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Schlup v. Delo: Actual Innocence as Mere Gatekeeper

James G. Clessuras

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SCHLUP V. DELO: ACTUAL INNOCENCE AS MERE GATEKEEPER

Schlup v. Delo, 115 S. Ct. 851 (1995)

I. INTRODUCTION

In *Schlup v. Delo*,[1] the United States Supreme Court addressed Lloyd E. Schlup, Jr.'s petition for the federal writ of habeas corpus. Schlup, an inmate on Missouri's death-row, presented new evidence indicating that he was actually innocent of the crime for which he was convicted and sentenced to death. Procedurally, rules generally preclude the availability of habeas review to capital prisoners, such as Schlup, who have already failed to obtain habeas relief through a prior petition. In *Schlup*, however, the Court held that federal habeas courts may address a capital prisoner's second or subsequent habeas petition if, in light of new evidence of innocence, it is "more likely than not that no reasonable juror would have convicted him."[2] In adopting "more likely than not" as an evidentiary standard, the Court rejected its own more stringent precedent which opened the "gateway" to habeas review only upon a showing of "clear and convincing" evidence.[3] Thus, the holding in *Schlup* reflects a heightened respect for the individual interests of capital prisoners who have newly discovered evidence of innocence. This Note argues, however, that although the Court's less stringent standard for "gateway" claims of innocence was appropriate, it will do very little to prevent innocent people from being executed.

First, "gateway" claims of actual innocence are a creature of legislative grace and equitable considerations. Thus, the Court's "more likely than not" standard is open to seemingly imminent congressional reversal.[4] Moreover, the Court's "gateway" standard provides tenuous protection under the existing law because *Schlup* does not require, but appears only to permit, federal courts to reach the merits of habeas petitions that are supplemented with evidence of innocence

[1] 115 S. Ct. 851 (1995).

[2] *Id.* at 867.

[3] *Id.* at 865.

[4] As this issue of the *Journal of Criminal Law and Criminology* was going to press, Congress and the President agreed on habeas corpus reform legislation that seriously limits the availability of habeas review. *See infra* note 281 and accompanying text.

meeting the "more likely than not" standard.

On the other hand, habeas petitioners with truly persuasive evidence of innocence would seem constitutionally entitled to habeas review if the Constitution prohibits the execution of innocent people. This Note does not argue whether actual innocence should be considered a bona fide constitutional claim. Because Schlup presented truly persuasive evidence of innocence, this Note argues that the Court should have answered the question of whether the execution of an innocent person is unconstitutional. The clear implication of the Court's silence on this issue is that the Constitution provides no such protection. Thus, it appears that mere evidence of innocence does not entitle an actually innocent prisoner to habeas review.

II. BACKGROUND

The writ of habeas corpus[5] is the exclusive federal remedy available to a state prisoner who challenges the fact or duration of his confinement and seeks as relief a speedier or immediate release.[6] However, federal habeas courts are not free to entertain the claims of every state prisoner who petitions for the writ. For federal jurisdiction to apply, a state prisoner's habeas petition must contain a cognizable issue for review, and must satisfy certain procedural prerequisites.[7] Evidence that a habeas petitioner is either legally[8] or factually innocent[9] of the crime for which he was convicted may be relevant in determining whether his petition satisfies both requirements.

A. COGNIZABLE ISSUES FOR REVIEW

1. Violations of Constitutional Rights

Federal courts have jurisdiction to entertain a state prisoner's petition for habeas corpus relief where confinement violates the prisoner's constitutional rights.[10] Although it is unclear whether factual

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5 The term "habeas corpus," when used alone, generally refers to the writ granted to secure release from unlawful confinement, *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807), also known as the common law writ of *habeas corpus ad subjiciendum*. *See* Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976).

6 Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973).

7 *See generally* Amos E. Hartston & Jay Gonzalez, *Habeas Relief for State Prisoners*, 83 GEO. L.J. 1392, 1404 (1995).

8 This Note uses the phrase "legally innocent" to describe a petitioner whose conviction was based on legally inadequate evidence.

9 This Note uses the phrase "factually innocent" to describe a petitioner who did not, in fact, commit the crime for which he was convicted.

10 28 U.S.C. § 2241(c) (1994) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." *See also* 28 U.S.C. § 2254(a) (1994) (federal judges shall

innocence of a crime by itself can present a constitutional basis for habeas relief, innocence is not wholly irrelevant. First, because several constitutional provisions protect the innocent from unjust conviction and sentencing, a habeas petitioner who is factually innocent, but who was found guilty at a state proceeding, may have grounds to assert that a constitutional deprivation occurred at his trial. For example, conviction of a factually innocent person may have occurred because trial counsel was ineffective. Because the Sixth Amendment to the United States Constitution[11] guarantees a right to the "*effective* assistance of counsel,"[12] such a petitioner would have a cognizable issue for habeas relief.

2. *Conviction Despite Inadequate Evidence—"Legal Innocence" as a Constitutional Claim Under* Jackson v. Virginia

Besides relying on specific procedural guarantees, a factually innocent habeas petitioner may also establish a cognizable issue for review based on the Fourteenth Amendment's general guarantee of due process. The Supreme Court has interpreted the Due Process Clause as embodying the evidentiary standard of proof that the Constitution requires in criminal cases—"proof beyond a reasonable doubt."[13] Therefore, a habeas petitioner effectively alleges a violation of his constitutional rights (and presents a cognizable issue for habeas review) when claiming that evidence adduced at trial did not prove his guilt beyond a reasonable doubt.[14]

In *Jackson v. Virginia*,[15] the Court articulated a "rationality" standard to govern habeas court review of cases where petitioners claim imprisonment based on constitutionally inadequate evidence. Under the *Jackson* rationality standard, habeas courts should ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found . . . [guilt] beyond a reasonable doubt."[16] In explaining the proper application of this standard, the *Jackson* Court held that habeas courts should consider

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entertain habeas corpus applications "in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States").

11 "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

12 Strickland v. Washington, 466 U.S. 668, 686 (1984).

13 *In re* Winship, 397 U.S. 358, 364 (1970). The Court has also held the Fourteenth Amendment's guarantee of due process to prohibit a prosecutor from suppressing evidence which is favorable to an accused. Brady v. Maryland, 373 U.S. 83, 86 (1963).

14 Jackson v. Virginia, 443 U.S. 307, 321 (1979).

15 *Id.*

16 *Id.* at 318-19.

only record evidence.[17] The inquiry that a habeas court makes when applying the *Jackson* rationality standard is therefore not whether the petitioner is in fact innocent of the crime for which he has been convicted. Rather, the *Jackson* inquiry is limited to the narrower issue of whether a prisoner's confinement was based on legally sufficient evidence of guilt. That is, whether the prisoner is legally innocent.[18]

3. *Conviction and Death Sentence Despite Actual Innocence—"Factual Innocence" Under* Herrera v. Collins

The *Jackson* Court did not answer the question of whether a persuasive claim of factual innocence, as opposed to legal innocence, could present a cognizable issue for habeas review. Whether this kind of actual innocence claim could, by itself, present a cognizable issue for habeas review depends on whether or not it is unconstitutional to imprison (and even execute) someone who is factually innocent but whose trial was otherwise free of constitutional error. In the 1993 case of *Herrera v. Collins*,[19] the Supreme Court intimated, but declined to hold, that the imprisonment or execution of a factually innocent person does indeed violate the Constitution.

In *Herrera*, Leonel Herrera invoked both the Eighth[20] and the Fourteenth Amendments[21] to support his claim that his imprisonment and death sentence violated the Constitution and therefore presented a cognizable issue for habeas review.[22] Leonel Herrera claimed that his deceased brother, Raul Herrera, Sr., had committed the murders of the two police officers for which he (Leonel) was under sentence of death.[23] To support his claim, Leonel Herrera relied not on allegations of error at trial, but on new evidence in the form of affidavits that he procured only after exhausting state court remedies.[24]

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17 *Id.* at 317-18.

18 William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995).

19 113 S. Ct. 853 (1993).

20 The Court has held that under the Eighth Amendment, punishment is "cruel and unusual" if it is "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. 584, 592 (1977), or if it is "grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173 (1976).

21 The Court has held that the "substantive" element of the Fourteenth Amendment's Due Process Clause "bar[s] certain arbitrary government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986). The Court has held this substantive element violated where conduct "shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

22 *Herrera*, 113 S. Ct. at 856-58.

23 *Id.* at 858.

24 *Id.* One of these affidavits was from Leonel Herrera's deceased brother's son (Raul Jr.). Raul Jr. swore that he witnessed his father (Raul Sr.) commit the murders for which Leonel Herrera had been convicted and sentenced to death. *Id.* The two other affiants—Raul Sr.'s former lawyer and former cellmate—corroborated the testimony given in Raul

Although the Supreme Court ruled against Herrera, the Court did not completely dismiss the contention that the Constitution bars the execution of factually innocent people. Instead, Chief Justice Rehnquist, writing for the Court, chose to "assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."[25] Chief Justice Rehnquist did not articulate an evidentiary test for such constitutional claims. Instead, Rehnquist merely stated that a habeas petitioner would have to meet an "extraordinarily high" threshold before receiving a full habeas hearing on the claim of innocence.[26]

Without articulating the standard he was applying, Chief Justice Rehnquist nonetheless concluded that the affidavits attesting to Leonel Herrera's innocence did not present a sufficiently persuasive case.[27] In reaching that conclusion, the Chief Justice emphasized the weaknesses in Herrera's affidavits. For example, Rehnquist noted that the affidavits contradicted one another,[28] and that there was no explanation for why statements by supporting affiants came ten years after the murders had been committed.[29] Chief Justice Rehnquist also emphasized the strength of the proof of Leonel Herrera's guilt that was adduced at trial.[30]

Although Chief Justice Rehnquist would not express an opinion as to whether there is a constitutional prohibition against the execution of a person who has made a persuasive showing of actual innocence (discussing the purported prohibition only arguendo), six justices—three dissenting and three concurring—concluded that such a prohibition exists. The three dissenting justices[31] argued that under the circumstances of Leonel Herrera's case, the Court should have held that the Constitution bars the execution of innocent peo-

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Jr.'s affidavit, each swearing that Raul Sr. confided in them and admitted being the true killer. *Id.* at 858 n.2.

25 *Id.*

26 *Id.*

27 *Id.* at 869-70.

28 *Id. See also id.* at 872 (O'Connor, J., concurring).

29 *Id.*

30 *Id.* at 870. *Accord id.* at 872 (O'Connor, J., concurring); *id.* at 875 (White, J., concurring). For example, when the police arrested Herrera, human blood (of the type of one of the murdered officers) was splattered throughout Herrera's car and on his jeans. *Id.* at 857. Moreover, evidence at trial indicated that when Leonel Herrera was arrested, he was in possession of a handwritten note in which he confessed and offered to turn himself in. *Id.* at 857 n.1.

