) (explaining that habeas corpus is a

A. *The Role of Federal Habeas Corpus Petitions*

After being convicted of a crime, an inmate has several legal avenues available to challenge a conviction or sentence.³⁸ A prisoner may first challenge a conviction directly through one or more appeals.³⁹ If the appeals are unsuccessful, the prisoner may collaterally attack a conviction by filing a writ of habeas corpus in state court.⁴⁰ Finally, if the prisoner fails to obtain relief in state court, the inmate may file a habeas petition in federal court asserting that the incarceration violates the inmate's constitutional rights.⁴¹ The habeas petition is a prisoner-initiated civil action that provides collateral review of the legality of the prisoner's criminal conviction.⁴² When a federal court grants a prisoner's petition

protection against convictions that violate fundamental fairness). The Supreme Court looks at each case individually to determine whether the incarceration of a criminal defendant violates the defendant's federal right to due process. 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.4(e), at 612 (3d ed. 2007). The Court has explained that it may intervene only when there is an infringement upon the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)) (internal quotation marks omitted); see also Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) ("[E]quity must be reserved for those rare instances where . . . it would be unconscionable to enforce the limitation period against the party and gross injustice would result.").

38. See Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 STAN. L. REV. 535, 549 (2012).

39. *Id.*

40. *Id.* A petition for writ of habeas corpus is a "collateral attack" on the final judgment or sentence of a criminal trial. See, e.g., Murray v. Carrier, 477 U.S. 478, 482–83 (1986) (using the terms *habeas corpus* and *collateral review* interchangeably). A habeas corpus proceeding may not be used to obtain a new trial or as an appeal or writ of error to correct, modify, or revise the judgment of a conviction, sentence, or order. See, e.g., Bartone v. United States, 375 U.S. 52, 53–54 (1963) (drawing a distinction between a "[d]irect attack" on a criminal judgment and "collateral proceedings," like habeas corpus proceedings); Wallace v. Willingham, 351 F.2d 299, 300 (10th Cir. 1965) (stating that habeas corpus does not provide a method to review judgments in proceedings to vacate a sentence).

41. Barry, *supra* note 38, at 549; see also 28 U.S.C. § 2254 (2006). Section 2254(a) provides that the courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). After the writ is filed, the federal court entertaining the petition will "award the writ or issue an order directing the respondent to show cause why the writ should not be granted" and the court will then set a hearing date. *Id.* § 2243.

42. Karen M. Marshall, *Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 37 AKRON L. REV. 549, 554 n.23 (2004) ("In theory, a federal habeas corpus petition is an independent civil suit, in which the prisoner asks only that the federal court

for habeas corpus, the court is generally ruling that the conviction or sentence violated the prisoner's constitutional rights.⁴³

Before seeking any federal judicial remedies, however, the inmate must first exhaust all state remedies⁴⁴ because state criminal proceedings are the principal means through which to determine the guilt or innocence of criminal defendants.⁴⁵ Finality and comity are "society's interest[s] in the efficiency of the criminal justice process," in that the process will "swiftly and certainly punish one who violates the law" and ensure the "accuracy of judgments."⁴⁶ If the petitioner does not exhaust the state

determine the validity of his current detention. In substance, a habeas action constitutes a collateral challenge to the prisoner's treatment in state court." (quoting Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61 LAW & CONTEMP. PROBS. 171, 172 (1998)).

43. See Barry, *supra* note 38, at 554. A federal court may grant a habeas corpus petition if, for example, "the performance of the individual's trial lawyer was so deficient that it failed to satisfy the requirements of the right to counsel, if the trial court deprived the individual of the right to confront the witnesses against her, or if the trial court imposed a cruel and unusual sentence." *Id.* at 554–55 (footnotes omitted).

44. 28 U.S.C. § 2254(b)(1)(A). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Comity, the respect one political entity shows another, is often described as part of federalism—"that federal courts should respect the determinations of state courts regarding the adjudication of constitutional claims." Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 489 (1995).

45. *Herrera v. Collins*, 506 U.S. 390, 416 (1993); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials."), *superseded by statute*, 28 U.S.C. § 2253 (2006), *as recognized in* *Slack v. McDaniel*, 529 U.S. 473 (2000).

46. Daniel M. Bradley, Jr., Comment, *Schlup v. Delo: The Burden of Showing Actual Innocence in Habeas Corpus Review and Congress' Efforts at Reform*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 463, 485–86 (1997); *see also* *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (discussing the importance of finality in the context of federal review of state convictions). Despite the extensive delays that may occur in habeas cases, however, the Supreme Court explained that delay should not deter the court from "withholding relief so clearly called for." Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1533 n.110 (1997) (quoting *Chessman v. Teets*, 354 U.S. 156, 164–65 (1957)). The Court further noted that

the overriding responsibility of [the Supreme] Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal . . . has been made on the eve of execution.

Chessman, 354 U.S. at 165. Furthermore, although the government has a legitimate interest in finality, the Supreme Court has ruled that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Sessions, *supra*, at 1533–34 (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)) (internal quotation marks omitted). If the government is to be "accountable to the judiciary for a man's imprisonment," access to the courts on habeas corpus must not be impeded. *Sanders*, 373 U.S. at 8 (quoting *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled by* *Keeney v. Tomayo-Reyes*, 504 U.S. 1 (1992)).

remedies within the statute of limitations period established by the state, the petitioner will “procedurally default” a claim to federal habeas corpus relief.⁴⁷ A federal court will generally refuse to consider any arguments raised in a habeas corpus petition when the individual procedurally defaulted a claim.⁴⁸

Additionally, federal courts may dismiss a prisoner’s subsequent habeas corpus petitions on the ground that the petitioner is abusing the writ.⁴⁹ Because the scope of federal postconviction review raises issues of comity, finality, and the conservation of judicial resources,⁵⁰ courts attempt to strike a proper balance between unlimited costly litigation and unconstitutional incarceration.⁵¹ Thus, federal courts have equitable discretion to hear the merits of habeas petitions claiming procedural failings to avoid a fundamental “miscarriage of justice.”⁵² Equitable

47. See *Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (defining procedural default). The procedural-default rule “bars federal review of a state prisoner’s federal constitutional claims denied by the state court for failure to comply with a state procedural requirement, such as the form or timing of a post-trial motion.” Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2121 (2002).

48. *Gray v. Netherland*, 518 U.S. 152, 162 (1996) (“[P]rocedural bar . . . prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.”). A federal court may bar a state prisoner from seeking federal habeas relief if the state court denied the prisoner’s federal claim on independent and adequate state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), *abrogated in part by* *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). However, if the petitioner shows cause and prejudice for the state procedural waiver, the petitioner’s procedurally defaulted claims will be eligible for federal habeas relief. *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977).

49. See Zheng, *supra* note 47, at 2121–22 (citing 28 U.S.C. § 2244(b) (2006)). Petitioners may abuse successive petitions, which “raise identical grounds to those raised and dismissed on the merits in a prior habeas corpus petition,” or second petitions, which “raise grounds that were previously available but not relied upon.” *Id.* (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986)).

50. See *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (discussing the AEDPA’s purpose of furthering “the principles of comity, finality, and federalism”).

51. See *Kuhlmann*, 477 U.S. at 448 n.8 (arguing that each court that considers the scope of habeas corpus review does so by balancing competing interests). Compare, e.g., *Fay*, 372 U.S. at 424 (concluding that individual liberty outweighed concerns for finality and federalism), with *Wright v. West*, 505 U.S. 277, 293 (1992) (plurality opinion) (“[H]abeas review . . . ‘disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.’” (quoting *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O’Connor, J., concurring))).

52. See *McCleskey v. Zant*, 499 U.S. 467, 502 (1991). “[H]abeas corpus has traditionally been regarded as governed by equitable principles.” *Kuhlmann*, 477 U.S. at

exceptions help ensure that finality and efficiency do not undermine the value of federal habeas corpus for defendants.⁵³

B. *The Emergence of Actual Innocence in Supreme Court Jurisprudence*

The Supreme Court has developed a standard of actual innocence⁵⁴ for habeas corpus petitions in a series of cases.⁵⁵ These decisions ensured “the equitable discretion of habeas courts to see that . . . constitutional errors do not result in the incarceration of innocent persons.”⁵⁶

Starting in the second half of the twentieth century, the Supreme Court held that courts must hear a successive petition when required by the

447 (quoting *Fay*, 372 U.S. at 438); see also *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“[H]abeas corpus is, at its core, an equitable remedy.”). The history of habeas corpus is “inextricably intertwined with the growth of fundamental rights of personal liberty. . . . [I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints.” *Fay*, 372 U.S. at 401–02.

53. See *Kuhlmann*, 477 U.S. at 448 (describing the proper scope of habeas corpus as a “sensitive weighing of the interests implicated”); *Sanders v. United States*, 373 U.S. 1, 8 (1963) (“Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”).

54. In the context of federal petitions for habeas corpus, actual innocence can be explained as follows:

A prototypical example of “actual innocence” in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake. In [this] context . . . , the concept of “actual innocence” is easy to grasp.

Sawyer v. Whitley, 505 U.S. 333, 340–41 (1992).

55. See *infra* notes 57–66 and accompanying text. Before Congress enacted the AEDPA, the Supreme Court applied a differential standard of proof for innocence-based claims, depending on whether the petitioner claimed that he or she was innocent in regard to the punishment or actually innocent of the crime charged. When a petitioner claimed ineligibility of the punishment, the Court held that “one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” *Sawyer*, 505 U.S. at 336. However, when a petitioner claims actual innocence—innocence of the crime charged—the petitioner must show that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Schlup*, 513 U.S. at 326–27 (“[W]e hold that the *Carrier* ‘probably resulted’ standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.” (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986))).

56. *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quoting *McCleskey*, 499 U.S. at 502) (internal quotation marks omitted). The fundamental miscarriage of justice exception is available “only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.” *Kuhlmann*, 477 U.S. at 454. The Supreme Court has never held that the fundamental miscarriage of justice exception extends to stand-alone claims of actual innocence. *Herrera*, 506 U.S. at 404–05.

“ends of justice.”⁵⁷ The Court adopted an exception to procedurally barred habeas petitions under the concept of “cause and prejudice,” under which a petitioner must show “cause for the noncompliance and . . . actual prejudice resulting from the alleged constitutional violation.”⁵⁸ Recognizing that the courts’ stringent application of the “cause-and-prejudice standard” might result in a “miscarriage of justice,”⁵⁹ the Supreme Court held that in an extraordinary case, where a constitutional violation has likely resulted in the conviction of one who is actually innocent, a court may grant a writ of habeas corpus, even in the absence of a showing of cause for the procedural default.⁶⁰

Although the Supreme Court held that the mere existence of “newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus,”⁶¹ the Court in *Schlup v. Delo*

57. *Sanders*, 373 U.S. at 15–17. Successive petitions are those that raise identical grounds to those raised and dismissed on the merits in a prior habeas corpus petition. See 28 U.S.C. § 2244(b) (2006). The burden is on the applicant to show that, although the court dismissed the ground of the new application on the merits in a prior application, determining for a second time the legal basis to grant the relief sought by the applicant would better serve the ends of justice. *Sanders*, 373 U.S. at 17.

58. *Wainwright v. Sykes*, 433 U.S. 72, 84, 87 (1977). Cause requires a showing that “some objective factor external to the defense impeded counsel’s efforts’ to raise the claim.” *McCleskey*, 499 U.S. at 493 (quoting *Murray*, 477 U.S. at 488). For example, interference by officials that makes compliance with the state’s procedural rule impracticable, the unavailability of the factual or legal basis for a claim, and ineffective assistance of counsel are objective factors that may constitute cause. *Id.* at 494 (citing *Murray*, 477 U.S. at 488). To demonstrate prejudice, a prisoner must show “not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982).

59. There are few circumstances under which a habeas petitioner can overcome a procedural barrier. See *Murray*, 477 U.S. at 495 (observing that the cause and prejudice exception is premised on concerns for comity and finality rather than concerns for a petitioner’s constitutional rights).

60. *Id.* at 495–96. On direct appeal to the Virginia Supreme Court, Carrier’s trial counsel failed to include in the petition a claim that the defendant had been denied due process by the prosecution’s withholding of the victim’s statements. *Id.* at 482. The Supreme Court found that the trial counsel’s performance on direct appeal did not constitute cause to excuse a procedural default. *Id.* at 497. The Court held that any attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default. *Id.* However, the Court noted that in “‘appropriate cases’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’” *Id.* at 495 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

61. *Herrera*, 506 U.S. at 398 (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). A jury convicted Herrera of the murder of police officer Enrique Carrisalez and sentenced him to death.

held that a petitioner may have his or her otherwise barred constitutional claim considered on the merits when it is accompanied by a claim of innocence.⁶² Thus, a petitioner who claims actual innocence must also plead an independent constitutional error or violation of federal law occurring in the course of the underlying state criminal proceeding. In other words, to overcome the procedural default, the petitioner must first make a sufficient showing of actual innocence to pass through the gateway and have the court consider the merits of the petitioner's underlying claims.⁶³ The court may then grant habeas relief if the court concludes that such relief is merited.⁶⁴ To establish a proper showing of actual innocence, a petitioner must show that, in light of all the evidence, "it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt."⁶⁵ In making this determination, the reviewing court should not limit itself to the evidence

Id. at 394. Seven months later, Herrera pled guilty to the related murder of officer David Rucker. *Id.* Ten years after his conviction, in a second federal habeas proceeding, Herrera claimed that newly discovered evidence demonstrated that he was actually innocent of the murders of both Carrisalez and Rucker. *Id.* at 396–97. Herrera supported his claim with affidavits tending to show that his now-dead brother had committed the murders, but he did not allege an independent constitutional violation during his trial. *Id.* The Supreme Court held that Herrera's claim was not cognizable on federal habeas absent an accompanying federal constitutional violation. *Id.* at 404–05.

