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FINDING TIME FOR FEDERAL HABEAS CORPUS: *CAREY V. SAFFOLD*[†]

The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.[‡]

Do not ask for whom the bell tolls, it tolls for thee.^{*}

I. INTRODUCTION

The existence of the writ of habeas corpus means that a guilty verdict in a criminal trial is not the end of the story.¹ A state prisoner may challenge the constitutionality of his confinement in both the state and federal courts.² However, public opinion and the courts have been increasingly hostile towards this collateral attack on state court

[†] Carey v. Saffold, 536 U.S. 214 (2002).

[‡] Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfurter J., dissenting).

^{*} John Donne, *No Man is an Island*, Preface to ERNEST HEMMINGWAY, FOR WHOM THE BELL TOLLS (New York, Charles Scribner's Sons 1940). The full text of the poem is reprinted for the reader's convenience:

No man is an *Iland*, intire of it selfe; every man is a peece of the *Continent*, a part of the *maine*: if a Clod bee washed away by the *Sea*, *Europe* is the lesse, as well as if a *Promontorie* were, as well as if a *Mannor* of thy *friends* or of *thine owne* were; any mans *death* diminishes *me*, because I am involved in *Mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*.

Id.

1. See Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J. dissenting). "But habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Id.* See also 39 C.J.S. *Habeas Corpus* § 6 (1976). Habeas Corpus is designed to give a prisoner an immediate hearing to inquire into and determine the legality of his confinement. *Id.*

2. William J. Brennan, Jr., *Landmarks of Legal Liberty*, in THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 4 (Bernard Schwartz ed. 1970). "[U]pon the state courts equally with the federal courts rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States." *Id.*

convictions.³ This hostility has been codified in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁴ One of the most dramatic restrictions codified in the AEDPA was the addition of a statute of limitations period which imposes a strict deadline to file a federal writ of habeas corpus.⁵ A state prisoner must file a federal habeas petition within one year from the finalization of his state court conviction.⁶ This unprecedented restriction is relaxed slightly by a tolling provision that excludes from the one year period the time when a properly filed petition for state collateral review is pending in the state courts.⁷ In the case of *Carey v. Saffold*,⁸ the Supreme Court reviewed the state habeas corpus procedure in California⁹ and found a window open for state defendants into the federal statute of limitations period.¹⁰

3. See *infra* notes 51-52 and accompanying text.

4. 28 U.S.C. §§ 2241-2266 (2000). See *infra*, note 22 and accompanying text; Dwight Aarons, *Criminal Law: Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 27 (1998) (explaining that prior to the changes made by the AEDPA there were only two substantive limitations on the availability of the writ; that Fourth Amendment claims were barred if the state court system provided a full and fair opportunity for the resolution of those claims and that prisoners could not rely on a “new rule” of constitutional law to collaterally attack their criminal convictions).

5. 28 U.S.C. § 2244(d)(1) (2000). This is the first time a statute of limitations period has been applied to habeas corpus. Doug Ward, *Yet Another Habeas Corpus Hurdle: The Limitation Period*, 35 ARK. LAW 18, 18 (2000).

6. 28 U.S.C. § 2244 (d) (2000). Where applicable, the limitation period can actually run from the latest of four events:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date upon which the impediment to filing an application created by unconstitutional state action was removed, assuming the applicant was prevented from filing by state action;
- (C) the date upon which the alleged constitutional right was recognized by the Supreme Court if the right was newly recognized and held applicable on habeas corpus;
- (D) the date upon which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

Id.

7. 28 U.S.C. § 2244(d)(2) (2000). This tolling provision provides:

[T]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. Tolling “interrupts the running of a statute of limitations in certain situations.” Black’s Law Dictionary 1495 (defining the verb “toll” as “to stop the running of”). The issue in *Carey* surrounds what constitutes a properly filed application for state post-conviction review. See *Carey v. Saffold*, 536 U.S. 214, 217 (2002).

8. *Carey v. Saffold*, 536 U.S. 214 (2002).