31 Justice Blackmun authored a dissent that was joined by Justices Stevens and Souter. *Id.* at 876 (Blackmun, J., dissenting).

ple.[32] Three concurring justices[33] also concluded that the Constitution bars the execution of innocent people.[34] Yet these concurring justices believed that the Court properly sidestepped the issue because in this specific case Leonel Herrera failed to present a persuasive showing of actual innocence.[35] Thus, after *Herrera*, it appeared that if a petitioner could make a showing of innocence sufficiently stronger than did Leonel Herrera, a majority of the Court would hold that the Constitution bars the execution of the innocent.[36]

However, several justices questioned whether the Court would ever again need to entertain the issue of whether the Constitution prohibits the execution of a habeas petitioner who makes a persuasive showing of factual innocence. First, the majority opinion stressed the ways in which the innocent have been historically protected through the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon.[37] Given these protections, Justice Scalia, in concurrence, concluded that "it is improbable that evidence of innocence as convincing as [Herrera's]" would ever again arise in a petition for the federal writ of habeas corpus.[38] In seeming agreement, Justice O'Connor concluded in her concurring opinion that the ques-

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[32] *Id.* at 882 (Blackmun, J., dissenting). The dissenting Justices also argued that the Court should have articulated the precise burden of proof that should govern constitutional claims of actual innocence when presented in a petition for the federal writ of habeas corpus. Under the dissent's formulation, a habeas petitioner could obtain relief on a claim of actual innocence upon a showing that he is "probably innocent." *Id.* (Blackmun, J., dissenting).

[33] Justice O'Connor wrote a concurring opinion that was joined by Justice Kennedy. *Id.* at 870 (O'Connor, J., concurring). Justice White wrote his own concurring opinion. *Id.* at 875 (White, J., concurring). And Justice Scalia wrote a separate concurring opinion that was joined by Justice Thomas. *Id.* at 874 (Scalia, J., concurring).

[34] *See id.* at 870 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"); *id.* at 875 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of the petitioner in this case"). *But see id.* at 874-75 (Scalia, J., concurring) ("there is no basis in text, tradition, or even contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction").

[35] *See id.* at 870 (O'Connor, J., concurring) ("[p]etitioner is not innocent, in any sense of the word"); *id.* at 875 (White, J., concurring) ("[f]or the reasons stated in the Court's opinion, petitioner's showing falls far short . . . and I therefore concur in the judgment."). *But see id.* at 875 (Scalia, J., concurring) (concurring only because "there is no legal error in deciding a case by assuming arguendo that an asserted constitutional right exists").

[36] *See, e.g.*, Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L. J. 817, 833 (1993) (*Herrera* "suggests that, if the issue were properly raised, a majority of the Court would interpret the Constitution to require at least a limited federal (substantive) review of a defendant's claim of innocence.").

[37] *Herrera*, 113 S. Ct. at 864-69.

[38] *Id.* at 875 (Scalia, J., concurring).

tion of whether federal habeas courts may entertain convincing claims of actual innocence "may never require resolution at all."[39]

Because evidence of factual innocence may not present grounds for habeas relief, a state prisoner who claims to be innocent may need to rely on independent constitutional grounds for habeas relief. However, even if a state prisoner has viable, independent constitutional grounds to assert in a petition for habeas corpus, he will not be entitled to habeas relief unless certain procedural prerequisites are met.

B. PROCEDURALLY BARRED HABEAS CLAIMS

Several types of procedurally defaulted claims are not entitled to federal habeas review. For example, before a state prisoner can raise a claim in a federal habeas corpus proceeding, he must exhaust state remedies.[40] If the exhaustion requirement is not met, a "procedural bar" precludes federal habeas court review.[41] Under 28 U.S.C. § 2244(b), a procedural bar also applies to "successive" petitions where a state prisoner raises grounds that are identical to grounds heard and decided in previous habeas petitions.[42] Moreover, under § 2244(b), even if a subsequent petition alleges new and different grounds, a district court may nonetheless dismiss the petition if the state prisoner "deliberately withheld" a claim from an earlier petition or if the petitioner "otherwise abused the writ" (an "abusive" petition).[43]

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39 *Id.* at 874 (O'Connor, J., concurring).

40 "An application for the writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State." 28 U.S.C. § 2254(b) (1994).

41 This exhaustion requirement is generally satisfied when the highest state court is afforded a fair opportunity to rule on the factual and theoretical substance of a claim. *See generally* Hartston & Gonzalez, *supra* note 7, at 1404.

42 Section 2244(b) provides:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States of a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1995).

43 *Id.*

1. *Cause and Prejudice*

Procedural bars do not apply in cases where a habeas petitioner can show both "cause" for his procedural default as well as actual "prejudice" attributable to his inability to comply with procedural requirements.[44] For example, a habeas court may view a state prisoner's claims of innocence as procedurally barred if the prisoner failed to raise his claims before a state court. But, such a petitioner could show cause for his procedural default if, for example, the state failed to disclose critical exculpatory evidence thus rendering "procedural compliance impracticable."[45] A federal habeas court could then review this procedurally barred habeas petition if, along with cause, prejudice also resulted. Prejudice is established where the petitioner can demonstrate "a reasonable probability that" if the fact finder would have had the exculpatory evidence, he "would have had a reasonable doubt respecting guilt."[46]

2. *The Miscarriage of Justice Exception*

Although a showing of cause and prejudice is generally required before a habeas court will hear an otherwise procedurally barred habeas petition, the Supreme Court has construed § 2244 to allow consideration of procedurally barred successive or abusive claims (even absent cause and prejudice) where the "ends of justice" demand.[47] The Court has expressly tied the triggering of this "ends of justice" exception to evidence of innocence, requiring habeas petitioners to supplement their claims with a "colorable showing of factual innocence."[48] Because the exception is intended to prevent the execution of innocent people—the "quintessential miscarriage of justice"[49]—it is often referred to as the "miscarriage of justice" exception.[50] In this context, the Court has made it clear that actual innocence is "not itself a constitutional claim, but instead a gateway

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44 In Murray v. Carrier, 477 U.S. 478, 488 (1986), the Supreme Court explained the "cause and prejudice" requirement: the "existence of cause for some procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Under this standard, cause can be demonstrated by showing that the "factual or legal basis of a claim was not reasonably available to counsel," or that governmental interference rendered procedural compliance "impracticable." *Id.*

45 *Id.*

46 Strickland v. Washington, 466 U.S. 668, 695 (1984).

47 Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

48 *Id.*

49 Schlup v. Delo, 115 S. Ct. 851, 866 (1995).

50 *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 350 (1993) (noting that although arguably distinct, the Court has previously equated "ends of justice" with "miscarriage of justice").

through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[51]

Under Supreme Court precedent before *Schlup v. Delo,* however, substantial questions existed as to exactly what a habeas petitioner would need to show to secure a full habeas hearing. A look at the evolution of the miscarriage of justice exception is therefore valuable in understanding the significance of *Schlup.*

3. The Evolution of the Miscarriage of Justice Exception

At common law, res judicata did not attach to a court's denial of habeas relief.[52] Thus, when a court would deny a habeas petition, the petitioner could then turn around and make "a renewed application . . . to every other judge or court in the realm."[53] The common law then bound each court or judge so petitioned "to consider the question of the prisoner's right to discharge independently, and [was] not to be influenced by the previous decisions refusing discharge."[54] The rule arguably "made sense," because at common law an order denying habeas relief was not reviewable.[55]

Once appellate review became available, however, the Supreme Court began to modify the common law rule that required courts to consider repetitive habeas petitions without regard to previous court holdings on individual petitioners' cases. In the 1924 companion cases of *Salinger v. Loisel*[56] and *Wong Doo v. United States,*[57] the Supreme Court recognized that, although res judicata does not apply to "a decision on habeas corpus refusing to discharge a prisoner,"[58] second and subsequent habeas petitions should nonetheless be "disposed of in the exercise of sound judicial discretion."[59] Thus, after *Salinger* and *Wong Doo,* habeas courts could dismiss any successive or abusive habeas petitions because they had the discretion to consider not only previous

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51 Herrera v. Collins, 113 S. Ct. 853, 862 (1993).

52 *See* McCleskey v. Zant, 499 U.S. 467, 479 (1991) (quoting 1 W. BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES 206 (1913) ("A refusal to discharge one writ [was] not a bar to the issuance of a new writ.").

53 *Id.* (quoting W. CHURCH, WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)).

54 *Id.* (quoting CHURCH, *supra* note 53, § 386, at 570). *See also, e.g., In re* Koppel, 148 F. 505, 506 (S.D.N.Y. 1906); Ex Parte Kaine, 14 F. Cas. 78, 80 (No. 7,597) (C.C.S.D.N.Y. 1853).

55 *McCleskey,* 499 U.S. at 479. *See also* W. DUCKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 5-6 (1980) (arguing that successive petitions served as substitute for appeal).

56 265 U.S. 224 (1924).

57 265 U.S. 239 (1924).

58 *Salinger,* 265 U.S. at 230 (emphasis omitted). *Accord Wong Doo,* 265 U.S. at 240.

59 *Salinger,* 265 U.S. at 231.

decisions refusing discharge,[60] but "whatever ha[d] a rational bearing on the propriety of the discharge sought."[61]

Evolution of the writ of habeas corpus then arose through congressional action. In 1948, Congress for the first time addressed successive and abusive habeas petitions by enacting § 2244. This original version of § 2244 stated that no judge "shall be required to entertain" a successive or abusive habeas petition where "the ends of justice w[ould] not be served by such inquiry."[62] The Supreme Court originally construed this version of § 2244 in *Sanders v. United States*.[63] In breaking from the law as expressed in *Salinger* and *Wong Doo*, *Sanders* held that under § 2244, habeas courts not only had the power, but "the duty" to reach the merits of successive or abusive habeas petitions wherever "the ends of justice demand[ed]."[64]

Three years after *Sanders*, Congress amended § 2244 to "introduc[e] a greater degree of finality of judgments in habeas corpus proceedings."[65] The amendment broke the habeas corpus statute into subparagraphs. Subparagraph (a) remained unchanged except that it now applied only to federal prisoners.[66] As to repetitive appli-

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60 In *Salinger*, the Court expressly held that among the matters that "may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review" (i.e. an unexhausted claim) and (b) another habeas court's "prior refusal to discharge on like application." (i.e. a successive claim). *Id.* Then in *Wong Doo*, the Court held that a habeas court properly dismissed a claim where the petitioner "had full opportunity to offer proof [of his claim] at the hearing on the first petition . . . [yet offered] no reason for not presenting proof at the outset" (i.e. an abusive claim). *Wong Doo*, 265 U.S. at 241.

61 *Salinger*, 265 U.S. at 231.

62 Section 2244 provides:

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244 (1964).

63 373 U.S. 1 (1963).

64 *Id.* at 18-19.