62. *Schlup v. Delo*, 513 U.S. 298, 315 (1995) ("Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" (quoting *Herrera*, 506 U.S. at 404)). The Court distinguished between a substantive *Herrera* claim and a procedural *Schlup* claim. *See id.* at 315–16 ("[W]hen a petitioner has been 'tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants . . . it is appropriate to apply an 'extraordinarily high' standard of review.'" (citations omitted) (quoting *Herrera*, 506 U.S. at 419, 426 (O'Connor, J., concurring))). Because Schlup's claim of innocence was accompanied by an assertion of constitutional error at trial, the Court found that his conviction "may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial." *Id.* at 316.

63. *Id.* ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.").

64. *Id.*; *see also* 28 U.S.C. § 2254(a), (d)(1) (2006) (permitting federal courts to grant writs of habeas corpus based on a violation of the Constitution or federal law).

65. *Id.* at 327 (citing *Murray*, 477 U.S. at 496); *see also* *House v. Bell*, 547 U.S. 518, 538 (2006) (noting that the *Schlup* standard does not require "absolute certainty"). "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. The Supreme Court has repeatedly asserted that when applying *Schlup*, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also* *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992))).

introduced at trial, but instead consider all the evidence, including evidence that has become available only after the trial.⁶⁶

Even if a court finds that an actual innocence exception applies to a particular case, the claim is not itself a constitutional claim, but instead an opportunity for the habeas petitioner to have the court consider the petitioner's otherwise barred constitutional claim on the merits.⁶⁷ Specifically, a petitioner who makes a sufficient showing of actual innocence to excuse the AEDPA's statute of limitations period is not entitled to any substantive relief at this stage; rather, a claim of innocence under *Schlup* is solely procedural.⁶⁸

C. *The Antiterrorism and Effective Death Penalty Act of 1996*

The AEDPA, which Congress enacted one year after the Supreme Court's decision in *Schlup*, represents a distinct change in direction for the function of habeas corpus petitions. The AEDPA's procedural requirements are quite complicated and are often misunderstood by pro se petitioner-inmates as well as attorneys.⁶⁹ Among other provisions, the AEDPA bans successive petitions, which raise identical grounds to those raised and dismissed on the merits in a prior habeas corpus petition, and thus requires defendants to put all of their claims into one petition.⁷⁰ Substantively, the Act only allows habeas corpus claims to succeed where the convictions were contrary to "clearly established Federal law"

66. *Schlup*, 513 U.S. at 328 (stating that when considering the petitioner's innocence, the federal court should look at all the evidence "alleged to have been illegally admitted" and evidence "tenably claimed to have been wrongly excluded or to have become available only after the trial" (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1971))).

67. *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404).

68. A petitioner's claim of innocence alone does not provide substantive relief, such as granting a new trial or having the conviction vacated. *See id.* at 314–15; *see also* Barry, *supra* note 38, at 552.

69. *See* Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002) ("Even with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, an informed calculation of [the prisoner's] tolling period evaded both his appointed counsel and the expertise of a federal magistrate judge."). Due to its complexity and resulting confusion, the Supreme Court has even reviewed the AEDPA's statute of limitations twelve times since it was enacted in 1996. Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 553 (2009).

70. 28 U.S.C. § 2244(b) (2006).

or based on an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁷¹

More significantly for this Comment, in enacting the AEDPA, Congress set forth a one-year limitations period in 28 U.S.C. § 2244(d), which governs state prisoners’ federal habeas corpus petitions.⁷² The one-year period of limitation runs from the latest of several events listed in § 2244(d)(1),⁷³ of which the most common is “the date on which the judgment became final, [either] by the conclusion of direct review or the expiration of time for seeking [direct] review.”⁷⁴ The statute of limitations does not reset after each filing; rather, the one-year limitations period set forth in the AEDPA will continue to run and can expire as defendants await resolution of their state claims before attempting to file federal petitions.⁷⁵ Further, although the statute of limitations provides for tolling during periods in which the petitioner seeks state postconviction

71. *Id.* § 2254(d)(1)–(2).

72. *Id.* § 2244(d)(1). The AEDPA’s one-year deadline in which state prisoners may file federal habeas petitions is not a per se violation of the Suspension Clause because the limitation is not jurisdictional and may be subject to equitable tolling. *Green v. White*, 223 F.3d 1001, 1003–04 (9th Cir. 2000) (citing *Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 113 (2d Cir. 2000)). Therefore, the time restriction does not per se render the remedy of habeas corpus inadequate or ineffective. *Id.* at 1004.

73. Section 2244(d)(1) provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

74. *See id.* § 2244(d)(1)(A). An application for postconviction relief is pending from the time it is first filed in the trial court until it is eventually dismissed and further appellate review is unavailable under the particular state’s procedures. *Currie v. Matesanz*, 281 F.3d 261, 266 (1st Cir. 2002) (stating that the application is pending not just during the time it is being considered by the trial or appellate court but also during the gap between each court’s resolution and the petitioner’s timely filing of a request for review at the next level). If a petitioner stops the appeal process before reaching the state court of last resort, the conviction becomes final, and the AEDPA’s one-year statute of limitations for federal habeas relief begins to run. *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

75. *See* 28 U.S.C. § 2244(d)(1)(A)–(B).

review,⁷⁶ the federal circuit courts and the United States Supreme Court continue to debate the application of this tolling.⁷⁷

Congress has received both criticism and support since enacting the AEDPA in 1996. Congress passed the statute on April 24, 1996, due to pressure to reform habeas corpus law after a federal court convicted and sentenced to death the perpetrator of the 1995 Oklahoma City Federal Building bombing.⁷⁸ Commentators criticized lawmakers for using the tragedy as justification for the aggressive restrictions on the remedy of habeas corpus review.⁷⁹ Critics claim it “reflected a passion-fueled, extreme, and not well thought-out form of habeas corpus bashing.”⁸⁰ On the other hand, defenders of the bill insist that Congress enacted the AEDPA to eliminate unfounded and abusive delays in the federal habeas

76. See *id.* § 2244(d)(2).

77. See generally 23 JOHN H. BLUME ET AL., *HABEAS ASSISTANCE & TRAINING PROJECT, FEDERAL HABEAS CORPUS UPDATE § II(A)(8)*, at 286–306 (2011), available at http://www.capdefnet.org/pdf_library/Habeas%20Update%2023.pdf. The *Federal Habeas Corpus Update* “serve[s] as a guide to various procedural trends and issues commonly arising in federal habeas corpus cases, and . . . provide[s] . . . information regarding developments arising from the [AEDPA],” including a listing of current AEDPA cases by topic. *Id.* intro.

78. See Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 10 (2004); see also James S. Liebman, An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases, 67 BROOK. L. REV. 411, 413 (2001) (“AEDPA . . . was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh’s twisted patriotism and disdain for ‘collateral damage,’ the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.”). Congress enacted the AEDPA as a result of “increased pressure on Congress and the President, during an election year, to do whatever was necessary to prevent Timothy McVeigh, the convicted bomber [of the Oklahoma City Federal Building], from delaying or escaping execution” by filing numerous habeas petitions. Erik Degrate, *I’m Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not if the Antiterrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 77–78 (2006). To some extent the AEDPA accomplished this goal because Timothy McVeigh was the first federal death row prisoner to be executed since 1963. *Id.* at 78.

79. See Angela Ellis, Note, “Is Innocence Irrelevant” to AEDPA’s Statute of Limitations? Avoiding a Miscarriage of Justice in Federal Habeas Corpus, 56 VILL. L. REV. 129, 147 n.116 (2011) (“Shame on those who invoke the names of innocents slaughtered in Oklahoma City . . . in their quest to effectively abolish the writ of habeas corpus.” (quoting 142 CONG. REC. 7965 (1996) (statement of Rep. Howard Berman)); see also 141 CONG. REC. 15,031 (1995) (statement of Sen. Russell Feingold) (condemning the reform provisions as political opportunism and expressing concern that the new procedures would lead to executions and imprisonment of innocent people).

80. See Ellis, *supra* note 79, at 147 n.116 (quoting Anthony G. Amsterdam, *Foreword* to RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at vi (5th ed. 2005)).

review process.⁸¹ The Supreme Court has also explained that the primary purpose of the AEDPA is to ensure the finality of state court judgments by creating procedural barriers to federal review of those judgments.⁸²

III. EQUITY VS. ADMINISTRATION

A. *Statute of Limitations*

Statutes of limitations create a bright-line rule that prohibits claims after a certain date, which provides certainty to the parties and ensures structure for the courts. Generally, federal courts have justified statutes of limitations as serving three main purposes—“providing fairness to the defendant, promoting efficiency, and ensuring institutional legitimacy.”⁸³ First, a petitioner’s claims, even those that are meritorious, must be cut off at some point to provide repose for the defendant.⁸⁴ Additionally, statutes of limitations promote accuracy of the evidence, as plaintiffs must bring forth their claims within a reasonable time frame so as to ensure that evidence is accessible, memories are not forgotten, and

81. See, e.g., H.R. REP. NO. 104-23, at 9 (1995) (“[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.”); see also *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (citing H.R. REP. NO. 104-518, at 111 (1996)). Additionally, “[f]airness, finality, and federalism are considered the touchstone principles that guide and shape habeas jurisprudence.” Bradley, *supra* note 46, at 483 (citing *Withrow v. Williams*, 507 U.S. 680, 697 (1993) (O’Connor, J., concurring in part and dissenting in part)). Prior to the AEDPA’s procedural changes, a state defendant convicted of a capital offense and sentenced to death “could take advantage of three successive procedures to challenge constitutional defects in his or her conviction or sentence.” Krystal M. Moore, Comment, *Is Saving an Innocent Man a “Fool’s Errand”? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197, 204 (2011) (quoting CHARLES DOYLE, CONG. RESEARCH SERV., FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1, 11 (2006)). As a consequence, victims were not able to receive justice, as “there were extensive delays between sentenc[ing] and execution of sentence.” DOYLE, *supra*, at 11.

82. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (“[The AEDPA’s purpose is] to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States’ interest in the integrity of their criminal and collateral proceedings.”); see also *supra* notes 44–46 and accompanying text.

83. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 74–75 (2005).

84. See *id.* at 75 (citing *Young v. United States*, 535 U.S. 43, 47 (2002)) (providing that statutes of limitations protect the defendant’s “expectations that he will not be held accountable for misconduct after a certain period of time has elapsed”); see also *Del. State Coll. v. Ricks*, 449 U.S. 250, 256–57 (1980) (protecting defendants from claims arising out of actions “long past”). Statutes of limitations are intended to promote fairness by “protect[ing] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time’ and by providing for repose.” Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 115–16 (2008) (quoting *Toussie v. United States*, 397 U.S. 112, 114–15 (1970)).

witnesses are available.⁸⁵ Furthermore, statutes of limitations reduce the number of frivolous or meritless claims.⁸⁶ In turn, by reducing the number of undesirable filings in the court system, a statutory deadline helps alleviate the growing dockets of federal courts.⁸⁷

Nevertheless, such a strict statutory deadline can lead to unfairness. If a petitioner files a claim even one day past the statute of limitations period, the court must dismiss the petition, thus depriving the petitioner of the right to be heard.⁸⁸ Such a deprivation “undermines [the] fundamental notions of fairness and due process that form the cornerstone of the legal system.”⁸⁹ An even greater injustice occurs when a petitioner with a meritorious claim, such as a claim of actual innocence, is denied relief solely because of a harsh statutory deadline.⁹⁰

Neither Congress nor the courts had ever imposed strict time constraints on filing federal habeas corpus petitions prior to the enactment of the AEDPA in 1996.⁹¹ Even in the mid-twentieth century, when the scope

85. See Malveaux, *supra* note 83, at 76; see also *United States v. Or. Lumber Co.*, 260 U.S. 290, 299 (1922) (“[Statutes of limitations] supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary.”); *David*, 318 F.3d at 347 (“There is a strong public interest in the prompt assertion of habeas claims.”). Avoiding deterioration of evidence serves several purposes: “(a) to ensure accuracy in fact-finding; (b) to prevent the assertion of fraudulent claims; (c) to reduce the cost of litigation; and (d) to preserve the integrity of the legal system.” Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 471 (1997).