9. See *In re Resendiz*, 19 P.3d 1171 (Cal. 2001). The California Supreme Court has jurisdiction to hear an appeal of a state habeas claim and original jurisdiction to hear a new habeas petition filed within a “reasonable time.” *Id.*

10. *Carey*, 536 U.S. at 223-27. The AEDPA provisions apply both to state and federal

The ultimate decisions regarding equity in habeas corpus reside with the courts. “[I]n a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”¹¹ No matter what laws Congress adopts or the statutory barriers erected between prisoners and the fair hearing of their claims, it is the courts and ultimately, the Supreme Court that is responsible.¹² It may make sense for the courts to concentrate on procedural mechanics in certain contexts, but habeas corpus is not one of them.¹³ To the extent that the Supreme Court is denying its role as guardian of the Constitution by hearing the procedural issues in habeas petitions while ignoring the merits of those same cases, and allowing lower courts to do the same, the criminal justice system is impoverished.¹⁴ This is more

prisoners. See Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1515 (1997) (arguing that the AEDPA provision imposing a statute of limitations on federal habeas review of state convictions is fundamentally flawed). This Note addresses the law as it applies to state petitioners for federal habeas corpus. See *infra* Part IV.

11. *Fay v. Noia*, 372 U. S. 391, 402 (1963).

12. See *Butler v. McKellar*, 494 U.S. 407, 417 (1990) (Brennan, J., dissenting). Prior to the passage of the AEDPA by Congress, Justice Brennan charged the Supreme Court, operating under the pre-1996 statutory requirements and common law, with stripping “state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration.” *Id.* In defense of the Supreme Court decisions on habeas, the Court recently revisited one issue and cautioned the appellate courts from too hastily denying review. See *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In that case the Court again addressed the issue of when a state prisoner can appeal the dismissal or denial of his habeas petition. *Id.* at 326 Under the AEDPA, a petitioner must obtain a “certificate of appealability” (COA) in order to give jurisdiction to the appellate court. 28 U.S.C. § 2253 (2000). Specifically, a threshold inquiry is required to determine “whether the circuit court may entertain an appeal.” *Miller-El*, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 482 (2000)). In an eight-to-one decision, the Supreme Court held that an appellate court “should limit its examination to a threshold inquiry into the underlying merit of [the] claims.” *Id.* at 327. This is consistent with the Court’s prior decision on the issue in *Slack v. McDaniel*, 529 U.S. 473 (2000). The Court reiterated the standard announced in *Slack*:

[A] prisoner seeking a COA need only demonstrate “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253 (c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Miller-El, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). The appellate court should not be ruling on the merits of petitioner’s claim in this initial inquiry. *Id.* at 336-337. This decision could have many ramifications and could, in essence, re-open courthouse doors to state petitioners seeking federal review. Linda Greenhouse, *Justices Stress Inmate’s Right to Press Appeal*, N.Y. TIMES, Feb. 26, 2003, at A1. The Court warned federal circuit courts “not to abdicate their responsibility to scrutinize state-court criminal proceedings for constitutional error.” *Id.*

13. See *infra* note 14.

14. See, e.g., *Carey v. Saffold*, 536 U.S. 214 (2002) (deciding the procedural issue of

than a problem of law, this is a question of justice.¹⁵

This Note begins by looking at the history of the writ of habeas corpus in the United States.¹⁶ There is a brief overview of the background and history of the AEDPA, specifically targeting the changes the AEDPA made to the law of federal habeas corpus.¹⁷ Next, the habeas corpus procedure in California is reviewed.¹⁸ Finally, this Note explains the Supreme Court's decision in *Carey v. Saffold*, focusing on the Court's policy rationale and what the lack of support for habeas corpus means for the future of the writ.¹⁹

timeliness and remanding a specific procedural question that would determine whether the merits are going to be heard); *Lester v. South Carolina*, No. 02-7382, 2003 U.S. App. LEXIS 2183 (4th Cir. 2003) (discussing the very high bar to obtain review after a district court has denied a habeas petition on procedural grounds); *Smith v. Newland*, No. C 99-4596 CRB (PR), 2003 U.S. Dist. LEXIS 2459 at *11-12 (N.D. Cal. 2003) (denying a habeas petition after remand, as untimely and deeming the reasons for the untimeliness as inadequate). Federal habeas corpus is available to all state prisoners, regardless of their sentence, so long as they are confined. *See Parker v. Ellis*, 362 U.S. 574, 575-76 (1960) (noting habeas is meaningless without a restraint of liberty). State petitioners facing the death penalty, however, are in a different situation when their claims are procedurally barred. In a case concerning the death penalty specifically, Justice Brennan noted that both the decision to take a person out of society *and* the decision to take a life should be carefully scrutinized by the courts:

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the impositions of the death penalty, for no decision of a society is more deserving of "sober second thought."