65 S. REP. No. 1797, 89th Cong., 2d Sess. 2 (1966); *see also* H.R. REP. No. 1892, 89th Cong., 2d Sess. 5-6 (1966).

Rule 9(b) of the Rules Governing Habeas Corpus Proceedings, promulgated in 1976, also addresses the issue of repetitive habeas petitions. It provides as follows:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254 Rule 9(b) (1994).

66 28 U.S.C § 2244(a) (1995).

cations by state prisoners, Congress added subparagraph (b).[67] Section 2244(b) states that a federal court "need not entertain" a second or subsequent habeas petition "unless" it is neither successive nor abusive.[68] But, unlike § 2244(a) (and the old version of §2244), § 2244(b) now contains no reference to "the ends of justice."[69]

After Congress adopted the amended version of § 2244, the courts struggled to define how evidence of innocence should fit in with habeas court discretion over successive, abusive, or otherwise procedurally defaulted claims. The Supreme Court first construed the amended version of § 2244 in *Kuhlmann v. Wilson.*[70] In *Kuhlmann,* a plurality of the Court provided federal habeas courts with "guidance for determining when to exercise the limited discretion granted them by § 2244(b)."[71] In doing so, the plurality announced that it would "continue to rely on the reference in *Sanders* to the 'ends of justice,'" although § 2244(b) no longer contained this language.[72]

4. *Open Issues Before* Schlup v. Delo

In *Kuhlmann,* a plurality confirmed the continued viability of the ends of justice exception where a habeas petitioner presented a procedurally barred successive petition. There, the Court stated that to secure habeas review, a petitioner must establish "by a fair probability" that "the trier of facts would have entertained a reasonable doubt about . . . guilt."[73] After *Kuhlmann,* however, the Court articulated a variety of innocence standards. Thus, prior to *Schlup,* it was unclear as to what requisite showing of factual innocence a petitioner would need to make to secure a full habeas hearing.

For example, in *Murray v. Carrier,* a prisoner who was not under sentence of death presented a procedurally barred abusive petition.[74] Though decided on the same day as *Kuhlmann,* a majority of the *Carrier* Court seemingly refined the *Kuhlmann* articulation of the miscarriage of justice exception. *Carrier* stated, in dicta, that the miscarriage of justice exception applies where a petitioner can demonstrate that a "constitutional violation has probably resulted in the conviction of one who is actually innocent."[75] Then, in *Sawyer v. Whitley*[76] the Court

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67 *See supra* note 42 and accompanying text.

68 28 U.S.C. § 2244(b).

69 *See id.*

70 477 U.S. 436 (1986).

71 *Id.* at 451.

72 *Id.* at 451-52.

73 *Id.* at 455 n.17.

74 Murray v. Carrier, 477 U.S. 478 (1986).

75 *Id.* at 496. *Accord* McCleskey v. Zant, 499 U.S. 467, 494 (1991) (recognizing that a habeas court might entertain an abusive petition where the constitutional violation

departed from the *Carrier* "probably resulted" standard when addressing the claim of an inmate whose habeas petition challenged his death sentence, but not his conviction. *Sawyer* held that the petitioner "must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found [him] eligible for the death penalty."[77]

Whatever the correct standard, *Kuhlmann* and subsequent Court holdings have also not been clear as to whether a petitioner's successful triggering of the miscarriage of justice exception thereby requires, or merely permits, a federal habeas court to hear the merits of such abusive or successive petitions.[78] For example, in *McCleskey v. Zant*[79] the Court explained that its decision in *Kuhlmann* "*required* federal courts to entertain successive petitions" where a petitioner presents evidence that meets the requirements of the miscarriage of justice exception.[80] The choice of the word "require" may indicate that habeas courts have an affirmative duty to hear a petitioner's habeas claim once the miscarriage of justice exception is triggered. Other Supreme Court statements, however, suggest otherwise. For example, in *McCleskey* the Court also stated that a procedural bar to a habeas petitioner's successive claim "*may* nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result."[81] The use of the word "may" seems to support the proposition that once a habeas petitioner triggers the miscarriage of justice exception, a habeas court, at its discretion, may or may not grant a full hearing.

III. Facts and Procedural History

On February 3, 1984, Arthur Dade, an inmate of the Missouri State Penitentiary, was stabbed to death in a high security area of the prison.[82] Prison guards arrested Lloyd E. Schlup, Jr. in the prison din-

claimed "probably has caused the conviction of one innocent of the crime").

76 505 U.S. 333 (1992).

77 *Id.* at 336.

78 Precedent for the rule of obligation position exists in the decisions that the Supreme Court announced when habeas corpus legislation specifically contained reference to an "ends of justice" exception. *See supra* note 64 and accompanying text. Precedent for the rule of permission position exists in the decisions that the Court made before Congress ever addressed the issue of successive and abusive petitions through legislation. *See supra* note 61 and accompanying text. Because the amended version of § 2244(b) seemingly outmoded both lines of precedent, the issue of whether the miscarriage of justice exception is now a rule of obligation or a rule of discretion necessarily depends on the Court's interpretations of the new statute.

79 499 U.S. 467 (1991).

80 *Id.* at 495 (emphasis added).

81 *Id.* at 494-95 (emphasis added).

82 Schlup v. Delo, 115 S. Ct. 851, 854 (1995).

ing room shortly after the murder took place.[83] The State ultimately charged Schlup, Robert O'Neal,[84] and Rodnie Stewart,[85] all of whom were white inmates, with the murder of Dade, who was an African-American.[86]

At his 1985 trial for the murder of Dade, Schlup claimed that the state had "the wrong man."[87] Specifically, the defense noted that while the physical evidence implicating both Stewart and O'Neal was substantial,[88] the State could not produce any physical evidence connecting Schlup to the killing.[89] Indeed, guards apprehended Stewart during his actual struggle with Dade,[90] and when they took O'Neal into custody, his clothes were dripping with blood.[91] In contrast, laboratory tests of Schlup's shoes and clothing revealed no trace of blood.[92]

A. THE STATE'S CASE

Although there was no physical evidence that connected Schlup to Dade's murder, the state won a guilty verdict by relying principally on testimony from two corrections officers who purportedly witnessed the killing.[93] The first such testimony was that of Sergeant Roger Flowers. Flowers was on duty on "Walk 1"[94] and "Walk 2"[95] of the penitentiary at the time of the murder.[96] Flowers testified that when releasing the inmates for lunch he unlocked the inmates' cells on Walk 2 first, including the cells of Schlup, O'Neal, and Stewart. Flowers then released the inmates of Walk 1, including Dade. Flowers testified that after he unlocked the cells to release the inmates of Walk 1, he noticed Stewart carrying a container of steaming liquid and mov-

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83 Petitioner's Brief at 3, *Schlup* (No. 93-7901).

84 O'Neal was convicted and sentenced to death in a separate trial. *See* State v. O'Neal, 718 S.W.2d 498 (Mo. 1986).

85 Stewart was convicted and sentenced to 50 years imprisonment in a separate trial. *See* State v. Stewart, 714 S.W.2d 724 (Mo. App. 1986).

86 *Schlup*, 115 S. Ct. at 854.

87 Although Schlup did not testify at the guilt phase of the trial, he did testify and maintain his innocence at the sentencing hearing. *Id.* at 855 n.3.

88 *Id.* at 855 n.2.

89 *Id.* at 855.

90 *Id.* at 855 n.2.

91 *Id.*

92 Petitioner's Brief at 3, *Schlup* (No. 93-7901).

93 *Schlup*, 115 S. Ct. at 854.

94 There were four floors to the housing unit of the penitentiary where the murder was committed. Each floor contained two rows of cells—one facing north and one facing south—called "Walks." Petitioner's Brief at 3, *Schlup* (No. 93-7901).

95 Both Walk 1 and Walk 2 were contained on the lower floor of the same housing unit. *Schlup*, 115 S. Ct. at 854.

96 *Id.*

ing against the flow of traffic from Walk 2 to Walk 1.[97] Flowers swore that he then saw Stewart throw the liquid in Dade's face.[98] According to Flowers, Schlup then jumped on Dade's back, and O'Neal joined in the attack.[99] Flowers shouted for help, then entered the Walk and grabbed Stewart as the two other assailants fled.[100]

Testimony from John Maylee, a second corrections officer, also bolstered the State's case.[101] Maylee testified that shortly before the killing, he witnessed Stewart, Schlup, and O'Neal[102] run from Walk 2 to Walk 1.[103] Maylee claimed that after Stewart threw a container of liquid at Dade's face, Schlup jumped on Dade's back and O'Neal stabbed Dade several times in the chest.[104] Although Maylee did not see what happened to Schlup or Stewart after the stabbing, he testified that he saw O'Neal run down Walk 1 and throw his weapon out a window.[105]

B. VIDEOTAPE EVIDENCE

To counter the officers' testimony, Schlup relied on a videotape from a surveillance camera located in the prison dining room, two floors and several hundred feet from the scene of the crime.[106] The videotape showed that Schlup was the first of several inmates to get in the dining room's lunch line. The videotape also showed that approximately one minute and five seconds after Schlup entered the dining room, several guards ran out of the room in apparent response to a distress call. Twenty-six seconds later, the tape shows O'Neal (one of Dade's killers) running into the dining room dripping with blood.[107] O'Neal was followed by another inmate, Randy Jordan, whose name was never mentioned at trial.[108]

In light of the videotape evidence, the timing of the sequence of

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97 *Id.* at 855.

98 *Id.*

99 *Id.*

100 *Id.*

101 Maylee was unavailable to testify at Schlup's trial, but testimony from his pretrial deposition was admitted in evidence and read to the jury. *Id.* at 854-55 n.1.

102 One of the inconsistencies that Schlup pointed out at trial was that Maylee testified that he saw Schlup, Stewart, and O'Neal running together and that the three stopped when they encountered Dade. Flowers, however, noticed only Stewart running, and he testified that O'Neal and Schlup were at the other end of the Walk on the far side of Dade. *Id.* at 855 n.6.

103 Maylee claimed to have witnessed the attack from Walk 7, which is three floors and 40-50 feet above Walks 1 and 2. *Id.* at 854.

104 *Id.*

105 *Id.*

106 Petitioner's Brief at 3, *Schlup* (No. 93-7901).

107 *Schlup*, 851 S. Ct. at 855.