86. Malveaux, *supra* note 83, at 80 (citing Ochoa & Wistrich, *supra* note 85, at 495–97). Limitation periods are intended to reduce the number of cases filed in general and to reduce the number of meritless or unwarranted cases in particular. Ochoa & Wistrich, *supra* note 85, at 495–500.

87. See, e.g., *Hardin v. Straub*, 490 U.S. 536, 542–43 (1989) (balancing the interests in disposing of litigation as quickly as possible and allowing claims to be heard on the merits); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (explaining that statutes of limitations promote efficiency by limiting docket burdens by “spar[ing] the courts from litigation of stale claims”); *Davila v. Mumford*, 65 U.S. (24 How.) 214, 223 (1860) (noting that one goal of statute of limitations is “preventing litigation”).

88. See, e.g., *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”). Additionally, providing litigants a day in court “promotes the dignitary value of the legal process.” Ochoa & Wistrich, *supra* note 85, at 501.

89. Malveaux, *supra* note 83, at 82.

90. *Id.* at 83; see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”).

91. The history of habeas corpus goes at least as far back as the early days of English common law, during which the doctrine of habeas corpus was never subject to a statute of limitations. See Sessions, *supra* note 46, at 1514. This continued throughout

of habeas review over state convictions drastically expanded and habeas corpus petitions inundated the federal judiciary,⁹² the writ of habeas corpus remained free of time constraints.⁹³ Although Congress attempted to place time limits on habeas corpus petitions in previous legislative sessions,⁹⁴ none of the proposed bills ever passed.⁹⁵ Prior to the AEDPA, habeas corpus statutes required only that petitioners file their applications for habeas corpus relief without prejudicial delay.⁹⁶ Shortly before the AEDPA's enactment in 1996, the Supreme Court held that a petitioner

the development of habeas corpus jurisprudence in the nineteenth century, when prisoners had the right to file habeas petitions in federal court without the restriction of a limitations period. *See* Bradley, *supra* note 46, at 465, 465 n.20 (quoting Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867)). Specifically, the Habeas Corpus Act of 1867 states, in relevant part, that “the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution” Ch. 28, 14 Stat. at 385.

92. Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 371 (2005) (citing Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 343–44 (1983)). For example, federal courts could review factual disputes de novo in habeas corpus proceedings. *Id.* (citing *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). Furthermore, the Warren Court held that the exhaustion doctrine, which applied to direct appeals in state court, did not apply to state collateral proceedings. *Id.* (citing *Fay v. Noia*, 372 U.S. 391, 398–99 (1963), *overruled by* *Keeney*, 504 U.S. at 1).

93. The Supreme Court held that habeas corpus provides a remedy “without limit of time.” Sessions, *supra* note 46, at 1533 (quoting *United States v. Smith*, 331 U.S. 469, 475 (1947)).

94. *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 452 n.2 (1990–1991) (detailing a number of congressional bills proposing time limits on habeas corpus petitions); *see also* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2350–76, 2416–23 (1993) (reviewing congressional debates and proposals concerning statutory limitations on habeas corpus law).

95. *See* Jake Sussman, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 356–57 (2002) (citing *Hunter v. United States*, 101 F.3d 1565, 1578–83 (11th Cir. 1996)) (providing an overview of “the numerous proposed reform bills that eventually led to the enactment of the AEDPA”).

96. Before the enactment of the AEDPA in 1996, courts had discretion to dismiss a habeas corpus petition as untimely, but only if it appeared that the state had been prejudiced in its ability to respond to the petition because of the petitioner’s delay in filing. *See* Act of Sept. 28, 1976, Pub. L. No. 94-426, § 2(7)–(8), 90 Stat. 1334, 1335 (current version at 28 U.S.C. § 2254 app. at R. 9(a) (2000)); *see also* *Lonchar v. Thomas*, 517 U.S. 314, 316 (1996) (holding that pre-AEDPA, a first federal habeas corpus petition was governed by Rule 9 of Habeas Corpus Rules rather than generalized equitable considerations and Rule 9 provides the only form of “time limitation” for first federal habeas corpus petitions).

could even file his initial habeas corpus petition on the day of his scheduled execution.⁹⁷

However, in enacting the AEDPA in 1996, Congress implemented a one-year statute of limitations period for state prisoners to file federal habeas corpus petitions.⁹⁸ This limitations period was justified according to the cornerstone principles of habeas corpus jurisprudence—finality, comity, and federalism.⁹⁹ Nevertheless, the statute of limitations should not be a hindrance to the fundamental purpose of habeas corpus—to correct miscarriages of justice.¹⁰⁰ The very nature of the writ of habeas corpus “demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”¹⁰¹

97. *Lonchar*, 517 U.S. at 316–17. Nine years after being sentenced to death for murder, Lonchar filed his first federal habeas corpus petition the day of his scheduled execution. *Id.* The Court held that a first federal habeas corpus petition should not be dismissed because of “special ad hoc ‘equitable’ reasons not encompassed within the framework of Rule 9(a) of the Habeas Corpus Rules.” *Id.* at 322. The Court reasoned that dismissal of a first federal habeas petition “denies the petitioner the protections of the Great Writ entirely.” *Id.* at 324. The Court also recognized that first petitions generally pose less threat to the state’s interest in finality and are more likely to lead to the discovery of unconstitutional convictions. *Id.*

98. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (codified at 28 U.S.C. § 2244(d)(1) (2006)) (governing state prisoners’ petitions); *id.* § 105 (codified at 28 U.S.C. § 2255 (2006)) (governing federal prisoners’ petitions). Both provisions impose a one-year time limit.

99. *See Bradley*, *supra* note 46, at 483 (citing *Withrow v. Williams*, 507 U.S. 680, 697 (1993) (O’Connor, J., concurring in part and dissenting in part)). Statutes of limitations, which apply to both civil and criminal actions, are designed to “provid[e] finality and predictability in legal affairs” and “ensur[e] that claims will be resolved while evidence is reasonably available and fresh.” BLACK’S LAW DICTIONARY 1546 (9th ed. 2009). In other words, because evidence may become lost or facts may become vague or unclear due to the passage of time and the loss of memory, death, or disappearance of witnesses, a statute of limitations period helps prevent those fraudulent and stale claims from arising. *See supra* note 85 and accompanying text.

100. *See Schlup v. Delo*, 514 U.S. 298, 325 (1995) (stating that concern about the injustice of convicting innocent persons is at the core of our criminal justice system); *see also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (reiterating the importance of avoiding wrongful convictions).

101. *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Additionally, in a 5–4 decision, Justice Fortas wrote:

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Id. at 292.

B. Equitable Tolling of the AEDPA's Statute of Limitations

Once the statute of limitations on a cause of action expires, a petitioner may no longer initiate a legal proceeding.¹⁰² However, the doctrine of equitable tolling permits a court to exclude a certain period of time that would otherwise count against the limitations period¹⁰³ when, for reasons of fundamental fairness, it would be unjust to strictly apply the statute of limitations.¹⁰⁴ Courts may equitably toll a statute of limitations when, despite due diligence, some external factor prevents a party from meeting the strict statutory deadline.¹⁰⁵ Courts generally will equitably toll a statute of limitations when the defendant presents “extraordinary circumstances”¹⁰⁶ beyond the defendant’s control or external to the defendant’s own conduct that make it impossible to file a petition on time.¹⁰⁷ Federal courts have

102. See BLACK’S LAW DICTIONARY 1546 (9th ed. 2009) (defining a statute of limitations as a federal or state law that restricts the time within which legal proceedings may be brought).

103. Equitable tolling is a remedy in which courts have discretion to allow a petitioner to assert a claim after the statutory limitations period has expired. See *Nara v. Frank*, 264 F.3d 310, 319–20 (3d Cir. 2001) (explaining that courts have used their discretion to equitably toll the AEDPA’s statute of limitations when a habeas petitioner “has been unfairly prevented from asserting his rights in a timely fashion”); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (“A court can allow an untimely petition to proceed under the doctrine of equitable tolling . . .”).

104. See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining the purpose of equitable tolling); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (“[E]quity must be reserved for those rare instances where . . . it would be unconscionable to enforce the limitation period against the party and gross injustice would result.”).

105. See David D. Doran, Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 WASH. L. REV. 681, 682–83 (1989) (describing generally the requirements of equitable tolling); see also *Trapp v. Spencer*, 479 F.3d 53, 60 (1st Cir. 2007) (stating that it is the litigant’s reason for the late filing that the court scrutinizes in determining whether a prisoner was unfairly prevented from filing a timely habeas petition); *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (explaining the requirements for equitable tolling).

106. Although there is no bright-line rule for what constitutes extraordinary circumstances, courts have generally required that they be situations that are beyond the prisoner’s control. See *Fisher*, 174 F.3d at 713 (“[E]quitable tolling does not lend itself to bright-line rules.”); see also *Barreto-Barreto v. United States*, 551 F.3d 95, 101 (1st Cir. 2008) (“[P]etitioners carry the burden of demonstrating that extraordinary circumstances beyond their control ‘prevented timely filing . . .’” (quoting *Trenkler v. United States*, 268 F.3d 16, 25 (1st Cir. 2001))); *Downs v. McNeil*, 520 F.3d 1311, 1319 (11th Cir. 2008) (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)) (articulating that courts require more than extraordinary circumstances; the circumstances must also be beyond the petitioner’s control); *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1288 (9th Cir. 1997) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997), *overruled on other grounds by Calderon v. U.S. Dist. Court*, 163 F.3d 530 (9th Cir. 1998) (en banc)).

107. In other words, a petitioner is entitled to equitable tolling only if he shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))

exercised their power to apply equitable tolling to extend the AEDPA's statute of limitations period for numerous reasons, including improper dismissal of a defendant's habeas petition,¹⁰⁸ the defendant's mental incompetence or incapacity,¹⁰⁹ the defendant's showing of actual innocence,¹¹⁰ and misconduct or concealment of evidence by state officials.¹¹¹ The petitioner must additionally show diligence in pursuing

(articulating this rule but not yet deciding whether equitable tolling was applicable to the AEDPA's statute of limitations). Federal courts have applied this rule of equitable tolling to extend the one-year statute of limitations period for prisoners seeking federal review of their state convictions since the late 1990s. *See* Marni von Wilpert, Comment, *Holland v. Florida: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 *FORDHAM L. REV.* 1429, 1440 n.64 (2010) (citing examples of district court and circuit court of appeals cases using equitable tolling to excuse the petitioner's failure to comply with the strict statute of limitations set forth by the AEDPA). The Supreme Court ultimately reaffirmed this rule in *Holland v. Florida*, holding that the AEDPA's statute of limitations is subject to equitable tolling. 130 S. Ct. 2549, 2562 (2010).

108. *See, e.g.*, *Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir. 2002) (applying equitable tolling when the district court improperly dismissed and then lost the petitioner's 28 U.S.C. § 2254 motion).

109. *See, e.g.*, *Ata v. Scutt*, 662 F.3d 736, 741–42 (6th Cir. 2011) (“[W]e now hold that a petitioner's mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA's one-year statute of limitations.”); *Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).

110. *See* *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (citing *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)) (stating that equitable tolling would be appropriate if a defendant is actually innocent). There is a distinction between the miscarriage of justice exception and claims based on pure innocence of fact. *See* *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (“[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.” (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992))). On the other hand, the actual innocence gateway established in *Schlup v. Delo* is “not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” 513 U.S. 298, 315 (1995) (quoting *Herrera*, 506 U.S. at 404).

111. Courts have allowed equitable tolling in AEDPA litigation when state officials misled prisoners about the habeas petition process, and thus the reasons for the untimely filings were beyond the prisoners' control. *See, e.g.*, *Spottsville v. Terry*, 476 F.3d 1241, 1246 (11th Cir. 2007) (holding that when a court misled the prisoner about the filing deadline, the prisoner's subsequent late filing was “not his fault”); *Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006) (holding that equitable tolling would be warranted because deficiencies in a prison library prevented a diligent pro se prisoner from learning about the limitations period); *Prieto v. Quarterman*, 456 F.3d 511, 514–15 (5th Cir. 2006) (applying equitable tolling because the petitioner detrimentally relied on a misleading filing extension granted by the district court when filing his habeas petition); *Knight v.*

federal habeas relief, which requires demonstrating “a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of [the] filing.”¹¹²

Before Congress passed the AEDPA in 1996, the Supreme Court had consistently held that federal courts had equitable discretion to hear the merits of procedurally defaulted habeas claims when the failure to do so would “result in a fundamental miscarriage of justice.”¹¹³ Ultimately, in 2010, the Supreme Court in *Holland v. Florida* formally decided that the AEDPA’s statute of limitations is subject to equitable tolling.¹¹⁴ The Court held that because the AEDPA’s one-year statute of limitations set forth in § 2244(d)(1) is not jurisdictional, it is “subject to a ‘rebuttable presumption’ in favor ‘of equitable tolling.’”¹¹⁵ The Court then explained that there are two reasons the presumption applies with particular force to the AEDPA. First, “‘equitable principles’ have traditionally ‘governed’ the substantive law of habeas corpus,”¹¹⁶ and federal courts will “not

Schofield, 292 F.3d 709, 710, 712 (11th Cir. 2002) (per curiam) (holding that equitable tolling was warranted when a state court failed to inform a prisoner about the disposition of his case); Lott v. Mueller, 304 F.3d 918, 924–25 (9th Cir. 2002) (applying equitable tolling when a prisoner was denied access to his legal files).