McClesky v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936)). The majority decision in *McClesky* took a different tone: "Apparent disparities in sentencing are an inevitable part of our criminal justice system McClesky's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *McClesky*, 481 U.S. at 312-15.

15. *See* Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 MONT. L. REV. 277, 288 n.38 (2002). Professor Gerhardt explains that a potential constitutional crisis occurs when two branches of government join together to retaliate against a defenseless portion of the population. *Id.* In this context, it would be that the legislature and the judiciary have joined to retaliate against state prisoners. Charging the Supreme Court with stepping down from the challenge of reconciling consistency and fairness in the death penalty, Justice Blackmun explains that the Court has chosen instead to replace "substantive constitutional requirements with mere aesthetics." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J. dissenting).

16. *See infra* Part II.A.

17. *See infra* Part II.B.

18. *See infra* Part II.C.

19. *See infra* Part III.

II. BACKGROUND

The debate over habeas corpus use and reform is not new; there have been discussions concerning the extent of the use of the writ for years.²⁰ Unfortunately, recent events in American history have had a decisive, albeit imprudent, role in the shaping of the current habeas corpus legislation.²¹

A. Historical Perspective

The writ of habeas corpus exists to protect American citizens from being unconstitutionally held by the government.²² It is a tool of

20. See Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661 (1999) (taking an extensive look at habeas reform debate); 135 Cong. Rec. S13472 (daily ed. Oct. 16, 1989) (statement of Sen. Biden), available at 1989 WL 185894 (“[Habeas corpus] has been the issue of debate . . . at least for the seventeen years that I have been a Senator . . .”). The 1995 U.S. Department of Justice Bureau of Justice Statistics Study on Federal Habeas Corpus began by describing the debate over habeas issues:

These [habeas] petitions raise basic questions about the respective institutional roles of the Federal and State courts, the finality of the criminal legal process, and the efficiency of Federal review. Is a Federal examination of issues already adjudicated in the State courts necessary to preserve individual constitutional rights? Is swift and sure punishment, a goal of the criminal justice system, compromised or maintained by review? Are the courts in control of habeas corpus litigation or do these cases take on lives of their own? These kinds of questions are part of a perennial debate among national and State policymakers, judges, and attorneys concerning the appropriate scope of review, with one side seeking to restrict the scope of Federal review and the other side seeking to maintain or to expand the scope.

ROGER A. HANSON & HENRY W. K. DALEY, U.S. DEP’T OF JUSTICE FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS iv (Bureau of Justice Statistics Publ’n, 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrscsc.pdf> [hereinafter 1995 Department of Justice Study].

21. See Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399, 407-08 (1997). The AEDPA, with the attached habeas provisions, was passed on April 19, 1996, one year after the Oklahoma City Federal Building was bombed, supposedly in response to that act of “domestic terrorism.” *Id.* Additionally, it has been noted that terrorism served as the driving force to push the habeas measures through both Houses. Rundlet, *supra* note 20, at 702.

22. See John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 272-73 (1996). The root of habeas corpus is the principle that an individual is entitled to immediate release if their imprisonment cannot be shown to conform to due process. *Id.* The federal writ of habeas corpus can be exercised by state prisoners under five different conditions:

The writ of habeas corpus shall not extend to a prisoner unless:

- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
- (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

collateral attack upon the criminal conviction.²³ Habeas petitions contain claims of constitutional violations that occurred at trial which make the subsequent confinement of a prisoner unconstitutional.²⁴ The court reviewing a petition can grant the writ or deny the petition.²⁵ If a

(3) He is in custody in violation of the Constitution of laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify for trial.

28 U.S.C. § 2241(c) (2000).

The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed.

Brown v. Allen, 344 U.S. 433, 512 (1953) (opinion of Frankfurter, J.).

23. Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61 LAW & CONTEMP. PROBS. 171, 171 (1998) [hereinafter Yackle, *American Bar*].