108 *Id.* at 855 n.4.

events was a key issue in the case. Because testimony before the court indicated that Schlup had walked from his cell to the dining room at a "normal pace,"[109] Schlup would not have had time to get to the dining room a full minute and five seconds ahead of the ensuing distress call if he was on the prison floor at the time of the murder and if the distress call went out shortly after the murder.[110] Accordingly, the defense argued that Schlup could not have participated in Dade's murder.[111] On the other hand, if there had been a delay between the time of the murder and the time of the distress call, Schlup could have assisted in Dade's murder before entering the dining room. Thus, Schlup's defense hinged on determining the time at which the dining room guards received the distress call relative to the time at which Dade's murder took place.[112]

Although neither the State nor Schlup was able to establish the exact time of either Dade's murder or the radio distress call, the State did present evidence indicating that there had in fact been a lag in time between the two. For example, Flowers testified that upon witnessing the stabbing, he did not report the incident, but instead proceeded to engage in a struggle with Dade's assailant, Stewart, over the course of "a couple [of] minutes."[113] According to Flowers, he did not report the incident until after he had apprehended Stewart and brought him downstairs where he then informed Captain James Eberle that there had been a "disturbance."[114] Moreover, Eberle testified that he did not radio[115] for help until "approximately a minute" from the time when he first saw Flowers.[116]

In light of the State's evidence, the jury found Schlup guilty and sentenced him to death.[117] The Missouri Supreme Court affirmed Schlup's conviction and death sentence,[118] and the United States Supreme Court denied certiorari.[119] After exhausting his state collateral remedies,[120] Schlup filed a pro se petition for a federal writ of

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109 Two inmates testified that they were behind Schlup on the way to the dining room and that they all walked at a leisurely pace. *Id.* at 856 n.10.

110 *Id.* at 855.

111 *Id.*

112 *Id.*

113 *See id.* at 856 (quoting trial transcript).

114 *See id.* (same).

115 Flowers testified that he and the other prison floor officer did not have radios. *Id.*

116 *See id.* (quoting trial transcript).

117 *Id.*

118 State v. Schlup, 724 S.W.2d 236 (Mo. 1987).

119 Schlup v. Missouri, 482 U.S. 920 (1987).

120 Schlup filed state collateral proceedings claiming, inter alia, that his trial counsel was ineffective having failed to investigate fully the circumstances of the murder. The Missouri Circuit Court determined that Schlup's counsel had in fact provided effective assistance,

habeas corpus on January 5, 1989.[121]

C. LLOYD SCHLUP'S PETITIONS FOR HABEAS RELIEF

In his initial petition for habeas relief, Schlup claimed that his trial counsel was ineffective at both the guilt and penalty phase of trial.[122] As in prior appeals to Missouri state courts, Schlup faulted his trial counsel for failing to call Randy Jordan[123] and other inmates as witnesses.[124] In addition, Schlup asserted new ineffectiveness claims based on his trial counsel's failure (1) to introduce psychiatric or psychological testimony as mitigating evidence during sentencing and (2) to object to unconstitutional jury instructions.[125] The district court[126] concluded, however, that because Schlup's petition asserted new claims that had not been "adequately raised or pursued in state court," habeas review was procedurally barred.[127] The court therefore denied relief without conducting an evidentiary hearing.[128] The Eighth Circuit Court of Appeals rejected the contention that Schlup's claim was procedurally barred,[129] but nonetheless affirmed Schlup's conviction based on its examination of the record; specifically, the court found that Schlup's trial counsel had not been constitutionally ineffective.[130] The court of appeals then denied Schlup's petition for rehearing as well as his suggestion for a rehearing en banc,[131] and the United States Supreme Court denied Schlup's petition for certiorari.[132]

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and the Missouri Supreme Court affirmed the denial of post-conviction relief. Schlup v. State, 758 S.W.2d 715 (Mo. 1988).

121 *Schlup*, 115 S. Ct. at 856.

122 *Id.* at 871 (Rehnquist, C.J., dissenting).

123 The dining room video camera showed that Jordan followed O'Neal, one of Dade's murderers, into the dining room. *See supra* note 108 and accompanying text.

124 In addition to Jordan, Schlup also identified three nonparticipant witnesses that he claimed had witnessed the murder: inmates Van Robinson, Lamont Griffin Bey, and Rickey McCoy. *Schlup*, 115 S. Ct. at 856 n.14.

125 *See* Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991) (reviewing the background of Schlup's case).

126 The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri, presided over the habeas petition.

127 *See Schlup*, 941 F.2d at 635.

128 *Id.*

129 *See id.* at 637 ("[w]e do not have to reach this issue" of whether Schlup has exhausted all state remedies).

130 The court concluded that: 1) Schlup's trial counsel had reviewed statements that Schlup's potential witnesses had given to prison investigators, and 2) the testimony of those witnesses would be "repetitive of the testimony to be presented at trial." *Id.* at 639. *But see id.* at 642 (Heaney, J., dissenting) ("I disagree with the court's conclusion that Schlup was not prejudiced by his counsel's ineffectiveness during the penalty phase.").

131 Schlup v. Armontrout, 945 F.2d 1062 (8th Cir. 1991).

132 Schlup v. Armontrout, 112 S. Ct. 1273 (1992).

On March 11, 1992, Schlup, who was represented by new counsel, filed a second federal habeas corpus petition. This second petition included claims that 1) Schlup was actually innocent of Dade's murder; 2) his trial counsel was ineffective for failing to interview alibi witnesses; and 3) the State had failed to disclose critical exculpatory evidence.[133] Attached to the State's response were transcripts of inmate interviews that had been conducted shortly after the murder.[134] One such transcript consisted of an interview with John Green, an inmate who had served as clerk for the housing unit of the penitentiary.[135] In this post-incident report, Green stated that he was in his office—at the end of Walks 1 and 2—at the time of Dade's murder.[136] According to the report, Flowers told Green to call for help, and Green notified the base shortly after the disturbance surrounding the attack on Dade began.[137]

Schlup immediately filed a traverse that claimed Green's interview statements conclusively proved Schlup's innocence; because Green's warning call came shortly after the incident began, Schlup would not have had time to both participate in the murder and reach the dining room a full minute and five seconds ahead of Green's distress call.[138] Nonetheless, the district court dismissed Schlup's second habeas petition,[139] concluding that Schlup's claim of actual innocence did not amount to a "fundamental miscarriage of justice" under the "clear and convincing" standard of *Sawyer v. Whitley*.[140]

In his motion to set aside the dismissal, Schlup included an affidavit from Green that confirmed and expanded upon his post-incident statement.[141] In the affidavit, Green swore that Flowers had instructed him to report the attack on Dade *during* the attack: "[Flowers] was on his way to break up the fight when he told me to call base."[142] Green also swore that after receiving Flowers' instruction he had in fact made a prompt call for assistance: "I immediately went into the office, picked up the phone, and called base."[143] Moreover, Green identified Jordan, not Schlup, as the third assailant.[144] In spite

133 Schlup v. Delo, 115 S. Ct. 851, 857 (1995).
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 858.
140 *Id.*
141 *Id.*
142 *Id.* at 858 n.21.
143 *Id.* at 858-59.
144 In his affidavit, Green stated, "I looked down one walk, and I saw Randy Jordan holding Arthur Dade. . . . I saw Robert O'Neal stab Dade several times in the chest while

of Green's affidavit, the district court denied Schlup's motion without opinion.[145] On appeal, the Eighth Circuit addressed Green's affidavit and several other affidavits which the court below did not consider.[146] In the face of a strong dissent from Judge Heaney,[147] the court of appeals nevertheless denied Schlup's request for a stay of execution.[148]

The court of appeals, sitting en banc, then denied Schlup's suggestion for a rehearing en banc.[149] In disagreeing with the decision of the court, Chief Judge Arnold argued that Schlup had raised two important issues.[150] First, Chief Judge Arnold recognized that the Eighth Circuit, in *McCoy v. Lockhart*,[151] held that the *Sawyer* "clear and convincing" standard applied to challenges to convictions as well as to challenges to death sentences.[152] Thus, he did not believe that the court erred in applying the *Sawyer* standard to Schlup's gateway claim

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Jordan was holding him." *Id.*

[145] *Id.* at 858-59 n.21.

[146] The district court expressly declined to consider affidavits from current and former prisoners (other than Green). *Id.* at 858 n.18. These prisoner affidavits are, however, a part of the record on appeal. *See* Schlup v. Delo, 11 F.3d 738, 743 (8th Cir. 1993) (addressing affidavits of former or current prisoners Lamont Griffin-Bey, Donnell White, and James Pierce). The affidavits of Griffin-Bey, White, and Pierce all contain sworn statements that Lloyd Schlup was not a part of the attack on Dade. *See id.* at 746 (Heaney, J., dissenting) (quoting Griffin-Bey Aff., at 2-3 (Apr. 7, 1993)) ("I saw Rodney [sic] Stewart throw liquid in Arthur Dade's face, and O'Neal stab him . . . [however,] Lloyd Schlup was not present at the scene of the fight"); *see id.* at 745 (Heaney, J., dissenting) (quoting White Aff., at 1 (Apr. 21, 1993)) ("I have seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade."); *see id.* (Heaney, J., dissenting) (quoting Pierce Aff., at 1 (Apr. 21, 1993)) ("I saw two white guys go onto 1-walk. One of them threw a cup of liquid into Arthur Dade's face, and the other one stabbed him. Lloyd Schlup was not involved in the stabbing.").

Moreover, Schlup also obtained, and the court considered, an affidavit that substantiated his videotape alibi (that he was in the dining room at the time of the murder). *Id.* at 742-43. This affidavit came from Robert Faherty, a prison lieutenant who Schlup had passed on his way to lunch on the day of the murder. Faherty's affidavit stated that before lunch, Schlup was in Faherty's presence for two and a half minutes to three minutes, and, that during that time, Schlup "was not perspiring or breathing hard, and . . . was not nervous." *Id.* at 748-49 (Heaney, J., dissenting) (quoting Faherty Aff., ¶ 4, at 6 (Oct. 26, 1993)).

[147] Judge Heaney dissented because he viewed the affidavits of eyewitnesses to Dade's murder, as well as the affidavits that substantiated Schlup's videotape alibi, as "truly persuasive" evidence that Schlup is actually innocent. *Id.* at 744 (Heaney, J., dissenting).

[148] The court of appeals initially denied Schlup's motion for stay pending appeal in Schlup v. Delo, No. 93-3272, 1993 WL 409815 (8th Cir. Oct. 15, 1993). However, on November 15, 1993, the court of appeals vacated its October 15 opinion, substituting it with a more comprehensive analysis in Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993).

[149] *Schlup*, 11 F.3d at 754.

[150] Circuit Judges McMillan and Wollman joined Chief Judge Arnold's dissent. *Id.* at 754 (Arnold, C.J., dissenting from denial of rehearing en banc).

[151] 969 F.2d 649, 651 (8th Cir. 1992).