112. Virginia E. Harper-Ho, *Tolling of the AEDPA Statute of Limitations*: Bennett, Walker, and the Equitable Last Resort, 4 CAL. CRIM. L. REV. 2, ¶ 27 (2001) (quoting Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000)); see also, e.g., Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990) (“We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”); Fisher v. Johnson, 174 F.3d 710, 716 (5th Cir. 1999) (“[Equity does not require tolling] absent a showing that [the petitioner] diligently pursued his application the remainder of the time [between the extraordinary circumstance and the filing deadline] and still could not complete it on time.”).

113. Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also, e.g., Schlup, 513 U.S. at 320–21; Sawyer v. Whitley, 505 U.S. 333, 339–40 (1992); McCleskey v. Zant, 499 U.S. 467, 494–95 (1991); Dugger v. Adams, 489 U.S. 401, 414 (1989) (Blackmun, J., dissenting).

114. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). In discussing what would constitute an extraordinary circumstance, the Supreme Court in *Holland* reiterated its conclusion from an earlier case that a “‘garden variety claim of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline,” does not warrant equitable tolling.” *Id.* at 2564 (quoting Lawrence v. Florida, 549 U.S. 327, 336 (2007); *Irwin*, 498 U.S. at 96). Nevertheless, even in the absence of an allegation of “‘bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part’ . . . unprofessional attorney conduct may, in certain circumstances, prove ‘egregious’ and can be ‘extraordinary.’” *Id.* at 2563–64 (quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (2008), *rev’d*, 130 S. Ct. 2549).

115. *Id.* at 2560 (quoting *Irwin*, 498 U.S. at 95–96). The Supreme Court explained that the AEDPA’s statute of limitations defense is “not ‘jurisdictional’” because it does not “set forth ‘an inflexible rule requiring dismissal whenever’ its ‘clock has run.’” *Id.* (quoting Day v. McDonough, 547 U.S. 198, 205, 208 (2006)).

116. *Id.* (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)); see also *Fay v. Noia*, 372 U.S. 391, 438 (1963) (describing habeas corpus as governed by equitable principles), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *United States ex rel. Smith v.*

construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'"¹¹⁷ Second, the Court asserted that Congress must have realized that courts would apply the presumption when interpreting the AEDPA's one-year statute of limitations because Congress enacted the AEDPA when case law had long established the presumption in favor of equitable tolling.¹¹⁸ Therefore, despite the silence of § 2244(d) as to an equitable exception and its express provision for statutory tolling, the Supreme Court held that the AEDPA's statute of limitations is subject to equitable tolling.¹¹⁹

Nevertheless, federal courts remain reluctant to consider a petition for habeas relief after the one-year limitations period has expired.¹²⁰ Additionally, petitioners have struggled to establish extraordinary circumstances to demonstrate that the petition is otherwise timely. For example, "a petitioner's ignorance of the law, lack of legal training or representation, incapacitating illness, illiteracy, and counsel's error in failing to timely file have all been deemed insufficient to justify equitable tolling of [the AEDPA's statute of limitations]."¹²¹ Therefore, although

Baldi, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting) ("[H]abeas corpus is certainly to be governed by the rules of fairness enforced in equity.").

117. *Holland*, 130 S. Ct. at 2560 (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)).

118. *Id.* at 2561. The presumption of equitable tolling is reinforced by the fact that Congress enacted the AEDPA after the Supreme Court decided *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, in which the Court held a nonjurisdictional federal statute of limitations is subject to equitable tolling, and thus Congress was likely aware that courts would apply the presumption when interpreting the AEDPA's limitations provisions. *Id.* at 95–96.

119. *Holland*, 130 S. Ct. at 2561–62; *see also* *Young v. United States*, 535 U.S. 43, 53 (2002) (rejecting a claim that an "express tolling provision, appearing in the same subsection as the [limitations] period" demonstrated "statutory intent *not* to toll the [limitations] period").

120. *See* Brandon Segal, Comment, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the Schlup v. Delo Gateway Standard for Claims of Actual Innocence Fails To Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 233 (2008); *see also* *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997) ("[D]istrict judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted."), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

121. Sussman, *supra* note 95, at 362–63 (footnotes omitted) (citing to situations in which federal courts refused to apply equitable tolling to extend the statute of limitations period set forth in the AEDPA); *see also* *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008) (holding that mere attorney negligence, in which an attorney miscalculates the limitations period, misinterprets the statute, or misunderstands the AEDPA's procedural requirements, does not justify equitable tolling); *Smith v. Suthers*, 18 F. App'x 727, 728–29 (10th Cir. 2001) (upholding the district court's ruling that illiteracy alone does not support equitable tolling); *Felder v. Johnson*, 204 F.3d 168, 171–72 (5th Cir. 2000)

the Supreme Court held that the AEDPA's statute of limitations is subject to equitable tolling, the instances where this actually occurs are few and far between.

IV. CONFLICTING APPROACHES TO WHETHER AN ACTUAL INNOCENCE EXCEPTION IS NECESSARY

A. *Whether an Actual Innocence Exception Matters*

One might wonder whether an actual innocence exception is necessary. Criminal defendants already have a number of constitutional rights and safeguards designed to ensure juries convict only guilty criminals.¹²² For example, due process in criminal cases requires a "fair trial in a fair tribunal."¹²³ Criminal defendants are entitled to a presumption of innocence and the prosecutor must prove the defendant's guilt beyond a reasonable doubt to sustain a conviction.¹²⁴ Furthermore, criminal defendants have

(stating that mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling); *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (holding that pro se status, illiteracy, deafness, and lack of legal training are not external factors excusing abuse of the writ); *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of petitioner's unfamiliarity with the legal process or his lack of legal representation); *Rhodes v. Senkowski*, 82 F. Supp. 2d 160, 168, 172 (S.D.N.Y. 2000) (holding that the petitioner's allegations of AIDS-related physical and mental impairments during the one-year period in which he could file his federal habeas petition were insufficient to establish extraordinary circumstances). *But see Holland*, 130 S. Ct. at 2563-64 (distinguishing "garden variety claim[s] of excusable neglect" from claims of professional misconduct that amount to egregious attorney behavior, which the Court held could constitute an extraordinary circumstance warranting the use of equitable tolling (quoting *Irwin*, 498 U.S. at 96)).

122. Under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the government may not deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amends. V, XIV, § 1.

123. *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that not only is a biased decisionmaker constitutionally unacceptable but "even the probability of unfairness" should be prevented); *see also* *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that the principle providing that a fair trial in a fair tribunal is a basic requirement of due process applies to administrative agencies that adjudicate as well as to courts).

124. *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). The Supreme Court described the presumption of the innocence of a criminal defendant as an "'assumption' [of innocence] that is indulged in the absence of contrary evidence." *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978) (quoting *Carr v. State*, 4 So. 2d 887, 888 (Miss. 1941)); *see also* BLACK'S LAW DICTIONARY 1306 (9th ed. 2009) ("The presumption of innocence is the fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence."). The prosecutor has the burden to prove the defendant's guilt beyond a reasonable doubt, which means that the jurors must not have

a right to jury trial¹²⁵ and to assistance of counsel.¹²⁶ Additionally, criminal defendants have the right to challenge their convictions through one or more appeals, state habeas corpus petitions, or federal habeas corpus petitions.¹²⁷

Nevertheless, the judicial system is admittedly imperfect, and despite these safeguards, innocent defendants are still wrongly convicted due to failures within the legal system.¹²⁸ For example, although every indigent capital defendant is entitled to appointed counsel during federal habeas procedures,¹²⁹ a tremendous discrepancy exists among state public defender services.¹³⁰ The majority of indigent defense systems labor under excessive

any doubt as to the defendant's guilt, or if they do, their doubts are unreasonable. *See* MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962).

125. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”); *see also* U.S. CONST. amend. VI.

126. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (deciding that the right to assistance of counsel is “fundamental” and that the Fourteenth Amendment makes the right constitutionally required in state courts); *see also* *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“[T]he right to counsel is the right to the effective assistance of counsel.” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))).

127. *See supra* notes 39–41 and accompanying text.

128. Although it is impossible to assess how many people are in jail for crimes they did not commit, 142 inmates have been released from death row since 1973 because of evidence of their innocence. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/Innocence-list-those-freed-death-row> (last updated Jan. 4, 2013) (estimating the average number of years between being sentenced to death and exoneration to be 9.8 years). DNA testing has also resulted in the postconviction exoneration of more than 300 people in the United States. *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Jan. 9, 2013). As former U.S. Supreme Court Justice Sandra Day O’Connor admitted, “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.” Editorial, *Justice O’Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16 (internal quotation marks omitted).

129. *See* 18 U.S.C. § 3599(a)(2) (2006) (stating that impoverished defendants seeking to vacate or set aside a death sentence are entitled to counsel during federal habeas proceedings).

130. For example, after establishing the first public defender office in 1914, California has consistently been looked upon as a leader in providing indigent defense services. *History of the Office*, L.A. COUNTY PUB. DEFENDER, http://pd.co.la.ca.us/About_history.html (last visited Jan. 9, 2013). The Wisconsin State Public Defender’s Office, with a program that uses both staff attorneys and appointments to attorneys in private practice, has also been used as a model for other states. *See About the SPD: History of the State Public Defender’s Office*, WIS. ST. PUB. DEFENDER’S OFF., <http://www.wisspd.org/htm/GenInfo/History.asp> (last visited Jan. 9, 2013); *Public Defender*, WEBSTER’S ONLINE DICTIONARY, <http://www.websters-online-dictionary.org/definition/public+defen>

caseloads and lack sufficient support services, thus preventing public defenders from providing adequate representation.¹³¹ Furthermore, habeas procedural requirements are often so complicated that even postconviction litigators can have difficulties understanding and meeting the requirements.¹³² Procedural error during postconviction proceedings is especially dangerous because the AEDPA's one-year limitations period continues to run and can expire while defendants await the resolution of their improper state claims, before even attempting to file federal

der (last visited Jan. 9, 2013) (including in the history of *public defender* the fact that Wisconsin's public defender program has been used as a model for other states). On the other hand, the public defender systems in states like Alabama and Texas fail to protect citizens' constitutional rights. Alabama underpays appointed capital counsel and sets low eligibility requirements, requiring only five years of experience in criminal cases. *See* *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012) (citing AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT 117–20, 124–29 (2006); ALA. CODE § 13A-5-54 (2006)) (noting that appointed counsel in death penalty cases are undercompensated). Texas, which has the third largest number of death row inmates per state and has had 491 executions since 1976, does not even have a public defender system for indigent defendants. *See* *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last updated Oct. 1, 2012); *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last updated Dec. 12, 2012). Instead, the state relies on court-appointed lawyers who may lack experience with capital murder defenses or appeals. *See* Brent Newton, *Capital Punishment: Texas Could Learn a Lot from Florida*, TEX. LAW., Feb. 26, 1996, at 31.

131. *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 269 (2009).

132. *See, e.g.,* *Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002) (“Even with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, an informed calculation of [the prisoner’s] tolling period evaded both his appointed counsel and the expertise of a federal magistrate judge.”). Criminal defendants, if desired, may represent themselves in habeas corpus litigation. *See, e.g.,* *Maples*, 132 S. Ct. at 918 (noting that prisoners may proceed in habeas litigation pro se because Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings); *Murray v. Giarratano*, 492 U.S. 1, 27–29 (1989) (Stevens, J., dissenting) (disagreeing with Virginia’s practice of allowing death row inmates to prepare postconviction petitions pro se). However, counsel is nevertheless encouraged during habeas proceedings because pro se petitioners can have even greater difficulty navigating the complex habeas corpus procedures than postconviction litigators. *See* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 354 (2006) (noting that proceeding pro se in habeas litigation is unreasonable because postconviction procedures usually involve strict fact-specific pleading standards, complex exhaustion requirements, and technical consequences that require a highly competent and skilled attorney); *see also* Mello & Duffy, *supra* note 94, at 481–84 (explaining that many habeas petitioner inmates are “illiterate, uneducated, mentally impaired, or any combination of the three”).

habeas petitions.¹³³ Without an actual innocence gateway, courts would dismiss a federal habeas petition filed even one day after the one-year statute of limitations, regardless of the strength of the actual innocence showing.¹³⁴ This is particularly troubling because it forecloses any further judicial review for innocent petitioners.¹³⁵

As such, commentators argue that the AEDPA's one-year statute of limitations period is an insufficient length of time for criminal defendants to file a federal habeas corpus petition because such a limited period may not provide enough time for a petitioner to first exhaust all state remedies.¹³⁶ Petitioners may use all or most of the one-year time period

133. See 28 U.S.C. § 2244(d)(1)(A)–(B) (2006). Even worse, procedural error may be fatal for criminal defendants in states with capital punishment. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 474 (1996) (exploring reasons why errors are more likely in capital cases than in other criminal matters).