In theory, a federal habeas corpus petition is an independent civil suit, in which the prisoner asks only that the federal court determine the validity of his current detention. In substance, a habeas action constitutes a collateral challenge to the prisoner's treatment in state court. When the prisoner claims that his detention violates federal law, the warden invariably responds that the prisoner's criminal conviction and sentence justify the custody about which he complains. That, in turn, places the validity of the conviction or sentence before the federal court for review.

Id. at 172. *But see In re Bittaker*, 55 Cal. App. 4th 1004, 1012 (Cal. Ct. App. 1997) (holding that California law does not characterize the writ of habeas corpus as civil). Once the avenue of direct review has been exhausted by the prisoner, he can then make an argument to the state court that his confinement is unlawful due to a constitutional violation at the criminal trial. Yackle, *American Bar*, *supra*, at 172. After exhausting state remedies, the constitutional argument can then be made to the federal courts. *Id.*

24. See Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1034-40 (1985). "[Habeas Corpus] ensures the availability of trial-level federal forum to litigants whose federal claims arise initially as defenses to state criminal prosecutions." *Id.* at 1019. Ineffective assistance of counsel is the constitutional claim Saffold made in all of his habeas petitions. See Respondent's Brief on the Merits at 2-3, *Carey v. Saffold*, 536 U.S. 214 (2002) (No. 01-301), available at 2002 WL 122615 [hereinafter Respondent's Brief]. The right to counsel is a constitutional right under the Sixth Amendment. U.S. CONST. amend. VI. To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must meet the test enumerated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant must show first, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and second, counsel's deficient performance was prejudicial, or in other words, that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. *Id.* See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *In re Resendiz*, 19 P.3d 1171, 1183-87 (Cal. 2001). State denial of "full and fair" litigation, under the Fourth Amendment is another basis for habeas relief. See, e.g., *U.S. ex rel. Conroy v. Bombard*, 426 F. Supp. 97 (S.D.N.Y. 1976).

25. 28 U.S.C. § 2243 (2000). *Habeas corpus* is Latin for "that you have the body." BLACK'S LAW DICTIONARY 715 (7th ed. 1999). Federal law provides that "[T]he person to whom the writ is

petition is granted, the court will issue an order requiring an explanation of the violations alleged in the petition from both sides.²⁶ It is not until after the hearing on the merits that the relief requested in the petition is granted or denied.²⁷

Habeas corpus has its roots in the English legal tradition.²⁸ An early form of the writ simply required people to appear in court; it did not concern criminal detention.²⁹ It was known in the common law as early as the fifteenth century.³⁰ The English courts of Chancery, King's Bench, Common Pleas, and Exchequer all issued the writ.³¹ Habeas corpus developed into the writ of liberty when petitioners could challenge confinements by the courts and detentions mandated by the King.³² Habeas corpus was "efficacious [in correcting the injustices] in all manner of illegal confinement."³³ Blackstone went so far as to describe it as the "bulwark of the British Constitution."³⁴

directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243 (2000). The writ is usually directed at the warden of the jail because warden is the one can produce the detainee for release. *See e.g. Carey*, 536 U.S. at 214 (listing Tom L. Carey as the warden). In the initial habeas petition, the respondent is the person who has custody over the petitioning inmate. *Id.* This type of writ, *habeas corpus ad subjiciendum*, is directed to "someone detaining another person and commanding that the detainee be brought to court." BLACK'S LAW DICTIONARY, *supra*, at 715. There are several other types of habeas writs: *habeas corpus as deliberandum et recipiendum*; *habeas corpus ad faciendum et recipiendum*; *habeas corpus ad prosequendum*; *habeas corpus ad respondendum*; and *habeas corpus ad testificandum*. *Id.*

26. 28 U.S.C. § 2243 (2000). After the writ is filed, the federal court entertaining the petition will "award the writ or issue an order directing the respondent to show cause why the writ should not be granted" and then a hearing date is set. *Id.* *See also Durdines v. People*, 90 Cal. Rptr. 2d 217 (Cal. Ct. App. 1999) (deciding that if a petition states a prima facie claim for relief then the superior court must either issue the writ or an order to show cause).