[152] *Schlup*, 11 F.3d at 754 (Arnold, C.J., dissenting from denial of rehearing en banc).

of innocence.[153] Nonetheless, Chief Judge Arnold argued that the issue of whether *McCoy* correctly interpreted *Sawyer* was "a question of great importance in habeas corpus jurisprudence."[154] Moreover, Chief Judge Arnold recognized that under *Herrera v. Collins*, sufficiently strong evidence of actual innocence would provide a constitutional basis for habeas relief.[155] Because Chief Judge Arnold thought that it was likely that Schlup's evidence of innocence would be "substantially more persuasive than Herrera's," he argued that the court of appeals should have remanded Schlup's case for a full evidentiary hearing on the constitutional claim of actual innocence.[156]

Although the court of appeals declined to consider Chief Judge Arnold's concerns, the United States Supreme Court granted certiorari.[157] The Court's grant of certiorari was limited, however, to the question of what evidentiary standard governs the miscarriage of justice inquiry where a state prisoner claims actual innocence of the crime (for which he was sentenced to death) in order to procure a full habeas review of his independent constitutional claims. Though also included in Schlup's petition for certiorari, the Court refused to certify the question of what evidentiary standard of innocence a prisoner must meet to secure a full evidentiary hearing on a constitutional claim of actual innocence.[158]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

Justice Stevens delivered the opinion of the Court,[159] holding that the "probably resulted" evidentiary standard of *Murray v. Carrier* governed Lloyd Schlup's second habeas petition. Under the Court's holding, Lloyd Schlup can open a gateway to habeas review if, in light of his new evidence of innocence, it is "more likely than not that no reasonable juror would have convicted him."[160]

Justice Stevens began the Court's analysis by distinguishing *Herrera v. Collins* and its discussion of a constitutional claim of actual innocence. Specifically, the Court construed the constitutional claim of

153 *Id.* at 745-55. (Arnold, C.J., dissenting from denial of rehearing en banc).

154 *Id.* at 755 (Arnold, C.J., dissenting from denial of rehearing en banc).

155 *Id.* (Arnold, C.J., dissenting from denial of rehearing en banc).

156 *Id.* (Arnold, C.J., dissenting from denial of rehearing en banc).

157 *Schlup v. Delo*, 114 S. Ct. 1368 (1994).

158 *Id. See also* Schlup v. Delo, 115 S. Ct. 851, 861 n.31 (1995) ("[W]e denied certiorari on Schlup's *Herrera* claim.").

159 Justices O'Connor, Souter, Ginsburg, and Breyer joined in the opinion.

160 *Schlup*, 115 S. Ct. at 867 (1995).

innocence asserted in *Herrera* as "novel" and "substantive."[161] In contrast, the Court construed Schlup's claim of innocence as "procedural."[162] To illustrate this distinction, Justice Stevens characterized Schlup's habeas petition as grounded not in his contention of innocence, but instead as dependent upon his independent constitutional claims that his trial counsel had been ineffective and that the prosecution improperly withheld evidence.[163] Thus, Justice Stevens construed Schlup's claim of innocence as "not itself a constitutional claim."[164]

Having held *Herrera* inapplicable, Justice Stevens then went on to discuss the availability of habeas court review of Schlup's independent constitutional claims. Justice Stevens noted that Schlup supported his second habeas petition with evidence that he did not present in his first petition.[165] Accepting the argument that Schlup failed to establish "cause and prejudice" sufficient to excuse this procedural default, Justice Stevens explained that a procedural bar precluded the availability of habeas review.[166] Thus, Justice Stevens concluded that Schlup could obtain habeas review of his independent constitutional claims "only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'"[167] Accordingly, Justice Stevens construed Schlup's claim of innocence as potentially relevant only as a means by which Schlup could trigger the miscarriage of justice exception.[168]

Justice Stevens then proceeded to review the evolution of the miscarriage of justice exception. Justice Stevens acknowledged that the need to control burdens on federal courts led to both congressional and judicial action,[169] and that the net result of such action had been a "*qualified* application of the doctrine of res judicata."[170] Justice Stevens explained that the Court has never required the strict application of the rules of res judicata because "habeas corpus is, at its core, an equitable remedy."[171] Thus, Justice Stevens held that an inquiry into the equitable nature of a successive petitioner's habeas claim is required to satisfy "the ends of justice."[172] And, according to Justice Ste-

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161 *Id.* at 860.
162 *Id.*
163 *Id.*
164 *Id.* at 861 (citing Herrera v. Collins, 113 S. Ct. 853, 862 (1993)).
165 *Id.* at 861.
166 *Id.* at 860-61.
167 *Id.* at 861 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)).
168 *Id.*
169 *Id.* at 862.
170 *Id.* at 863 (emphasis added).
171 *Id.* at 863.
172 Justice Stevens relied on Sanders v. United States, 373 U.S. 1 (1963), which held that habeas courts "must adjudicate even a successive habeas claim when required to do so by

vens, the 1986 trio of habeas cases—*Sawyer v. Whitley*, *Murray v. Carrier*, and *Kuhlmann v. Wilson*—"firmly establish the importance of the equitable inquiry" that is needed to protect against "fundamental miscarriages of justice."[173]

As to the standard of proof that should govern such claims, Justice Stevens distinguished the applicability of the *Sawyer* "clear and convincing"[174] standard from the *Carrier* "probably resulted"[175] standard. Specifically, Justice Stevens noted that in *Sawyer*, the habeas petitioner's claim challenged only the imposition of the death penalty, not guilt of the crime itself.[176] Because Schlup argued that he was actually innocent of the crime for which he was convicted, Stevens concluded that the *Carrier* "probably resulted" standard—and not the *Sawyer* "clear and convincing" standard—applied in this case.[177] Justice Stevens supported this conclusion by presenting *Carrier* as a "less exacting standard"[178] that best accommodates the competing interests posed by successive claims of actual innocence; societal interests in "finality, comity, and conservation of scarce judicial resources"[179] on the one hand, and "individual interests in justice"[180] on the other.

Justice Stevens then went on to articulate exactly what a habeas petitioner must show to be granted a full hearing under the *Carrier* "probably resulted" standard. Noting that the *Carrier* gateway stan-

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the 'ends of justice.'" *Schlup*, 115 S. Ct. at 863 (quoting *Sanders*, 373 U.S. at 15-17 (1963)).

173 *Id.* at 863-64. Justice Stevens noted that in *Kuhlmann*, the Court applied this type of equitable exception even though Congress removed reference to an "ends of justice" inquiry from 28 U.S.C. § 2244(b). *Id.* at 863.

174 Under the *Sawyer* standard, a petitioner must "show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

175 Under the *Carrier* standard, a petitioner must show that a "constitutional error has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986).

176 *Schlup*, 115 S. Ct. at 865.

177 *Id.* at 866-67.

178 *Id.* at 866.

179 *Id.* at 865. Justice Stevens viewed the Court's choice of *Carrier* over *Sawyer* as posing very little threat to societal interests. Specifically, Justice Stevens noted that while challenges to death sentences are "routinely asserted," claims of actual innocence are "extremely rare." *Id. See also id.* at 866 n.40 (quoting Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 377 (1993)) ("in virtually every case, the allegation of actual innocence has been summarily rejected"); *id.* at 864 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970)) ("the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime").

180 As to individual interests, Justice Stevens recognized that the "quintessential miscarriage of justice is the execution of a person who is actually innocent." *Id.* at 866 (citations omitted). Accordingly, the Court held that a habeas petitioner alleging a "fundamental miscarriage of justice" is entitled to a "somewhat less exacting standard of proof" than is a habeas petitioner "alleging that his sentence is too severe." *Id.*

dard requires a habeas petitioner to show that he is actually innocent, the Court held that to demonstrate actual innocence a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him."[181] Because this standard is made by reference to the likely behavior of jurors, Justice Stevens acknowledged that it was somewhat similar to the *Jackson v. Virginia* rationality standard of review for the sufficiency of record evidence.[182]

However, Justice Stevens responded to Justice Rehnquist's dissenting arguments by noting points of distinction between the majority's "more likely than not" gateway standard, and the rationality standard of *Jackson.* First, Justice Stevens pointed out that the scope of review of the Court's instant gateway standard was broader than that recognized under the *Jackson* rationality standard.[183] Second, Justice Stevens noted that the use of the word "could" in the *Jackson* standard focused the inquiry on whether the trier of fact would have the power or ability to find guilt.[184] Justice Stevens argued that the use of the word "would" in the Court's gateway standard focused the inquiry instead on how the trier of fact was likely to behave.[185]

Turning to the disposition of Lloyd Schlup's case, the Court held that because the courts below improperly evaluated Schlup's gateway claim of innocence under the "clear and convincing" standard of *Sawyer,*[186] a remand[187] was necessary.

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181 *Id.* at 867.

182 *Id.* at 868-69. Under *Jackson,* a federal habeas court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found . . . [guilt] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 321 (1979).

183 *See Schlup* 115 S. Ct. at 867-68. Justice Stevens explained that because the "*Carrier* standard is intended to focus the inquiry on actual innocence," district courts are "not bound by the rules of admissibility that would govern at trial" when entertaining gateway claims of actual innocence. *Id.* at 867. Thus, unlike the *Jackson* inquiry, where the reviewing judge resolves all credibility issues in favor of the state, *see Jackson,* 443 U.S. at 319, when applying the majority's gateway standard, the judge must consider the credibility of the State's evidence. *See Schlup,* 115 S. Ct. at 868.

184 *Id.*

185 *Id.* Thus, Justice Stevens explained that the phrase "more likely than not," as applied to gateway claims of actual innocence, is not satisfied where the district court believes that reasonable doubt exists. Rather, "the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.*

186 *Id.* at 869. Justice Stevens also noted that the courts below failed to consider the credibility of Schlup's newly discovered evidence; thus, the courts below misapplied the *Sawyer* standard. Accordingly, the decisions below were reversible no matter which standard was appropriate, making the Court's "more likely than not" articulation of the *Carrier* standard arguably pure dictum. Joseph M. Ditkoff, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review:* Schlup v. Delo, *115 S. Ct. 851 (1995),* 18 HARV. J.L. & PUB. POL'Y 889, 903 n.52 (1995).

187 *Schlup,* 115 S.Ct. at 869. After reviewing Schlup's evidence of innocence on remand, the district court held that "it is more likely than not that no reasonable juror would have

B. JUSTICE O'CONNOR'S CONCURRENCE

Although Justice O'Connor joined in the majority opinion, she wrote separately to address the concerns raised by the dissent.[188] Turning to Chief Justice Rehnquist's dissenting opinion,[189] Justice O'Connor acknowledged that while the majority's standard "focuses the inquiry on the likely behavior of jurors,"[190] the threshold standard for actual innocence is "substantially different" from the rationality standard of *Jackson v. Virginia*.[191] *Jackson*, Justice O'Connor argued, can not apply here because that case established the standard of review for the sufficiency of record evidence; thus, it would appear "ill-suited as a burden of proof."[192]

Next, in addressing Justice Scalia's dissenting opinion,[193] Justice O'Connor explained that in this case, "the Court does not, and need not decide whether the fundamental miscarriage of justice exception is a discretionary remedy."[194] Rather, the Court merely determined that the court below committed legal error by relying on *Sawyer* instead of *Carrier*.[195] Because it is a "paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law," Justice O'Connor explained that the Court's reversal of the lower court's judgment does not "disturb the traditional discretion of the district courts in this area."[196]

C. CHIEF JUSTICE REHNQUIST'S DISSENT

In dissent, Chief Justice Rehnquist[197] acknowledged that the Court had never before confronted the issue of what evidentiary standard a capital prisoner claiming innocence *of a crime* must meet to secure a full hearing before a habeas court.[198] However, Chief Justice Rehnquist did not agree with the majority's conclusions in this case.[199]

First, the Chief Justice argued that although the *Sawyer* Court ar-

convicted [Schlup] in light of the new evidence." Schlup v. Delo, 912 F. Supp. 448, 455 (E.D. Mo. 1995) (applying *Schlup*, 115 S. Ct. at 867). Because the district court concluded that it "may reach the merits of [Schlup's] claims," it then scheduled a hearing. *Id.*

188 *Schlup*, 115 S.Ct. at 869 (O'Connor, J., concurring).