134. See generally *Schlup v. Delo*, 513 U.S. 298 (1995) (explaining the actual innocence gateway).

135. See *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). This is not to say, however, that a petitioner may not raise his actual innocence claim in a different forum. A petitioner may file a request for executive clemency, in which the President or a governor has the power to pardon the criminal. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (stating that throughout American history, “[e]xecutive clemency has provided the ‘fail safe’ in our criminal justice system” by providing a mechanism for granting relief to prisoners who demonstrate their actual innocence (quoting KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 131 (1989))). Nevertheless, scholars have criticized clemency as an ineffective remedy. See, e.g., Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC’Y REV. 183, 186 n.8 (2008) (“[Rare use of clemency] represents a radical shift from several decades ago, when governors granted clemency in 20 to 25 percent of the death penalty cases they reviewed.” (citing AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* app. B (2005))).

136. For instance, commentator Limin Zheng offers a compelling analysis of why actual innocence is necessary as a gateway to habeas review:

One year is insufficient time for a confined inmate to prepare and file a meaningful habeas corpus petition that would escape the fatal traps of the exhaustion doctrine, the procedural-default doctrine, and the second and successive petitions doctrines. Many inmates are uneducated, mentally impaired, or both. . . .

. . . [Even if a prisoner is educated or receives assistance of counsel, reinvestigation is crucial] where the claims must rely on new evidence. . . .

[F]ew inmates have access to the outside resources necessary to engage in further factfinding [for claims of ineffective assistance of counsel or prosecutorial misconduct]. . . .

. . . [And m]ost of these attorneys [who assist in investigation] represent prisoners on a pro bono basis.

See Zheng, *supra* note 47, at 2129–30 (footnotes omitted); see also Diane E. Courselle, *AEDPA Statute of Limitations: Is It Tolded When the United States Supreme Court Is*

investigating new evidence and drafting their postconviction petitions.¹³⁷ Furthermore, because the statute of limitations continues to run after each final judgment,¹³⁸ petitioners typically do not have enough time remaining after exhausting state remedies to seek certiorari from the United States Supreme Court.¹³⁹ As a result, courts are likely to deny petitioners their last opportunity to remedy a wrongful conviction. Therefore, an actual innocence exception to the AEDPA's statute of limitations is essential to ensure that courts provide an effective legal avenue of relief to the wrongfully convicted.¹⁴⁰

B. Split Among the Circuits

Prisoners who would otherwise be time-barred from filing habeas petitions possess the option to seek equitable tolling of their limitations period.¹⁴¹ However, establishing the requisite extraordinary circumstances to justify equitable tolling of the AEDPA's limitations period can be quite challenging for prisoners.¹⁴² Over the last decade, federal circuit courts have started to recognize an actual innocence exception as an alternative ground for equitable tolling of the AEDPA's statute of limitations.¹⁴³

Asked To Review a Judgment from a State Post-Conviction Proceeding?, 53 CLEV. ST. L. REV. 585, 587–88 (2005–2006) (stating that petitioners face numerous difficulties when attempting to understand the AEDPA's tolling provisions, especially regarding the task of exhausting of state remedies).

137. See Courselle, *supra* note 136, at 588; see also, e.g., Souter v. Jones, 395 F.3d 577, 587–88 (6th Cir. 2005) (barring the petition because it was filed three days after the one-year limitation following discovery of new evidence); Johnson v. McBride, 381 F.3d 587, 589 (7th Cir. 2004) (barring the petition because the court found that the police investigation of another suspect was not a new factual predicate for purposes of tolling).

138. See 28 U.S.C. § 2244(d)(1)(A).

139. See, e.g., Lawrence v. Florida, 549 U.S. 327, 332, 337 (2007) (holding that AEDPA's one-year limitations period is not tolled during the pendency of a certiorari petition in the Supreme Court and, even assuming equitable tolling were available, the petitioner failed to make a showing of extraordinary circumstances necessary for tolling).

140. See, e.g., Bradley, *supra* note 46, at 468–70.

141. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010); see *supra* notes 103–11 and accompanying text.

142. See Segal, *supra* note 120, at 233; see also *supra* note 121 and accompanying text.

143. Four circuits have expressly recognized that actual innocence is a valid argument for equitable tolling of time-barred habeas petitions. Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011) (en banc); San Martin v. McNeil, 633 F.3d 1257, 1267–68 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 158; Lopez v. Trani, 628 F.3d 1228, 1231 (10th Cir. 2010); Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005). Four other circuits have refused to decide the issue, finding that the petitioner would not have met the burden of proof of actual innocence in that specific case but not reaching whether the statute of limitations is entitled to equitable tolling. See Horning v. Lavan, 197 F. App'x 90, 94 (3d Cir. 2006); Doe v. Menefee, 391 F.3d 147, 174 (2d Cir. 2004); Flanders v. Graves, 299 F.3d 974, 977–78 (8th Cir. 2002); Fields v. Johnson, No. 7:06-CV-00701, 2007 WL

Until August 2011, the majority of circuit courts that considered this question declined to recognize an actual innocence exception.¹⁴⁴ However, the recent en banc decision in *Lee v. Lampert*, holding that a credible claim of actual innocence constitutes an equitable exception to the AEDPA's one-year statute of limitations, tipped the scale in favor of recognizing the exception.¹⁴⁵ Nevertheless, the federal circuit courts remain divided on whether actual innocence is grounds for equitable tolling of the AEDPA's statute of limitations period.

1. *No Equitable Exception of Actual Innocence to the AEDPA's Limitations Period*

The First, Fifth, and Seventh Circuits have long held that an actual innocence exception does not apply under any circumstances to the AEDPA's one-year statute of limitations.¹⁴⁶ The First Circuit explained that because the same statutory or judicial deadlines apply to both defendants who may be innocent and defendants against whom the evidence is overwhelming, defendants must adhere to the time constraints for pretrial motions, appeals, and habeas claims, regardless of the evidence.¹⁴⁷ The court also found that the actual innocence exception explicitly conflicts with the AEDPA.¹⁴⁸ In rejecting an actual innocence exception,

45641, at *3 (W.D. Va. Jan. 5, 2007) (stating that the U.S. Court of Appeals for the Fourth Circuit has not held that actual innocence is a ground for equitable tolling of the AEDPA's limitations period), *appeal dismissed*, 225 F. App'x 108 (4th Cir. 2007). Three circuits have expressly rejected equitable tolling of time-barred habeas petitions for actual innocence claims. *See Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005); *David v. Hall*, 318 F.3d 343, 347–48 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002).

144. *See, e.g., Lee v. Lampert*, 610 F.3d 1125, 1126 (9th Cir. 2010), *rev'd*, 653 F.3d 929; *Escamilla*, 426 F.3d at 872; *David*, 318 F.3d at 347–48; *Cousin*, 310 F.3d at 849.

145. *See Lee*, 653 F.3d at 945.

146. The Fifth Circuit has continuously held that a petitioner's claims of actual innocence do not justify equitable tolling of the limitations period. *See Cousin*, 310 F.3d at 849; *see also Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). The First Circuit held that the dicta in cases that have inferred that actual innocence might override the one-year limit is in tension with the statute and is not persuasive. *See David*, 318 F.3d at 347. In addition, Seventh Circuit cases generally support the notion that the circuit does not recognize an actual innocence exception under any circumstances. *See Escamilla*, 426 F.3d at 871–72.

147. *David*, 318 F.3d at 347.

148. *Id.* The First Circuit acknowledged that Congress adopted an actual innocence test as part of the AEDPA's requirements for allowing second or successive habeas petitions. *Id.* at 347 n.5. Congress also provided, however, that the second habeas petition is only allowed "where the factual predicate for the claim of constitutional error

the First Circuit stressed the public interest in the prompt assertion of habeas claims due to fading memory, disappearance of witnesses, and dispersion of evidence.¹⁴⁹

Because the AEDPA's one-year statute of limitations does not contain an exemption for petitioners claiming actual innocence of the crimes for which they have been convicted, the Fifth Circuit explained that a petitioner's claim of actual innocence is only "relevant to the timeliness of his petition if [the claims] justify equitable tolling of the limitations period."¹⁵⁰ The court held that a petitioner's claims of actual innocence do not preclude the dismissal of the petition as untimely.¹⁵¹ Similarly, the Seventh Circuit stated that actual innocence does not relate to the statutory timeliness rules,¹⁵² and "although the statute leaves some . . . room for equitable tolling, courts cannot alter the rules laid down in the text."¹⁵³ The court explained that unless a prisoner meets the AEDPA's standard for new evidence, the petitioner's contention that new factual discoveries amount to actual innocence is unavailing.¹⁵⁴

2. *Recognizing a Credible Claim of Actual Innocence as an Exception to the AEDPA's Limitations Period*

In contrast, in its recent en banc decision in *Lee v. Lampert*, the Ninth Circuit held that where an otherwise time-barred habeas petitioner demonstrates that it is "more likely than not that no reasonable juror

could not have been discovered previously through the exercise of due diligence." *Id.*; see also 28 U.S.C. § 2244(b)(2)(B)(i) (2006). Therefore, the First Circuit found that the one-year limitations period on filing initial habeas petitions is not alleviated by any statutory exception for actual innocence. *David*, 318 F.3d at 347.

149. *David*, 318 F.3d at 347; see also *supra* note 85 and accompanying text.

150. *Cousin*, 310 F.3d at 849.

151. *Id.*; see also *Felder*, 204 F.3d at 171.

152. *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005) ("Actual innocence' permits a second petition under § 2244(b)(2)(B)—it clears away a claim that the prisoner defaulted in state court or by omission from the first federal petition—but does not extend the time to seek collateral relief.>").

153. *Id.* at 872 (citation omitted); see also *Dodd v. United States*, 545 U.S. 353, 359 (2005) (holding that a second or successive petition must meet the AEDPA's timeliness requirements even if time runs out before a given avenue becomes legally and factually available to challenge a conviction or sentence).

154. *Escamilla*, 426 F.3d at 872 ("Actual innocence without a newly discovered claim does nothing at all."). Under the AEDPA, a second petition is only possible if the factual predicate could not have been discovered earlier, and the defendant shows actual innocence by clear and convincing evidence. *Id.*; see also 28 U.S.C. § 2244(b)(1)(B) (2006). The AEDPA's required standard of proof for claims of actual innocence presents a greater hurdle for petitioners to overcome than the *Schlup* standard. See *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (holding that a petitioner could demonstrate actual innocence by showing that it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

would have found [the] petitioner guilty beyond a reasonable doubt,”¹⁵⁵ the petitioner may pass through the *Schlup* gateway and have his or her constitutional claims heard on the merits.¹⁵⁶ In recognizing an equitable exception based on a credible showing of actual innocence, the Ninth Circuit joined the Sixth, Tenth, and Eleventh Circuits.¹⁵⁷ The circuits in support of an actual innocence exception found that: (1) Congress did not remove federal courts’ equitable powers in habeas proceedings; (2) recognition of an actual innocence exception to the AEDPA’s limitations period is consistent with the AEDPA’s underlying principles; and (3) the doctrine of constitutional avoidance further warrants the circuits’ conclusion.¹⁵⁸

The Ninth and Sixth Circuits declared that Congress intended for the actual innocence exception to apply to the AEDPA’s limitation period.¹⁵⁹ When Congress enacted the AEDPA, Congress was working against the background of *Murray v. Carrier*¹⁶⁰ and *Schlup v. Delo*,¹⁶¹ in which the

155. *Schlup*, 513 U.S. at 327.

156. *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc). In a petition for habeas relief from the petitioner’s conviction of first degree sex abuse and first degree sodomy, the Ninth Circuit held that although a credible showing of actual innocence under *Schlup v. Delo* excuses the AEDPA’s statute of limitations period, the petitioner failed to present sufficient evidence of actual innocence to permit review of his constitutional claims on the merits. *Id.* at 931.

157. *See San Martin v. McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011) (holding that although the petitioner did not raise a claim of actual innocence, the court may consider an untimely AEDPA petition if the court would “endorse a ‘fundamental miscarriage of justice’ because it would require that an individual who is actually innocent remain imprisoned”), *cert. denied*, 132 S. Ct. 158; *Lopez v. Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 2010) (“[A] sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier.”); *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005) (“Similar to our holding in the equitable tolling context, we conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted [the AEDPA’s] procedural limitation consistent with the *Schlup* actual innocence exception.”).