27. *See infra* note 84 and accompanying text.

28. Brief Amici Curiae of Legal Historians Listed Herein in Support of Respondent, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767), 16 GEO. IMMIGR. L. J. 465, 468 n.3 (2002), [hereinafter Legal Historians] (citing R.J. Sharpe, *THE LAW OF HABEAS CORPUS* 6-8 (2d ed. 1989)). The writ has been traced as far back as the fifteenth century. *Id.* at 468. *See* ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS* (2d ed. 1856) *reprinted in* DA CAPO PRESS REPRINTS IN AMERICAN CONSTITUTIONAL AND LEGAL HISTORY (Leonard W. Levy ed., 1972); 9 W.S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 104-25 (Methuen Co., Sweet & Maxwell, 1966 reprint) (2d ed. 1938); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 129-38 (facsimile reprint, Univ. of Chicago Press, 1979) (1st ed. 1765-1769); *see also* Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 378 (1998) (tracing the writ to its origins as early as 1230 through the present day).

29. Clarke, *supra* note 28, at 378 (placing the origin of the writ as a prerogative writ of the Crown which was used to require people to appear at court).

30. Legal Historians, *supra* note 28, at 468.

31. BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

32. Clarke *supra* note 28, at 383.

33. Legal Historians, *supra* note 28, at 468 (quoting 3 BLACKSTONE'S COMMENTARIES 131).

34. *Id.* (citing 4 BLACKSTONE'S COMMENTARIES 438).

Early colonial provisions ensured the use of the writ in America.³⁵ At the Constitutional Convention, Charles Pinckney was the first delegate to propose a provision to include the writ of habeas corpus.³⁶ There was debate at the Convention as to whether the writ should be subject to suspension or not.³⁷ The final version of the clause contained in Article 1, section 9, clause 2 of the Constitution provides, “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³⁸ Congress gave the first power to issue the writ to federal judges in 1789.³⁹ The writ was extended to state prisoners in 1833.⁴⁰ Habeas law continues to evolve today.⁴¹

Article one, section 9, clause 2, popularly referred to as the

35. Erwin Chemerinsky, *The Individual Liberties within the Body of the Constitution: A Symposium: Thinking about Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 751-52 (1987). Many of the American colonies provided for the writ either in common law, by statute or in their charters. *Id.* See also William F. Duker, *A Constitutional History of Habeas Corpus*, in 13 CONTRIBUTIONS IN LEGAL STUDIES 3-179 (Paul L. Murphy ed., 1980); Max Rosenn, *The Great Writ - A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983) (giving an excellent review of the history of habeas corpus).

36. Duker, *supra* note 35, at 127. Pinckney brought up the writ several times in the Constitutional Convention. *Id.* He first mentioned the writ of habeas corpus in his “Draught of the Federal Government,” four days after the Convention convened in Philadelphia. *Id.* Pinckney later proposed an amendment to an article dealing with the judiciary by providing:

The privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasion and for a time period not exceeding . . . months.

Id. Another delegate at the Convention, Mr. Morris, proposed a compromise version, “The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public Safety may require it.” *Id.* at 131. The clause was passed and later moved to its Article 1 position by the Committee on Style and Arrangement. *Id.* at 131. *But see* Jordan Steiker, *Incorporating the Suspension Clause: Is there a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 871-72 (1994) (placing emphasis on the placement of the clause as a limit on federal interference with the writ). There seems to be no significance in the change from the affirmative to the negative. Duker, *supra* note 35, at 129.

37. *Id.* at 128. Given the recent history of English deprivation of rights, some delegates saw no need for the new government to ever suspend the writ. *Id.* Some delegates opposed to allowing for suspension of the writ at all. *Id.* Indeed, the availability of habeas corpus was important to early Americans because of their past history with King George and the fear of a new “King George Washington.” Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism after the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 339 (1997).

38. U.S. CONST. art. I, § 9, cl. 2.

39. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

40. Act of Mar. 2, 1833, ch. 57, 4 Stat. 634.

41. See *infra* Part IV. AEDPA is just the latest of an on-going conversation as to the use and purpose of the writ. See *supra* note 20 and accompanying text.