189 *See id.* at 873 (Rehnquist, C.J., dissenting); *see also infra* discussion at part IV.C.

190 *Id.* at 870 (O'Connor, J., concurring).

191 *Id.* (O'Connor, J., concurring).

192 *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring) (citing Concrete Pipe & Prod. of Cal. v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264 (1993)).

193 *See id.* at 874-78 (Scalia, J., dissenting); *see also infra* discussion at part IV.D.

194 *Id.* at 870 (O'Connor, J., concurring).

195 *Id.* (O'Connor, J., concurring).

196 *Id.* (O'Connor, J., concurring).

197 Justices Kennedy and Thomas joined in Chief Justice Rehnquist's dissent.

198 *Schlup*, 115 S. Ct. at 873 (Rehnquist, C.J., dissenting).

199 *Id.* (Rehnquist, C.J., dissenting).

ticulated its "clear and convincing" standard where a habeas petitioner challenged his death sentence, habeas courts should nonetheless apply the *Sawyer* standard even where a capital prisoner claims innocence of the crime for which he was convicted.[200] But even accepting the majority's holding that *Carrier*, and not *Sawyer*, applied to cases where a petitioner claims innocence of an underlying crime, Chief Justice Rehnquist still differed from the majority. Specifically disturbing to the Chief Justice was the majority's "more likely than not" articulation of *Carrier's* "probably resulted" standard.[201]

Chief Justice Rehnquist criticized the majority's articulation[202] of *Carrier* as unduly confusing.[203] Specifically, Chief Justice Rehnquist faulted the majority's articulation for containing both a charge to a finder of fact ("more likely than not"),[204] with a conclusion of law ("no reasonable juror would have convicted him in light of new evidence").[205] Chief Justice Rehnquist argued that if the Court was set on applying *Carrier* instead of *Sawyer*, it could have prevented the confusion inherent in its "hybrid" standard by instead making express reference to the established rationality standard used in the review of criminal appeals as presented in *Jackson v. Virginia*.[206]

To support his position, Chief Justice Rehnquist characterized the majority's articulation of the *Carrier* "probably resulted" standard as itself an implicit adoption of the *Jackson* rationality standard.[207] Thus, Rehnquist argued that the majority should have recognized the similarities between its standard and that announced in *Jackson*.[208] Although Chief Justice Rehnquist acknowledged that a claim of actual innocence in a federal habeas petition presents a different issue than the situation where such a claim is made to a court of appeals,[209] he nonetheless would conclude that the *Jackson* rationality standard, when properly modified, would better reflect the language used in

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200 *Id.* (Rehnquist, C.J., dissenting).

201 *Id.* (Rehnquist, C.J., dissenting).

202 The majority's articulation requires a habeas petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence." *Id.* at 867.

203 *Id.* at 873 (Rehnquist, C.J., dissenting).

204 *Id.* (Rehnquist, C.J., dissenting).

205 *Id.* (Rehnquist, C.J., dissenting).

206 *Id.* at 873-74 (Rehnquist, C.J., dissenting) (citing Jackson v. Virginia, 443 U.S. 307 (1979)). Under *Jackson*, a federal habeas court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found . . . [guilt] beyond a reasonable doubt." *Jackson*, 443 U.S. at 321.

207 *Schlup*, 115 S. Ct. at 873 (Rehnquist, C.J., dissenting).

208 *Id.* (Rehnquist, C.J., dissenting).

209 Chief Justice Rehnquist noted how claims of "actual innocence" before a habeas court can be supplemented by additional evidence that was not part of the original trial. *Id.* at 874 (Rehnquist, C.J., dissenting).

Carrier.[210]

D. JUSTICE SCALIA'S DISSENT

In his dissenting opinion, Justice Scalia[211] argued that § 2244(b)[212] controlled this case.[213] Justice Scalia pointed out that under § 2244(b), a federal district court "need not . . . entertai[n]"[214] a state prisoner's second or subsequent petition for the writ of habeas corpus.[215] Considering this statutory language, Justice Scalia found the majority's opinion—which he viewed as *requiring* habeas courts to entertain second and successive petitions upon the showing that a "miscarriage of justice" has occurred—to be "flatly contradicted by statute."[216]

In fact, Justice Scalia argued that Congress specifically acted to make the miscarriage of justice exception inapplicable under the circumstances of Schlup's case. As Justice Scalia noted, Congress first addressed the issue of repetitive habeas petitions by adopting legislation in 1948.[217] Under the terms of that legislation, federal district courts could deny petitions for habeas review only where "the ends of justice w[ould] not be served by such inquiry."[218] Accordingly, Justice Scalia, though dissenting in this case, found that in *Sanders v. United States*,[219] the Court acted with "unimpeachable logic" when it construed the statute as imposing a "duty" on habeas courts to reach the merits of a subsequent petition "if the ends of justice demand."[220] Justice Scalia argued, however, that subsequent congressional amendments make the *Sanders* holding inapplicable here.[221] As Justice Scalia pointed out, Congress amended § 2244 three years after the *Sanders* decision.[222] Because of these amendments, § 2244(b), which applies to state prisoners, contains no "ends of justice" provision.[223]

Although Justice Scalia felt that congressional amendments to § 2244 made *Sanders* bad law, he acknowledged[224] that in *Kuhlmann*, a

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210 *Id.* (Rehnquist, C.J., dissenting).
211 Justice Thomas joined in Justice Scalia's dissent.
212 *See supra* note 42.
213 *Id.* at 875 (Scalia, J., dissenting).
214 28 U.S.C. § 2244(b); *see supra* note 42.
215 *Schlup*, 115 S. Ct. at 875 (Scalia, J., dissenting).
216 *Id.* (Scalia, J., dissenting).
217 *Id.* (Scalia, J., dissenting).
218 *See supra* note 62.
219 373 U.S. 1 (1963).
220 *Schlup*, 115 S. Ct. at 876 (Scalia, J., dissenting) (quoting *Sanders*, 373 U.S. at 18-19).
221 *Id.* (Scalia, J., dissenting).
222 *Id.* (Scalia, J., dissenting).
223 *See supra* notes 65-69 and accompanying text.
224 *Schlup*, 115 S. Ct. at 876 (Scalia, J., dissenting).

plurality of the Court announced that it would "continue to rely on the references in *Sanders* to the 'ends of justice.'"[225] Nonetheless, Justice Scalia concluded that the miscarriage of justice inquiry is "not required by [Supreme Court] precedent."[226] First, Justice Scalia argued that *Kuhlmann*, having been decided without a majority, "lacks formal status as authority."[227] Moreover, Justice Scalia construed subsequent majority Court holdings as not imposing a duty on habeas courts to apply the ends of justice exception.[228] Although Justice Scalia acknowledged that some of these cases have restated the "ends of justice" duty recognized in *Kuhlmann*,[229] he also pointed out that many cases treated this "miscarriage-of-justice doctrine as a rule of permission rather than a rule of obligation."[230]

Thus, according to Justice Scalia, *stare decisis* does not *require* habeas courts to hear abusive and successive petitions where the "ends of justice demand."[231] Rather, a federal habeas court *may* make an "ends of justice" inquiry as a matter of judicial discretion.[232]

V. ANALYSIS

Part A of this Note argues that the Supreme Court improperly distinguished Lloyd Schlup's claim of actual innocence from the constitutional claim of innocence that the Court discussed, but did not formally recognize, in *Herrera v. Collins*. Part A of this Note concludes that the Court could have, and should have, used Schlup's case to definitively decide whether the Constitution bars the execution of a factually innocent person.

Part B of this Note concludes, as a separate matter, that when discussing the applicability of a procedural bar to Lloyd Schlup's habeas petitions, the Court properly construed the miscarriage of justice exception. The Court's "more likely than not" articulation is a proper standard of proof to govern such claims. However, Part B ar-

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225 Kuhlmann v. Wilson, 477 U.S. 436, 451 (1986).

226 *Schlup*, 115 S. Ct. at 875. (Scalia, J., dissenting).

227 *Id.* at 877. (Scalia, J., dissenting).

228 *Id.* (Scalia, J., dissenting).

229 *Id.* (Scalia, J., dissenting) (citing McCleskey v. Zant, 499 U.S. 467, 495 (1991) ("*Kuhlmann* . . . required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence'")).

230 *Id.* at 877-78 (Scalia, J., dissenting) (citing Sawyer v. Whitley, 112 S. Ct. 2514, 2519 (1992) ("[*Kuhlmann* held that] the miscarriage of justice exception would allow successive claims to be heard"); *McCleskey*, 499 U.S. at 494 ("[f]ederal courts retain the authority to issue the writ [in cases of fundamental miscarriages of justice]"); Murray v. Carrier, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal court may grant the writ")).

231 *Id.* at 878 (Scalia, J., dissenting).

232 *Id.* (Scalia, J., dissenting).

gues that *Schlup* does not appear to require habeas courts to apply the miscarriage of justice exception even where a state prisoner meets the majority's "more likely than not" gateway standard. Thus, Part B of this Note concludes that *Schlup* provides actually innocent habeas petitioners with tenuous protection.

A. BECAUSE LLOYD SCHLUP PRESENTED SUBSTANTIAL EVIDENCE OF INNOCENCE, THE COURT SHOULD HAVE ADDRESSED WHETHER THE CONSTITUTION BARS THE EXECUTION OF FACTUALLY INNOCENT PEOPLE

1. *The Majority Improperly Distinguished the Nature of Schlup's Actual Innocence Claim from that Asserted in* Herrera v. Collins

In *Herrera v. Collins*, six Supreme Court Justices expressly concluded that, with the appropriate evidentiary showing, the execution of an innocent person would violate the Constitution.[233] However, because a majority of the Court viewed Leonel Herrera's evidence of innocence as weak, the Court did not have the occasion to decide whether the execution of an innocent person is unconstitutional.[234] Because Lloyd Schlup supported his claim of actual innocence with substantial evidence, it appeared that the *Schlup* Court would decide the issue,[235] and it is troubling that it refused to do so.