158. *Lee*, 653 F.3d at 935–36; *Souter*, 395 F.3d at 599; *see also San Martin*, 633 F.3d at 1267–68; *Lopez*, 628 F.3d at 1230–31.

159. *Lee*, 653 F.3d at 934; *Souter*, 395 F.3d at 599.

160. 477 U.S. 478 (1986). Although the Supreme Court held that any attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default, *id.* at 497, the Court held that “[i]n appropriate cases’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration,’” *id.* at 495 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

161. 513 U.S. 298, 327–28 (1995) (holding that if a petitioner brings forth new evidence and establishes that “it is more likely than not that no reasonable juror would

Supreme Court held that a showing of actual innocence was sufficient to overcome a procedurally defaulted habeas corpus petition.¹⁶² Additionally, federal courts have consistently had equitable discretion to hear the merits of claims involving procedural failings if the failure to do so would result in a “fundamental miscarriage of justice,” like a conviction, incarceration, or execution of an actually innocent person.¹⁶³ Thus, the Ninth and Sixth Circuits both contend that “[a]bsent evidence of Congress’s contrary intent, there is no articulable reason for treating habeas claims barred by the federal statute of limitations differently.”¹⁶⁴

Additionally, the Ninth Circuit found that the actual innocence exception does not go against the AEDPA’s intent to eliminate abuse of habeas petitions.¹⁶⁵ The Sixth Circuit agreed on this point and explained that an actual innocence exception to the AEDPA’s statute of limitations provisions does not foster abuse and delay but rather recognizes that, in certain extraordinary and rare situations, the interests of finality, comity, and federalism “must yield to the imperative of correcting a fundamentally

have convicted him” in light of the new evidence, he may overcome the procedural barriers that would otherwise bar his path and have a federal court consider his habeas petition on the merits).

162. *Souter*, 395 F.3d at 599. The Sixth Circuit concluded that based on existing jurisprudence and in the absence of evidence to the contrary, Congress enacted the AEDPA’s procedural limitation consistent with the *Schlup* actual innocence exception. *Id.* Thus, the Sixth Circuit held that equitable tolling of the statute of limitations based on a credible showing of actual innocence is appropriate. *Id.*

163. *Lee*, 653 F.3d at 933–34 (quoting *McCleskey v. Zant*, 499 U.S. 467, 502 (1991)); see also *Schlup*, 513 U.S. at 320–21 (discussing courts’ ability to exercise equitable principles to prevent miscarriages of justice). The Supreme Court stressed the need in a free society for “an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.” *McCleskey*, 499 U.S. at 495 (quoting *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976)).

164. *Lee*, 653 F.3d at 934 (quoting *Souter*, 395 F.3d at 599). Congress adopted a more stringent actual innocence exception in the AEDPA’s successive petition and evidentiary hearing provisions, requiring that the factual predicate of the claim could not have been discovered earlier through the exercise of due diligence and imposing a “clear and convincing” standard of proof. *Souter*, 395 F.3d at 598–99 (quoting 28 U.S.C. §§ 2244(b)(2)(B), 2254(e)(2) (2006)). The Sixth Circuit explained that the AEDPA’s narrower actual innocence exception “is indicative, not of Congress’s desire to exclude the exception with regards to the limitations period, but rather of its intent to limit the scope of the exception in those two specific areas.” *Id.* at 599. Thus, in looking at the absence of an exception in § 2244(d)(1), the Sixth Circuit found that the more reasonable inference to draw is that “Congress intended not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default.” *Id.*

165. *Lee*, 653 F.3d at 935. As the Supreme Court has stated, “The miscarriage of justice standard is altogether consistent . . . with AEDPA’s central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.” *Calderon v. Thompson*, 523 U.S. 538, 558 (1998).

unjust incarceration.”¹⁶⁶ Moreover, although case law sets a “very high” threshold for initiating equitable exceptions,¹⁶⁷ recognition of the actual innocence exception is consistent with the infrequent application of the doctrine of equitable tolling.¹⁶⁸ In other words, habeas petitions that advance a credible claim of actual innocence are “extremely rare,”¹⁶⁹ and there is thus little danger that these extraordinary cases will swallow the rule of equitable tolling.¹⁷⁰

Furthermore, the Ninth and Sixth Circuits relied on the doctrine of constitutional avoidance, which provides that federal courts should refuse to rule on a constitutional issue if the court could resolve the case on a nonconstitutional basis.¹⁷¹ According to the canon of constitutional avoidance, courts must construe the statute to avoid serious constitutional problems, such as denying federal habeas relief to an actually innocent petitioner.¹⁷² Barring a habeas petitioner who establishes a claim of actual

166. *Souter*, 395 F.3d at 600 (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986)); see also *Lee*, 653 F.3d at 935 (quoting *Murray*, 477 U.S. at 495). As Judge Moore stated in *Souter*, “It is only the extraordinary case . . . in which the habeas petitioner can present new evidence which undermines this court’s confidence in the outcome of the trial and therefore requires assurance that it was free of non-harmless constitutional error.” 395 F.3d at 600.

167. See *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)).

168. See, e.g., *House v. Bell*, 547 U.S. 518, 538 (2006) (“[T]he *Schlup* standard . . . permits review only in the ‘extraordinary’ case.” (quoting *Schlup*, 513 U.S. at 327)); *Spencer v. Sutton*, 239 F.3d 626, 629–30 (4th Cir. 2001) (holding that equitable tolling is appropriate only when extraordinary circumstances beyond the petitioner’s control “prevented him from complying with the statutory time limit” (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000))).

169. *Schlup*, 513 U.S. at 321.

170. *Lee*, 653 F.3d at 937.

171. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”); see also Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551 (2000) (defending use of the canon of statutory construction when interpreting the AEDPA). Critics, however, have called into question the federal courts’ general approach to construction of the AEDPA’s provisions. See David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 7 (2002) (“The avoidance canon . . . may extend judicial policy-making power by creating a constitutional penumbra, effectively extending the scope of a constitutional doctrine . . .”); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

172. *Lee*, 653 F.3d at 936; see *Souter v. Jones*, 395 F.3d 577, 601 (6th Cir. 2005) (“Several courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic.”).

innocence purely because the petitioner filed the petition after the limitations period raises a serious constitutional concern because of the “inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person’s innocence.”¹⁷³

Based on the foregoing reasons, the Sixth, Ninth, Tenth, and Eleventh Circuits support the actual innocence exception and assert that there can be no “stronger equitable claim for keeping open the courthouse doors than one of actual innocence.”¹⁷⁴

V. THE SUPREME COURT SHOULD ADOPT THE GATEWAY STANDARD OF ACTUAL INNOCENCE FOR EQUITABLE TOLLING OF TIME-BARRED PETITIONS

All federal courts should recognize an actual innocence exception to hear federal habeas corpus petitions of prisoners with valid claims after the AEDPA’s one-year statute of limitations period has run. Because courts consider the writ of habeas corpus as “the best and only sufficient defence of personal freedom,”¹⁷⁵ recognizing an actual innocence exception to the AEDPA’s statute of limitations “would enable the courts to continue to redress the most egregious injustice that can occur under our

173. *Wyzykowski v. Dep’t of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (explaining that if a petitioner can demonstrate actual innocence, the AEDPA’s limitations period “raises serious constitutional questions,” which “possibly render[] the habeas remedy inadequate and ineffective”); *Triestman v. United States*, 124 F.3d 361, 378–79 (2d Cir. 1997) (discussing the “serious constitutional questions” that would arise if a petitioner’s actual innocence claim was barred from collateral review); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1190 (E.D. Mich. 2001) (“[T]o utilize the one year statute of limitations contained in the AEDPA to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause contained in U.S. Const. Art. I, § 9 cl. 2, as well as the Eighth Amendment’s ban on cruel and unusual punishment.”). It is a well-established principle that punishing an innocent person or someone without culpability is at odds with the Constitution, including the Eighth Amendment. *See In re Davis*, No. CV409 130, 2010 WL 3385081, at *41 (S.D. Ga. Aug. 24, 2010); *see also Herrera v. Collins*, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting) (“It also may violate the Eighth Amendment to imprison someone who is actually innocent.”).

174. *Lee*, 653 F.3d at 934–35 (“[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.” (quoting *Schlup*, 513 U.S. at 324)); *see also San Martin v. McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011); *Lopez v. Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 2010); *Souter*, 395 F.3d at 599.

175. *See Zheng*, *supra* note 47, at 2132 (quoting *Ex parte Yerber*, 75 U.S. (8 Wall.) 85, 95 (1868)) (internal quotation marks omitted).

criminal justice system: the incarceration of an innocent person [as a result of] an unconstitutional process.”¹⁷⁶

Critics of the actual innocence exception focus on the text of the AEDPA’s statute of limitations, explaining that Congress did not explicitly include any exceptions for innocence.¹⁷⁷ However, unlike the other preclusive defenses under the AEDPA, the statute of limitations is an “unprecedented restriction” on habeas corpus petitions.¹⁷⁸ Before Congress enacted the AEDPA in 1996, the doctrine of habeas corpus was never subject to strict time limitations.¹⁷⁹ Moreover, in enacting the AEDPA, Congress was working against the jurisprudential background of *Schlup v. Delo*, in which the Supreme Court held that a showing of actual innocence was sufficient to excuse a procedurally barred claim and have a federal court consider a defendant’s habeas petition on the merits.¹⁸⁰ Courts have consistently held that a federal court could excuse a procedural default resulting from an untimely filing “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.”¹⁸¹ In the “absence of evidence to the contrary,”¹⁸² and in light of existing jurisprudence, Congress enacted the

176. *Id.*; see also *Schlup*, 513 U.S. at 325 (“[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.”).

177. See, e.g., *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005) (stating that actual innocence does not relate to the statutory timeliness rules); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) (stating that the AEDPA’s one-year statute of limitations “contains no explicit exemption for petitioners claiming actual innocence of the crimes of which they have been convicted”); see also 28 U.S.C. § 2244(d)(1) (2006) (providing no explicit exception to the AEDPA’s statute of limitations for actual innocence). The Sixth Circuit, however, explained that although Congress did adopt a narrow actual innocence exception in the AEDPA’s successive-petition and evidentiary-hearing provisions, Congress did not desire to exclude the actual innocence exception with regard to the limitations period. *Souter*, 395 F.3d at 599. The court held that the more reasonable inference is that Congress likely intended “not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default.” *Id.*

178. Sussman, *supra* note 95, at 356.

179. See *supra* notes 91–93 and accompanying text.

180. *Souter*, 395 F.3d at 598; see also *Schlup*, 513 U.S. at 326 (explaining the actual innocence exception to procedural bars on petitions).

181. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

182. *Souter*, 395 F.3d at 599. The Supreme Court has explained that silence as to an actual innocence gateway to procedural defaults should not be construed as a rejection of the equitable principles traditionally governing claims of habeas corpus. See *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (noting that it is improper to “construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command’” (quoting

procedural limitation in the AEDPA consistent with the *Schlup* actual innocence exception.

Additionally, although Congress enacted the AEDPA to alleviate the burden on the federal courts and to contain the threat to the principles of finality and comity,¹⁸³ an actual innocence exception does not threaten the leading principles of the AEDPA.¹⁸⁴ Under *Schlup*, a petitioner’s “otherwise-barred claims [may be] considered on the merits . . . if his claim of actual innocence is sufficient to bring him within the ‘narrow class of cases . . . implicating a fundamental miscarriage of justice.’”¹⁸⁵ For a claim of actual innocence to be credible, a claim that constitutional error has caused the conviction or imprisonment of an innocent person requires that the petitioner “support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.”¹⁸⁶ Because such required evidence is unavailable in the majority of cases, a petitioner’s claim of actual innocence is “rarely successful.”¹⁸⁷

Nevertheless, opponents of the actual innocence exception maintain that “states should be trusted to adjudicate federal-rights claims.”¹⁸⁸ However, according to a 1995 study by the U.S. Department of Justice, completed one year before Congress enacted the AEDPA restrictions,

Miller v. French, 530 U.S. 327, 340 (2000)); Slack v. McDaniel, 529 U.S. 473, 483 (2000) (holding that the AEDPA incorporated historical equitable principles governing habeas corpus petitions).

183. See Williams v. Taylor, 529 U.S. 420, 436 (2000) (discussing the AEDPA’s purpose of furthering “the principles of comity, finality, and federalism”); see also McCleskey v. Zant, 499 U.S. 467, 491 (1991) (discussing the importance of finality of judgments in the habeas corpus context); Murray, 477 U.S. at 487 (listing a reduction in finality of litigation and frustration of states’ sovereign powers as among the costs of habeas corpus redress).

184. *Schlup*, 513 U.S. at 324; see also Souter, 395 F.3d at 599–600 (“Inclusion of an actual innocence exception to the limitations provisions does not foster abuse and delay . . .”). Moreover, the Supreme Court reasoned that in certain extraordinary situations, the interests of finality, comity, and federalism “must yield to the imperative of correcting a fundamentally unjust incarceration.” Murray, 477 U.S. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

185. Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997) (en banc) (quoting *Schlup*, 513 U.S. at 315).