Even though the *Schlup* Court refused to certify the question of whether the execution of an innocent person violates the Constitution,[236] it nonetheless went to great lengths to distinguish the nature of Schlup's claim of innocence from that asserted in *Herrera*.[237] The Court's primary distinction was that in *Herrera*, Leonel Herrera relied exclusively on a substantive claim of actual innocence.[238] Lloyd Schlup, on the other hand, supplemented his claim of innocence with procedural constitutional claims, such as the claim that his trial counsel had been ineffective.

The Court's distinction is highly questionable. If the Constitution does bar the execution of factually innocent people, then it would seem manifestly inappropriate for the Court to have punished Lloyd Schlup for having actual innocence as an additional constitu-

233 *See* Herrera v. Collins, 113 S. Ct. 853, 870 (1993) (O'Connor, J., concurring); *id.* at 875 (White, J., concurring); *id.* at 876 (Blackmun, J., dissenting).

234 *See id.* at 870-71 (O'Connor, J. concurring); *id.* at 875 (White, J., concurring).

235 *See* L. Anita Richardson, *Claims of Innocence: Court to Define Evidence Standard for Prisoners Alleging Wrongful Conviction*, 80 A.B.A.J. 38 (1994).

236 *See* Schlup v. Delo, 114 S. Ct. 1368 (1994); *Schlup*, 115 S. Ct. at 861 n.31 (1995) ("[W]e denied certiorari on Schlup's *Herrera* claim.").

237 *Schlup*, 115 S. Ct. at 860-62.

238 *Id.* at 860.

tional claim. If anything, the mere fact that Schlup had separate constitutional claims (independent of his straight-forward actual innocence claim) should have strengthened, not weakened, his habeas petition.[239] Indeed, although Lloyd Schlup had constitutional claims other than actual innocence,[240] he still had a "personal stake" in the resolution of whether a free-standing constitutional claim of innocence could be a cognizable issue for habeas review.[241] A look at the inherent problems with Schlup's independent constitutional claims demonstrates how the Court's refusal to address actual innocence as a free-standing claim compromised his individual interests in justice.

Because the Supreme Court is unwilling to recognize innocence as a constitutional claim in and of itself, Schlup must necessarily rely on other constitutional claims such as ineffectiveness of trial counsel.[242] Yet in determining whether trial counsel has been constitutionally ineffective, a court must indulge in a strong presumption that counsel's conduct falls within a wide range of professional assistance.[243] If Schlup received only bad legal assistance, and not unreasonable assistance, he would not have a valid constitutional claim for relief. Thus, his evidence of innocence, no matter how persuasive, would seem irrelevant. Evidence of innocence would provide Schlup with a gateway, but a gateway to nowhere.[244] Such a result seems wholly inconsistent with the Court's long held credo that cases involving capital punishment deserve the most serious scrutiny.[245]

2. *Lloyd Schlup's New Evidence of Innocence Was Substantially More Persuasive Than That Asserted in* Herrera v. Collins

The facts of Schlup's case also presented a particularly appropriate context for the Court to consider the constitutional actual innocence claim that it instead chose to ignore. In fact, Schlup's evidence

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239 Thus, the Court should have viewed Schlup's claim of actual innocence as presenting alternative grounds for habeas relief; a constitutional claim of actual innocence on the one hand, and on the other, a gateway claim of actual innocence that would permit habeas court review of his other constitutional claims.

240 *Schlup*, 115 S. Ct. at 861.

241 Thus, the "case and controversy" mandate of Article III in no way barred Supreme Court review of Schlup's constitutional claim of actual innocence. *See* Baker v. Carr, 369 U.S. 186 (1962).

242 *Schlup*, 115 S. Ct. at 860.

243 *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 690 (1984).

244 *See* Steiker, *supra* note 50, at 477 (noting the "serious anomaly in the Court's habeas jurisprudence").

245 The Supreme Court has noted on multiple occasions that "death . . . is different." *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Lankford v. Idaho, 500 U.S. 110 (1991).

of actual innocence was much stronger than that presented in *Herrera*, where the Court at least addressed, albeit arguendo, whether the execution of an innocent person could be unconstitutional.[246] In Schlup's case, the State could produce no physical evidence that linked Lloyd Schlup to the murder of Dade.[247] By contrast, in *Herrera* there was substantial physical evidence that implicated Leonel Herrera in the murders for which he was convicted.[248] For example, when the police arrested Herrera, human blood (of the type of one of the murdered officers) was splattered throughout his car and on his jeans.[249]

Moreover, in *Herrera*, Leonel Herrera presented his new evidence of actual innocence to a federal habeas court a full ten years after his state court conviction.[250] Schlup's case also presented the problem of stale evidence, but not as severely. While Schlup did not procure some of the affidavits that comprised his new evidence until seven years after his original trial,[251] the affidavit of John Green—critical to Schlup's claim of actual innocence—merely confirmed the post-incident statements that Green had made shortly after the assault on Dade.[252] And Schlup procured the central unifying piece of his actual innocence claim—the videotape evidence—before trial.[253] Thus, Schlup presented persuasive evidence of actual innocence that was not the least bit stale.

Further, Schlup's actual innocence claim was significantly more credible than that presented in *Herrera*. Schlup could point to specific reasons why he produced the affidavits that established his innocence only in his second petition for a writ of habeas corpus: (1) his trial counsel had been ineffective;[254] (2) the State failed to disclose critical exculpatory evidence such as the post-incident statement of John Green;[255] and (3) racial strife in the prison initially prevented black inmates from coming forward in his defense.[256] Leonel Herrera, on the other hand, presented affidavits that purportedly established his

246 Herrera v. Collins, 113 S. Ct. 853, 869 (1993).
247 Petitioner's Brief at 3, *Schlup* (No. 93-7901).
248 *See Herrera*, 113 S. Ct. at 857.
249 *Id.*
250 *Id.* at 856.
251 Schlup v. Delo, 11 F.3d 738, 743 (8th Cir. 1993).
252 *See* Schlup v. Delo, 115 S. Ct. 851, 858-59 n.21 (1995).
253 *See id.* at 855 (explaining that Schlup introduced videotape evidence at trial).
254 *Id.* at 857.
255 *Id.*
256 *See, e.g., id.* at 858 n.18 (quoting Griffin-Bey Aff., at 2-3 (Apr. 7, 1993)) ("When this happened, there was a lot of racial tension in the prison. . . . I would not stick my neck out to help a white person under these circumstances normally, but I am willing to testify because I know Lloyd Schlup is innocent.").

innocence "with no reasonable explanation for the decade-long delay."[257] Further, because Herrera's affidavits identified a dead man as the true murderer, his evidence of innocence should be viewed skeptically.[258] Lloyd Schlup, in contrast, presented an affidavit that implicated a living suspect, Randy Jordan.[259]

Finally, Lloyd Schlup consistently maintained that the state had "the wrong man";[260] Leonel Herrera did not.[261] When the police arrested Herrera, he had in his possession a signed letter in which he acknowledged responsibility for the murders of the two police officers for which he was ultimately convicted.[262] In sharp contrast, when Lloyd Schlup was arrested, he told investigators that he had gone directly from his cell to the prison dining room because he planned to play handball after lunch. Schlup carried no letter of admission; only a handball was found in his pocket.[263]

Given the substantial evidence of factual innocence that Lloyd Schlup presented, it is clear that *Herrera* concurrers were wrong when predicting that it is "improbable that evidence of innocence as convincing as [Herrera's]" would ever again reach the Supreme Court.[264] Indeed, Lloyd Schlup's evidence of innocence was not merely "as convincing" as Leonel Herrera's, rather, it was substantially more convincing.[265] Thus, Schlup's case flies in the face of *Herrera* concurrers who candidly expressed their view that "with any luck" the Supreme Court would never again have to face the "embarrassing question" of whether the Constitution bars the execution of factually innocent people.[266] Given the facts present in Schlup's case, the Court should have realized that its "luck" had run out.

Yet the Court remained silent. This silence in the face of substantial—if not "truly persuasive"—evidence of innocence seems to indicate that the Court simply will not make full habeas hearings available on straight-forward constitutional claims of actual innocence.

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257 Herrera v. Collins, 113 S. Ct. 853, 872 (1993) (O'Connor, J., concurring).

258 *Id.*

259 *See supra* note 144 and accompanying text.

260 Although Schlup did not testify at the guilt phase of the trial, he did testify and maintain his innocence at the sentencing hearing. *Schlup*, 115 S. Ct. at 855 n.3.

261 *See Herrera*, 113 S. Ct. at 857.

262 *See id.* at 857 n.1.

263 Petitioner's Brief at 6 n.7, *Schlup* (No. 93-7901).

264 *Herrera*, 113 S. Ct. at 875 (Scalia, J., concurring).

265 *Accord* Schlup v. Delo, 11 F.3d 738, 744 (8th Cir. 1993) (Heaney, J., dissenting); *id.* at 755 (Arnold, C.J., dissenting from denial of rehearing en banc).

266 *Herrera*, 113 S. Ct. at 875 (Scalia, J., concurring).

B. THE MAJORITY'S "MORE LIKELY THAN NOT" ARTICULATION PROVIDES HABEAS COURTS WITH AN APPROPRIATE STANDARD FOR DECIDING "GATEWAY" CLAIMS OF ACTUAL INNOCENCE, BUT HABEAS COURTS MAY PROPERLY IGNORE IT

1. The Majority's "More Likely Than Not" Gateway Standard Best Accommodates the Interests of Society and the Individual

Although the Court should have addressed the issue of whether actual innocence is itself a constitutional claim, the majority did properly recognize that capital prisoners may use evidence of innocence to open a gateway to habeas court review of independent claims.[267] For the purposes of guiding habeas courts confronted with gateway claims of actual innocence, the *Schlup* Court appropriately articulated the "more likely than not" standard as an alternative to the more stringent *Sawyer* "clear and convincing" standard. First, the terms of the *Sawyer* standard indicate that it was intended to apply only to challenges to death sentences, and not to challenges to convictions.[268] *Sawyer* held that to trigger the miscarriage of justice exception, a petitioner would need to show "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner *eligible for the death penalty*."[269] Because Lloyd Schlup argued that he was actually innocent of the crime for which he was convicted,[270] *Sawyer* was distinguishable.

There were also compelling reasons for not expanding the *Sawyer* "clear and convincing" standard to gateway claims of innocence, such as Schlup's, where the petitioner disputes guilt of an underlying crime. Intuitively, someone who may be entirely innocent of a crime (i.e., a prisoner claiming actual innocence of the crime) would seem entitled to a greater degree of protection than would someone who comes to the court with dirty hands (i.e., a prisoner who only challenges the severity of his sentence). Moreover, lowering the barrier to habeas review for prisoners who claim innocence of a crime will only minimally implicate societal interests. As the majority noted, because evidence of actual innocence of a crime is generally not available to habeas petitioners,[271] the "threat to judicial resources, finality, and comity posed by claims of actual innocence is less than that posed by claims relating only to sentencing."[272]

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267 Schlup v. Delo, 115 S. Ct. 851, 860 (1995).