186. *Schlup*, 513 U.S. at 324; Souter, 395 F.3d at 590 (quoting *Schlup*, 513 U.S. at 324).

187. *Schlup*, 513 U.S. at 324; see also NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 15, 17, 48–49 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (providing information that out of over 2,750 federal habeas petitions brought by state prisoners, only one petitioner made a successful *Schlup* claim).

188. Zheng, *supra* note 47, at 2137; see also Friedman, *supra* note 44, at 489 (“Federal courts [in following the principles of comity and federalism] should respect the determinations of state courts regarding the adjudication of constitutional claims.”).

“only 1% of federal habeas corpus petitions were granted and another 1% were remanded to state courts.”¹⁸⁹ Even after Congress enacted the AEDPA’s limitations, the actual innocence gateway has had a minor impact, if any, on comity and finality because the number of state prisoners that file habeas petitions and the number of federal habeas petitions actually granted has remained minimal.¹⁹⁰ Therefore, “[a]t the very least, these low figures show that permitting federal habeas corpus review of time-barred petitions on the basis of actual innocence will not lead to any significant encroachment on states[’] rights.”¹⁹¹

Finality also remains a legitimate concern of those opposing an actual innocence exception because habeas corpus review can involve considerable costs, extend the ordeal of trial, and exhaust judicial resources.¹⁹² Nonetheless, incarcerating or executing an innocent person

189. See Zheng, *supra* note 47, at 2137 (citing ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP’T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/FHCRSCC.pdf>). According to another report published by the U.S. Department of Justice, the estimated grant rate nationwide for all noncapital cases filed in federal court in 2007 was at most 0.51%, or one in every 196 cases. KING ET AL., *supra* note 187, at 52 n.88.

190. See Segal, *supra* note 120, at 247–48 (citing Brief for Former Prosecutors and Professors of Criminal Justice as Amici Curiae Supporting Petitioner at 10, *House v. Bell*, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 2367033 (reviewing the federal adjudication of *Schlup* claims electronically available on Westlaw or LexisNexis from 1995, the year of the *Schlup* decision, until 2005)). In its amicus brief supporting the petitioner in *House v. Bell*, the amici found that during a ten-year period, federal habeas courts only issued 338 decisions regarding *Schlup* claims. *Id.* The courts found that the petitioners had presented sufficient evidence of actual innocence to have the court consider their otherwise-barred claims on the merits in thirty-one of those cases, but petitioners in only twenty of those cases received relief from their conviction or sentence. *Id.* at 248. This number is extremely small in comparison to the number of prisoners who are “actually innocent” of their crimes. See, e.g., C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 53–62 (1996) (describing a ten-year research study of case samples and survey data of judges, prosecutors, public defenders, sheriffs, and police chiefs that resulted in a “conservative” estimation of 9,969 wrongful convictions, or 0.5% of the 1,993,880 convictions for index crimes, in 1990); *Exonerations in the United States, 1989–2012*, NAT’L REGISTRY EXONERATIONS (May 20, 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_summary.pdf (finding that more than 2,000 people who were falsely convicted of serious crimes have been exonerated in the United States in the past 23 years).

191. Zheng, *supra* note 47, at 2137.

192. See *Engle v. Isaac*, 456 U.S. 107, 126–27 (1982). Justice Harlan explained that

“[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to

“should far outweigh the desired termination of litigation.”¹⁹³ Therefore, the actual innocence gateway is consistent with congressional intent and the AEDPA’s underlying principles.

Finally, recognizing an actual innocence exception to the AEDPA’s statute of limitations is appropriate because the Supreme Court has already recognized that the limitations period may be equitably tolled in extraordinary circumstances.¹⁹⁴ Critics argue that an actual innocence exception would only provide petitioners an opportunity to relitigate a settled matter, fabricate new evidence, and attempt to bring forth the same evidence again but with a different approach.¹⁹⁵ However, many commentators note that the argument that actual innocence exceptions lead to abuse is unfounded, because federal courts rarely encounter

litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.”

Id. at 127 (quoting *Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting)).

193. *See Zheng, supra* note 47, at 2138 (quoting *Friendly, supra* note 66, at 150). Courts should “not neglect the public fear and distrust that may arise as a result of incarcerating the innocent.” *Id.* Furthermore, in the case of actual innocence, providing a remedy for constitutional error in an initial federal habeas petition actually promotes finality and conserves judicial resources. *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) (“If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action.”). Without the burden of a strict time constraint, petitioners with meritorious claims of actual innocence are more likely to carefully prepare and develop their cases in a first habeas petition, which will in turn help conserve judicial resources. *Zheng, supra* note 47, at 2138.

194. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). Federal circuit courts have also recognized that the limitations period may be equitably tolled in cases of extraordinary circumstances. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001) (providing examples of other circuits who have recognized the “extraordinary circumstances” requirement), *overruled on other grounds by Plummer v. Warren*, 463 F. App’x 501 (6th Cir. 2012). Furthermore, the recent trend of federal circuit courts to recognize an actual innocence exception to the AEDPA’s limitations period suggests that the standard established in *Schlup* may become the accepted standard by which petitioners with actual innocence claims could have their time-barred habeas petitions heard. *See supra* Part IV.B.2.

195. *See Segal, supra* note 120, at 237. Justice O’Connor noted that “the federal courts will be deluged with frivolous claims of actual innocence by prisoners who, refusing to accept the jury’s verdict, demand[] a hearing in which to have [their] culpability determined once again.” *Id.* (quoting “*The Streamlined Procedures Act of 2005*”: *Legislative Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Thomas Dolgenos, Chief, Federal Litigation Unit, Philadelphia District Attorney’s Office), *available at* http://www.constitutionproject.org/pdf/dolgenos_10_11_05_testimony1.pdf) (internal quotation marks omitted).

meritorious claims of actual innocence in habeas petitions.¹⁹⁶ Moreover, holding that a credible claim of actual innocence is an equitable exception to the AEDPA's limitations period is "entirely 'consistent with [courts'] sparing application of the doctrine of equitable tolling.'"¹⁹⁷

The Ninth Circuit, along with other circuits, has applied equitable principles to the AEDPA's statute of limitations in a variety of contexts.¹⁹⁸ If equitable tolling is appropriate in those contexts, courts should also excuse untimely habeas petitions that invoke the "ultimate equity"—actual innocence.¹⁹⁹ As the Ninth Circuit explained in *Lee*, "[i]t would seem odd indeed that, under *Holland*, a petitioner could receive the benefit of equitable tolling for attorney error and yet be denied habeas review upon making a credible showing of actual innocence."²⁰⁰ Thus, the Supreme Court should harmonize the two avenues for equitable exceptions to the AEDPA's statute of limitations.

Although the government must conserve limited judicial resources and further the principles of finality and comity in criminal trials,²⁰¹ ultimately courts have a duty to ensure that prisoners are actually guilty of the crimes for which they are convicted and sentenced.²⁰² Therefore, the Supreme Court should adopt the gateway standard of actual innocence as an exception to time-barred petitions because the exception serves as an

196. *Id.* (citing *Bellamy*, *supra* note 78, at 39); *see also* *Schlup v. Delo*, 513 U.S. 298, 324 (1995) ("[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare."). In fact, courts have rarely sustained habeas petitions containing a claim of actual innocence because the burden of proof to establish a claim of actual innocence is so rigorous. *See* *Jordan Steiker, Innocence and Federal Habeas*, 41 *UCLA L. REV.* 303, 377 & n.370 (1993) (citing cases denying relief based on claims of actual innocence).

197. *Lee v. Lampert*, 653 F.3d 929, 937 (9th Cir. 2011) (en banc) (quoting *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009)).

198. *See supra* notes 34, 108–11 and accompanying text.

199. *Lee*, 653 F.3d at 935 n.10 (internal quotation marks omitted).

200. *Id.* (citing *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010); *Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) ("We . . . conclude that the misconduct of Spitsyn's attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period under AEDPA.")).

201. *See Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (listing the values intruded upon by habeas corpus). The individual criminal defendant, the victim of the crime, and society in general each have an interest in insuring that there will eventually be the assurance and closure that comes at the conclusion of litigation. *Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

202. *See Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (describing the "powerful and legitimate interest" of an innocent prisoner in obtaining relief); *see also Murray v. Carrier*, 477 U.S. 478, 495 (1986) (explaining the importance of review of claims involving issue "bearing on the reliability of the verdict").

additional “safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.”²⁰³

Several cases illustrate that an actual innocence exception is fundamental in ensuring the equitable application of the AEDPA’s provisions to habeas corpus petitions. For example, in *Souter v. Jones*, the Sixth Circuit ordered the district court to consider Souter’s habeas petition, even though it was time barred, because Souter “presented new evidence which raise[d] sufficient doubt about his guilt and undermine[d] confidence in the result of his trial.”²⁰⁴

In 1979, Kristy Ringler died of a severe head wound shortly after her body was found in the middle of the road.²⁰⁵ A forensic pathologist hired by the state concluded that Ringler’s injuries were consistent with being hit by a car and not with a homicide.²⁰⁶ Twelve years later, after the election of a new sheriff who had committed to reviewing unsolved homicide files, the State reopened the case and prosecuted Souter for murder, arguing that he had hit Ringler with his whiskey bottle.²⁰⁷ At trial, the prosecution’s evidence consisted primarily of a whiskey bottle found near the victim and expert testimony that the bottle previously had a sharp edge that could have been used to kill the victim.²⁰⁸ Souter was convicted, and after procedurally defaulting on his state habeas claims, he sought federal habeas relief.²⁰⁹

In his federal habeas petition, Souter presented several pieces of exculpatory evidence, including two expert witnesses’ recantations of trial testimony and photographs from the crime scene showing blood stains inconsistent with the prosecution’s theory.²¹⁰ Specifically, two of the three forensic experts who testified for the prosecution at trial recanted their testimony, stated that it was “unlikely” that the bottle could have caused the victim’s injuries, and discredited the credentials of the state’s third expert witness.²¹¹ Souter also presented extensive evidence from the bottle manufacturer and forensic technicians that

203. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (quoting *Stone*, 428 U.S. at 491 n.31) (discussing the need in a free society for this additional safeguard).

204. *Souter v. Jones*, 395 F.3d 577, 597 (6th Cir. 2005).

205. *Id.* at 581.

206. *Id.* at 582.

207. *Id.* at 582–83.

208. *Id.* at 581–83.

209. *Id.* at 583.

210. *Id.* at 583–84. Souter introduced previously unavailable pictures of the crime scene that showed the back of the victim’s clothes covered in blood, even though she was found lying on her back and little blood was visible at the time. *Id.* at 591–92. The large amounts of blood visible in these photographs made it significantly less likely that Souter could have hit or moved Ringler without getting any blood on himself. *Id.* at 592.

211. *Id.* at 583–84.

proved that the bottle could not have had a sharp edge, as well as an affidavit from the police laboratory technician, who said that the bottle did not have a sharp edge when it was recovered after the murder.²¹²

Based on the extensive evidence of his actual innocence, the Sixth Circuit allowed Souter to pass through the *Schlup* gateway and argue the merits of his underlying constitutional claims of ineffective assistance of counsel and due process violations.²¹³ Ultimately, the court exonerated and released Souter from state prison after serving thirteen years for a murder he did not commit.²¹⁴ However, if Souter had filed his federal habeas petition in a circuit that does not recognize an equitable exception based on actual innocence, the court would have dismissed his habeas corpus petition and would never have considered his constitutional and actual innocence claims.

Additionally, *Lisker v. Knowles* exemplifies the consequences of a strict and inflexible system that denies prisoners the opportunity to have their valid and reasonable claims of innocence heard.²¹⁵ In 1983, a woman named Dorka Lisker was killed in her home.²¹⁶ The prosecution charged her seventeen-year-old son, Bruce Lisker, with the murder.²¹⁷ Although Lisker continued to assert his innocence to the police and told the detective that he believed the actual killer was another juvenile named Michael Ryan, Lisker's case went forward and a jury convicted him of second-degree murder.²¹⁸ In his habeas corpus petition, Lisker presented new evidence that, among a number of things, the shoe prints inside and around the house did not all belong to Lisker; that an object resembling the unidentified shoe which left prints in the guest bath and outside the house also made a mark on the victim's head; and that there was a different suspect who was not "convincingly cleared" and whose involvement police appeared to have ignored despite compelling evidence.²¹⁹ Under all of these circumstances, the court held that "it would be a miscarriage of justice for th[e] Court to dismiss the First Amended Petition

212. *Id.* at 591.

213. *Id.* at 602.

214. Order and Judgment Approving Report and Recommendation, *Souter v. Jones*, No. 1:02-cv-00067-GJQ-HWB (W.D. Mich. Oct. 11, 2005) (granting writ of habeas corpus).

215. *Lisker v. Knowles*, 463 F. Supp. 2d 1008 (C.D. Cal. 2006).

216. *Id.* at 1010.

217. *Id.*

218. *Id.*

219. *Id.* at 1040.

as untimely.”²²⁰ Therefore, despite being time barred by the AEDPA’s one-year statute of limitations, the court held that Lisker could pass through the *Schlup* gateway and argue the merits of his constitutional claims.²²¹ Lisker successfully established constitutional errors and was released after being incarcerated for twenty-six years.²²²

However, after the panel in *Lee v. Lampert* held that there was no actual innocence exception to override the AEDPA’s statute of limitations,²²³ the State of California filed a motion to reopen the habeas proceedings in an effort to return Lisker, an exonerated man, to prison based on a procedural technicality.²²⁴ This occurred prior to the Ninth Circuit’s en banc decision holding that a credible claim of actual innocence constitutes an equitable exception to the AEDPA’s limitations period.²²⁵ Ultimately a federal judge denied the motion,²²⁶ yet the case illustrates the potential consequences of an inflexible system.

Like the petitioners described above, the petitioner in *Souliotes v. Evans*²²⁷ presents a compelling case for habeas relief, providing new reliable evidence of actual innocence such that any “reasonable juror” would arguably conclude the charges against Souliotes had not been proven “beyond a reasonable doubt.”²²⁸ In his federal habeas corpus petition, Souliotes presented both a claim that was potentially timely under § 2244(d)(1),²²⁹ as well as affiliated claims that would otherwise be barred but which Souliotes sought to bring through the *Schlup* actual innocence gateway.²³⁰

220. *Id.* at 1042. For a more detailed discussion of the factual and procedural background, see Scott Glover & Matt Lait, *New Light on a Distant Verdict*, L.A. TIMES (May 22, 2005), <http://articles.latimes.com/2005/may/22/local/la-me-lisker22may22>.

221. *Lisker*, 463 F. Supp. 2d at 1042.

222. See Matt Lait, *Judge Rejects Motion To Put Bruce Lisker Back in Prison*, L.A. TIMES (Oct. 9, 2010), <http://articles.latimes.com/2010/oct/09/local/la-me-lisker-20101009>.

223. *Lee v. Lampert*, 610 F.3d 1125, 1129–30 (9th Cir. 2010), *rev’d en banc*, 653 F.3d 929 (9th Cir. 2011).

224. See Lait, *supra* note 222. “The state attorney general’s office filed a motion . . . seeking to have Lisker sent back to prison on a technicality, citing a [Ninth Circuit] ruling in another case [holding that] inmates cannot file ‘untimely’ petitions for release even if they can prove they are innocent.” *Id.*

225. See *Lee*, 653 F.3d at 945.

226. See Lait, *supra* note 222.

227. *Souliotes v. Evans*, 622 F.3d 1173 (9th Cir. 2010), *vacated*, 654 F.3d 902 (9th Cir. 2011).

228. See *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995) (“[T]he *Carrier* ‘probably resulted’ standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner . . . raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.”).

229. See 28 U.S.C. § 2244(d)(1)(D) (2006).

230. *Souliotes*, 622 F.3d at 1176 (claiming actual innocence, ineffective assistance of counsel, violation of the Vienna Convention, and juror misconduct).

Initially, Souliotes sought equitable tolling based on his counsel's reliance on an "ambiguous" docket entry.²³¹ Because Souliotes's attorney mistook October 22, 2002, rather than October 16, 2002, to be the triggering date for the AEDPA's one-year deadline, Souliotes's attorney filed his federal habeas petition five days past the limitations period.²³² The Ninth Circuit held that the clerical error did not amount to "extraordinary circumstances" that warranted a grant of equitable tolling.²³³

Despite his untimely filing, Souliotes asserted that he could pursue his remaining claims under the *Schlup* actual innocence gateway, which was the only remaining mechanism Souliotes had to present his affiliated constitutional claims.²³⁴ In recognizing a credible claim of actual innocence as an exception to the AEDPA's limitations period, the Ninth Circuit provided the district court with discretion to determine whether Souliotes could present his otherwise time-barred claims.²³⁵ On remand, the district court considered all of the evidence, including the newly discovered evidence.²³⁶ The district court subsequently found that Souliotes made a sufficient showing of actual innocence to serve as an equitable exception to the AEDPA's statute of limitations, thereby allowing the court to consider all of Souliotes's constitutional habeas claims on the merits.²³⁷

Souliotes presented a compelling case for habeas relief because the new scientific evidence and the unreliability of the prosecution's eyewitness cast considerable doubt on the accuracy of the verdict.²³⁸ Furthermore, in pursuing his ineffective assistance of counsel claim, Souliotes "could likely show that his conviction was not the product of an error-free

231. *Id.* at 1180.

232. *Id.*

233. *Id.* at 1181.

234. *Id.*

235. *See* Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011) (en banc).

236. Souliotes v. Hedgpath, No. 1:06-cv-00667 OWW, 2011 WL 4433098, at *6 (E.D. Cal. Sept. 21, 2011) (order granting request to hold evidentiary hearing).

237. Souliotes v. Hedgpath, No. 1:06-cv-00667 AWI MJS HC, 2012 WL 2684972, at *4 (E.D. Cal. Jul. 6, 2012) (order adopting magistrate judge's Findings and Recommendation concluding that Souliotes made a sufficient showing of actual innocence). For purposes of the *Schlup* gateway, Souliotes did not need to show that he was actually innocent of the crime he was convicted of committing; instead, he only had to show "that 'a court cannot have confidence in the outcome of the trial.'" Carriger v. Stewart, 132 F.3d 463, 478 (9th Cir. 1997) (en banc) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

238. *Souliotes*, 622 F.3d at 1176–77, 1187 n.7.

trial.”²³⁹ In the first trial, Souliotes’s trial counsel presented evidence, including testimony from fourteen witnesses, to undermine the prosecution’s case, which ultimately resulted in a hung jury.²⁴⁰ However, at the second trial, the same attorney called only one witness, an individual who had testified for the prosecution at the first trial.²⁴¹ The reduced level of representation at trial, coupled with new and sufficient evidence that was not available at trial, is the type of situation the Supreme Court intended to protect with the *Schlup* gateway.

Nevertheless, in contrast to the Ninth Circuit’s recent protection of individual liberty against unjust and illegal incarceration or execution,²⁴² the federal circuit courts that fail to recognize an actual innocence exception to the AEDPA’s statute of limitations still allow the incarceration of innocent individuals. But continued incarceration of innocent individuals is of secondary concern compared to limited review for capital defendants because losing the opportunity for federal postconviction review on account of a strict statutory deadline can mean the difference between life and death, as capital defendants are unlikely to receive any further review before execution.²⁴³ For example, similar to Souliotes, who was incarcerated for three murders by arson, Cameron Todd Willingham was convicted and incarcerated in Texas for allegedly setting a fire in 1991 that killed his three daughters.²⁴⁴ However, unlike Souliotes, who was recently allowed to present his otherwise time-barred claims asserting

239. *Id.* at 1187 n.7.

240. *Id.* at 1176.

241. *Id.*

242. *See* *Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011) (en banc) (reversing judgment of the trial court granting petition for habeas relief from the petitioner’s conviction of first degree sex abuse and first degree sodomy, where although the court held that a credible showing of actual innocence under *Schlup v. Delo* excuses the one-year statute of limitations period, the petitioner failed to present sufficient evidence of actual innocence to permit review of his constitutional claims on the merits).

243. *See* *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (“Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”). For capital defendants, a dismissal of a federal habeas petition denies prisoners the only mechanism by which they may present claims of actual innocence, thus resulting in the loss not only of their liberty, but also of their lives.

244. *See* *Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php (last visited Jan. 9, 2013). Willingham was convicted of capital murder after arson investigators concluded that twenty indicators of arson led them to believe that an accelerant had been used to set the fire inside his home. *Todd Willingham: Innocent and Executed*, NAT’L COALITION TO ABOLISH DEATH PENALTY, <http://www.ncadp.org/index.cfm?content=106> (last visited Jan. 9, 2013). During the trial, the prosecutors also presented testimony from jailhouse informant Johnny E. Webb, a drug addict on psychiatric medication, who claimed Willingham had confessed to him in the county jail. *Id.*

new reliable evidence of actual innocence,²⁴⁵ Willingham was not allowed to present such evidence after the limitations period had expired.²⁴⁶ Ultimately, Willingham was executed despite the overwhelming evidence of his actual innocence.²⁴⁷

Willingham filed a petition for federal habeas relief in April 1998, but the district court denied relief.²⁴⁸ Prior to his execution in 2004, Willingham's attorneys tried again, presenting expert testimony regarding a new arson investigation to the state's highest court, as well as to Texas Governor Rick Perry.²⁴⁹ The independent investigation, reported by Gerald Hurst of the *Chicago Tribune*, found that prosecutors and arson investigators used arson theories that had since been rejected by scientific advances, and concluded that it was possible the fire was accidental.²⁵⁰ The court did not grant relief and Willingham was executed on February 17, 2004.²⁵¹ If Willingham had filed his habeas petition in a circuit that recognized an equitable exception based on actual innocence, such as the case in *Souliotes*, the court may not have dismissed his habeas corpus petition and Willingham might still be alive today.

Whether an innocent person remains unjustly incarcerated or even executed can depend on the circuit court in which the petitioner files the habeas petition. In recognizing an actual innocence exception for equitable tolling of time-barred petitions, the Supreme Court would correct the

245. See *supra* note 237 and accompanying text.

246. INNOCENCE PROJECT, *supra* note 244; see also David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

247. Grann, *supra* note 246.

248. Willingham v. Johnson, No. Civ.A. 3:98-CV-0409-L, 2001 WL 1677023, at *5 (N.D. Tex. Dec. 31, 2001).

249. Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics: Fire That Killed His 3 Children Could Have Been Accidental*, CHI. TRIB. (Dec. 9, 2004), http://articles.chicagotribune.com/2004-12-09/news/0412090169_1_cameron-todd-willingham-arson-fire-scene.

250. *Id.*; see also Report of Dr. Gerald Hurst, *Ex parte Willingham*, No. 24,2670(B) (Tex. Dist. Ct. Feb. 2004), available at <http://www.texasobserver.org/wp-content/legacy/uploads/files/hurstreport.pdf>. Coincidentally, less than a year after Willingham's execution, arson evidence presented by some of the same experts who had appealed for relief in Willingham's case helped exonerate Ernest Willis in Texas. Mills & Possley, *supra* note 249. The experts noted that the evidence in the Willingham case was nearly identical to the evidence used to free Willis from death row. *Id.*

251. INNOCENCE PROJECT, *supra* note 244. For information about other cases in which prisoners were executed despite strong evidence of their innocence, see *Executed but Possibly Innocent*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executed-possibly-innocent> (last visited Jan. 9, 2013).

inconsistency among federal circuit courts. The Court would also provide a more complete and effective legal avenue of relief to the wrongfully convicted while enforcing a system that weeds out frivolous claims and balances the interests of finality, comity, and judicial efficiency. “If there is *any* core function of habeas corpus . . . it would be to free the innocent person unconstitutionally incarcerated.”²⁵²

VI. CONCLUSION

By its recent decision in *Lee v. Lampert*, the Ninth Circuit recognized how the actual innocence exception is consistent with the AEDPA’s underlying principles,²⁵³ furthers the purpose of habeas corpus,²⁵⁴ and protects an individual interest in avoiding injustice²⁵⁵ without interfering with congressional intent.²⁵⁶ In affirming this holding, the Supreme Court would empower all federal courts to call on their equitable powers, including both equitable principles already applied to the AEDPA’s statute of limitations as well as the actual innocence exception, in assessing the timeliness of each actual innocence claim a petitioner asserts. When a person’s life is on the line, allowing even one innocent person to remain unjustly incarcerated or executed goes against the core function of our criminal justice system.²⁵⁷

252. *Alexander v. Keane*, 991 F. Supp. 329, 338 (S.D.N.Y. 1998).

253. *See Lee v. Lampert*, 653 F.3d 929, 935 (9th Cir. 2011) (en banc) (“[The actual innocence exception] does not foster abuse or delay, but instead recognizes that in extraordinary cases, the societal interests of finality, comity, and conserving judicial resources ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’” (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986))).

254. *See, e.g., Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (emphasizing the significance of habeas jurisprudence to AEDPA interpretation); *Fay v. Noia*, 372 U.S. 391, 424 (1963) (concluding that individual liberty outweighed concerns for finality and federalism), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Sanders v. United States*, 373 U.S. 1, 8 (1963) (“Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”).

255. *Schlup v. Delo*, 513 U.S. 298, 324–25 (1995) (recognizing the injustice that results from convicting an innocent person).

256. *See Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005) (concluding that Congress enacted the AEDPA’s statute of limitations “consistent with the *Schlup* actual innocence exception”).

257. *See Zheng, supra* note 47, at 2138 (“[E]ven those gravely concerned about conservation of judicial resources have acknowledged that ‘the policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.’” (quoting *Friendly, supra* note 66, at 150)).