268 *Accord* Schlup v. Delo, 11 F.3d 738, 751 (Heaney, J., dissenting).

269 Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (emphasis added).

270 *Schlup*, 115 S. Ct. at 865.

271 *Schlup*, 115 S. Ct. at 865-66; *see also* Friendly, *supra* note 179, at 145; Steiker, *supra* note 50, at 377.

272 *Schlup*, 115 S. Ct. at 866.

In contrast to the minimal threat that claims of actual innocence of a crime pose to societal interests are the potentially extraordinary benefits to individual death row inmates with substantial evidence of innocence. To be sure, at least some death row inmates who would not have been able to meet the stringent "clear and convincing" standard of *Sawyer* will now be able to open a gateway to a full habeas hearing. Lloyd Schlup is one of them.[273] As a direct result of the majority's less stringent standard, Lloyd Schlup no longer awaits his execution, but instead a full federal court hearing on the merits of his habeas petition.[274] Thus, the qualitative impact of a less exacting standard can be extraordinary to individuals.[275]

Given the overriding individual interests that would otherwise be threatened by expansion of the *Sawyer* "clear and convincing" standard, the majority was correct in holding the less stringent "probably resulted" *Carrier* standard applicable here.[276] Under the *Schlup* majority's articulation of the *Carrier* standard, a capital prisoner can receive a full hearing on a petition for habeas corpus if he can show that new evidence of innocence makes it "more likely than not that no reasonable juror would have convicted him."[277] Though this articulation may contain inherent similarities[278] with the *Jackson v. Virginia* standard[279] (for the sufficiency of record evidence), any potential confusion with the *Jackson* standard is not likely to frustrate the majority's purpose. By all accounts, the majority's standard is understood to be less exacting than the "clear and convincing" standard of *Sawyer*.[280] Thus, despite some imperfections, the *Schlup* Court's "more likely than not" standard has the potential to better protect the individual interests of capital prisoners with evidence of innocence.

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273 After reviewing Schlup's evidence of innocence on remand, the district court held that "it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence." Schlup v. Delo, 912 F. Supp. 448, 455 (E.D. Mo. 1995) (applying *Schlup*, 115 S. Ct. at 867).

274 Because the district court concluded that it "may reach the merits of [Schlup's] claims," it scheduled a hearing. *Id.*

275 Of course, even though the district court scheduled a full hearing, Lloyd Schlup must still rely on his independent grounds for habeas relief such as the claim that his trial counsel had been ineffective. Thus, even if the evidence shows that Lloyd Schlup is factually innocent, Lloyd Schlup may ultimately be executed. *See supra* part V.A.1.

276 *See Schlup*, 115 S. Ct. at 867.

277 *Id.* at 867.

278 *See id.* at 873-74 (Rehnquist, C.J., dissenting).

279 Under *Jackson*, a federal habeas court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found . . . [guilt] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 321 (1979).

280 *See, e.g.*, Ditkoff, *supra* note 186, at 889 ("the Court lowered the barrier"); Note, *Death Penalty—Actual Innocence Claims*, 109 HARV. L. REV. 259 (1995) ("the Supreme Court has finally taken [a] . . . step toward restoring the rights of actually innocent defendants").

2. *The Implications of the Court's "More Likely Than Not" Holding*

Despite the potential of the majority's less stringent standard, it is not likely to significantly protect future, actually innocent habeas petitioners. First, Congress has already moved to reverse *Schlup*, and bring habeas courts back to the "clear and convincing" standard of *Sawyer*.[281] But regardless of whether Congress and the President agree on legislation that would rekindle *Sawyer*, the *Schlup* majority's analysis of the miscarriage of justice exception provides actually innocent petitioners with precarious protection because, consistent with Justice Scalia's dissenting arguments, the miscarriage of justice exception appears to be a "rule of permission."[282]

Under a rule of permission approach, federal habeas courts have permission, but are under no obligation, to grant full habeas hearings where prisoners present evidence of innocence sufficient to trigger the miscarriage of justice exception. Thus, although the *Schlup* majority explicitly recognized the individual interests that actually innocent capital prisoners have in justice, those interests may not receive additional respect under the Court's less stringent gateway standard. That is, habeas courts may simply choose to ignore the miscarriage of justice exception even where a state prisoner's new evidence of innocence makes it "more likely than not that no reasonable juror would have convicted him."[283] Though this result seems unfair and unnecessary,[284] it is consistent with popular will as expressed by Congress through § 2244.[285]

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281 As this issue of the *Journal of Criminal Law and Criminology* was going to press, Congress and the President agreed on habeas reform provisions as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 §§ 101 to 108, 110 Stat. 1214, 1214-26 (1996) (enacted Apr. 24, 1996) (to be codified at 28 U.S.C.). The Act severely limits the availability of habeas court review by, among other things, amending 28 U.S.C. § 2244(b) to provide as follows:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed unless the applicant shows that . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

See Pub. L. No. 104-132, §106(b).

282 *See* Schlup v. Delo, 115 S. Ct. 851, 878 (1995) (Scalia, J., dissenting).

283 *Id.* at 867.

284 As the majority notes, actual innocence claims will not significantly implicate societal interests because evidence of actual innocence is generally not available to habeas petitioners. *Schlup*, 115 S. Ct. at 865-66; *see also* Friendly, *supra* note 179, at 145; Steiker, *supra* note 50, at 377.

285 Through legislative history, Congress made clear that the purpose of the amended version of § 2244 was to "introduc[e] a greater degree of finality of judgments made in habeas corpus proceedings." S. REP. No. 1797, 89th Cong., 2d Sess., 2 (1966); *see also* H.R. REP. No. 1892, 89th Cong., 2d Sess., 5-6 (1966). Certainly, giving habeas courts the free-

Section 2244(b) now addresses successive and abusive habeas claims by state prisoners, and contains no reference to an "ends of justice" inquiry.[286] Interestingly enough, § 2244(a), which now addresses claims by federal prisoners, retained the "ends of justice" language from the earlier version of the statute.[287] It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute, but omits it in another.[288] Thus, it is clear that Congress at least intended the miscarriage of justice exception to apply differently as between state and federal prisoners.

Because § 2244(a) contains identical language as the original habeas legislation (except that § 2244(a) now addresses only federal prisoners),[289] Supreme Court precedent interpreting the original version should still apply. That is, when addressing habeas petitions of federal prisoners, habeas courts should still have a "duty" to reach the merits of subsequent petitions wherever the ends of justice demand.[290] However, the current version of § 2244(b) states that habeas courts "need not entertain" a state prisoner's successive or abusive petition.[291] It therefore appears that habeas courts may dismiss such claims, as a matter of discretion, even where denial of a full habeas hearing would implicate a fundamental miscarriage of justice under the "more likely than not" gateway standard of *Schlup*.[292]

The *Schlup* majority opinion does not appear to contradict the natural construction of § 2244.[293] In fact, prompted by Justice Scalia's dissent, Justice O'Connor made clear in her concurrence that the majority's holding "does not disturb the traditional discretion" afforded

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dom to dismiss successive and abusive habeas petitions whether or not a miscarriage of justice would result is consistent with Congress' express purpose.

286 *See supra* note 42.

287 *Compare* 28 U.S.C. § 2244(a) (1994) *with* 28 U.S.C § 2244 (1964), *quoted in Schlup*, 115 S. Ct. at 876 (Scalia, J., dissenting).

288 A five to four majority, led by Justice Scalia, adopted this principle of statutory construction in BFB v. Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994).

289 *Compare* 28 U.S.C. § 2244(a) (1995) *with* 28 U.S.C § 2244 (1964), *quoted in Schlup*, 115 S. Ct. at 876 (Scalia, J., dissenting).

290 *See* Sanders v. United States, 373 U.S. 1, 18-19 (1963) (interpreting original version of § 2244).

291 *See supra* note 42 and accompanying text.

292 *See Schlup*, 115 S. Ct. at 878 (Scalia, J., dissenting).

293 Justice Scalia dissented in this case in part because he viewed the majority opinion as "unmistakably pronounc[ing]" the miscarriage of justice exception as a rule of obligation. *Id.* at 875 (Scalia, J., dissenting). However, it is very likely that the majority never intended its opinion to address the issue of whether the miscarriage of justice exception is a rule of permission or a rule of obligation because the issue was neither argued by the parties nor addressed by the court of appeals below. *Id.* at 870 (O'Connor, J., concurring).

habeas courts.[294] This result, correct under the terms of § 2244, would of course be void if in defiance of the Constitution.[295] As discussed above, however, the clear inference of *Schlup* is that the Constitution does not prohibit the execution of an innocent person.[296] A law which allows federal judges to deny habeas hearings despite evidence of innocence would therefore appear to be, *a fortiori*, constitutional.[297]

VI. CONCLUSION

Although the Court viewed Lloyd Schlup's second petition for habeas corpus relief as procedurally barred, it held that he could receive a full habeas hearing if his new evidence of innocence makes it "more likely than not that no reasonable juror would have convicted him."[298] While this is a correct result, the Court's opinion is not likely to significantly protect innocent people from being executed.

First, the Court failed to recognize key points of distinction between the evidence of innocence that Lloyd Schlup presented, and the evidence of innocence presented in *Herrera v. Collins*. Because Schlup's evidence was much stronger, the Court should not have ruled on the issue of whether the Constitution bars the execution of a factually innocent person. The implication of the Court's silence is that full habeas hearings are unavailable on straight-forward constitutional claims of actual innocence. Second, the Court's analysis of the fundamental miscarriage of justice exception does not appear to contradict the argument that the exception is a rule of permission. Thus, after *Schlup*, federal courts will likely be free to dismiss the habeas petitions of state prisoners even where new evidence of innocence makes it "more likely than not that no reasonable juror would have convicted."

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294 *Id.* (O'Connor, J., concurring). Because Justice O'Connor represents the fifth Justice in a five Justice majority, her narrow understanding of the majority opinion becomes the law. Marks v. United States, 430 U.S. 188, 193 (1970).

295 The Constitution is supreme over ordinary law, and laws in defiance of the Constitution are void. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

296 Schlup v. Delo, 114 S. Ct. 1368 (1994). *See* Schlup v. Delo, 115 S. Ct. 851, 861 n. 31 (1995) ("we denied certiorari on Schlup's *Herrera* claim").

297 This is particularly significant now that Congress and the President have acted to severely limit the availability of habeas review through the "Antiterrorism and Effective Death Penalty Act of 1996." *See supra* note 281 and accompanying text. These new provisions, which severely limit the availability of habeas review, would likewise appear constitutional.

298 *Schlup*, 115 S. Ct. at 867.