“Suspension Clause,” gives two powers to the federal government.⁴² One is the power to grant the writ of habeas corpus.⁴³ The other is the power to suspend the writ of habeas corpus.⁴⁴ These powers have been exercised in different ways by all three branches of government.⁴⁵ President Lincoln found cause to suspend the writ of habeas corpus during the Civil War.⁴⁶ This was the only time in history the writ of habeas corpus was suspended by the executive branch; subsequent suspensions have come from the legislative branch.⁴⁷ There have been several occasions where Congress authorized the President to suspend the writ.⁴⁸ Congress has also passed statutes ordaining the use and

42. See U.S. CONST. art. I, § 9, cl. 2. The power to suspend the writ implies the power to grant the writ. See *id.*

43. For a debate on whether the Suspension Clause requires federal courts to make available the remedy of habeas corpus, see Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 BYU L. REV. 131, 134-35 (1990). Congress has given this power to the courts and the courts in turn have exercised this power. *Id.* The extent to which the writ should be used is debated. The Constitution does not define or explain the writ, it simply provides for it. *Id.*

44. See U.S. CONST. art. I, § 9, cl. 2.

45. See *infra*, notes 46-50 and accompanying text.

46. Duker, *supra* note 35, at 168. Lincoln authorized the suspension of habeas corpus several times during the Civil War. *Id.* at 168 n.110. In order to declare martial law, the writ of habeas corpus must be suspended. In *Ex parte Milligan*, 71 U.S. 2 (1866), Lambdin P. Milligan was tried in a military court in Indiana for his anti-Union activities during the Civil War. *Id.* He was convicted and sentenced to death. *Id.* at 107. His habeas claim was that the military commission had no jurisdiction to try him because he was a citizen of the United States and of Indiana and as such, he had a Constitutional right to a trial by jury. *Id.* at 108. The Supreme Court agreed. *Id.* at 126. Writing for the majority, Justice Davis stated, “[u]nquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further.” *Id.* The Constitution allows for a suspension of the writ, but it does not also allow for a person to be tried in a military court. *Ex parte Milligan*, 71 U.S. at 126. Milligan was released from prison. *Id.* at 131. For more on the historical background of Milligan’s arrest, see Allan Nevins, *The Case of the Copperhead Conspirator*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* (John A. Garraty ed., 1964).

47. JOHN MABRY MATHEWS, *THE AMERICAN CONSTITUTIONAL SYSTEM* 373 (James W. Davis ed., 2nd ed. 1940) (stating the generally accepted view is the power to suspend was vested in the legislative branch).

48. Duker, *supra* note 35, at 178 n.190. Pursuant to congressional order, President Grant suspended habeas in nine counties in North Carolina in order to fight the Klu Klux Klan in 1871. *Id.* In 1905, when Theodore Roosevelt was President, the Philippine civil commission authorized the governor to suspend habeas in the Philippines, pursuant to a congressional act. *Id.* See *Fisher v. Baker*, 203 U.S. 174 (1906) (explaining the ability of a governing body, not the President, to declare martial law). The writ was suspended from January to October in two provinces due to terrorism and guerilla attacks on the people by an organized group of insurgents. *Id.* at 181. Another significant suspension of habeas corpus occurred in 1941. See generally, Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai’i, 1941-1946*, 19 U. HAW. L. REV. 477 (1997). On December 7, 1941, after the Japanese planes left Hawaii, the then territory of the United States, was placed under martial law by the civilian territorial governor. *Id.* at 480. The suspension of the writ of habeas corpus was provided

availability of the writ.⁴⁹ The judicial branch has interpreted those statutes in various ways to extend and constrict the power of habeas.⁵⁰ In the forty years before the changes in the AEDPA, United States Supreme Court decisions touched every aspect of habeas.⁵¹

for in the Hawaii Organic Act, ch. 339, § 67, 31 Stat. 141 (1900), “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it.” *Id.* Martial law, including the suspension of habeas corpus, was supported by the “fears of impending land invasion and subversion” by the Japanese. *Id.* Martial law persisted until President Truman restored the privilege of the writ of habeas corpus and formally terminated martial law by Presidential Proclamation on October 24, 1944. *Duncan v. Kahanamoku*, 327 U.S. 304, 313 n.5 (1946).

49. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (creating the lower federal courts and giving the power to grant habeas only to federal judges); Act of Mar. 2, 1833, ch. 57, 4 Stat. 634 (making habeas available to state prisoners); Act of Aug. 29, 1842, ch. 188, 5 Stat. 539 (including state prisoners who were foreign nationals); Act of Feb. 5, 1867, ch. 20, 14 Stat. 385 (expanding the writ to all state and federal cases where the conviction resulted from a violation of any United States law, treaty or the federal Constitution); 28 U.S.C. §§ 2241-2255 (1988), *amended by* 28 U.S.C. §§ 2244-2255 (1996). *See also* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 338-39 (1998) (stating the impact of other congressional acts on habeas).

50. *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review of all cases arising under the Constitution). *See* Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375 (1998), for an overview of three major cases decided by John Marshall. It is beyond the scope of this Note to explore all the decisions of the Supreme Court in relation to habeas corpus rights; however, a recent overview of Supreme Court trends may be helpful to see the chronology of the present controversy. *See* Andrea A. Kochan, *supra* note 21, at 402 n.19 (stating that “the courts will have to look at decisional law to fill in the gaps created by the [AEDPA]”); *c.f.* *Slack v. McDaniel*, 529 U.S. 473 (2000) (examining § 2254 in light of existing federal habeas corpus practice).

51. *See generally* Chemerinsky, *supra* note 35; David Gottlieb & Randall Coyne, Panel Discussion, *Habeas Corpus Practice in State and Federal Courts*, 31 N.M. L. REV. 201, 201 (2001) (stating the restrictive view of habeas taken by the court in the last twenty years has failed to account for any satisfactory role for habeas in this generation); Steiker, *supra* note 36. In general, the 1960’s were a period of expansion of the writ of habeas corpus. *E.g.*, *Sanders v. United States*, 373 U.S. 1 (1963) (creating a standard for successive petitions); *Fay v. Noia*, 372 U.S. 391 434-35 (1963) (defining a test for the exhaustion requirement); *Townsend v. Sain*, 372 U.S. 293 (1963) (stating circumstances where an evidentiary hearing for federal habeas is necessary). *See* Steiker, *supra* note 36, at 862. The Warren Court “established the groundwork for the modern interpretation of federal habeas corpus review.” Kochan, *supra* note 21, at 402. Also, the court provided procedural safeguards for defendants. Chemerinsky, *supra* note 35, at 755. The Warren court “saw its role and the purpose of habeas corpus as preventing people from being detained if their conviction resulted from unconstitutional conduct.” *Id.* at 757. The Burger Court, in the 1970’s, cut back on some of the previous expansions and showed less concern for defendants’ rights. *Id.* at 761. *See, e.g.*, *Davis v. United States*, 411 U.S. 233 (1973), *Francis v. Henderson*, 425 U.S. 536 (1976), *Wainright v. Sykes*, 433 U.S. 72 (1977), *Stone v. Powell*, 428 U.S. 465 (1976). The 1990’s continued to place stricter standards on habeas corpus. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *McClesky v. Zant*, 499 U.S. 467 (1991); *Keeney v. Tomayo-Reyes*, 504 U.S. 1 (1992); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. REV. 303, 303-04 (1993) (arguing the only exception to the Court’s curtailing of habeas is the emphasis on factual innocence as a safe guard to allow a petition to go forward). The Rehnquist court, unlike the Warren court, has blocked

Exercise of both the suspension powers and the granting powers of the writ of habeas corpus have been controversial.⁵² There is historical debate over the original intent of the framers for the writ.⁵³ The suspension of the writ of habeas corpus by both the executive and the legislative branches has been criticized by the courts.⁵⁴ Adding to the debate are differing opinions on the modern purpose of the writ and the issue of the death penalty.⁵⁵

Popular opinion equates habeas petitions with death row inmates because such proceedings are brought to the public's attention through the media when the imposition of the death penalty is delayed in high profile cases.⁵⁶ Arguably, this is a narrow view of the purpose of the writ.⁵⁷ "The Great Writ" is the last chance an innocent person has to be freed from a sentence for a crime he did not commit.⁵⁸ This is especially heightened in cases where the sentence is death.⁵⁹ It is often the time

petitioners from the federal courts. David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the AntiTerrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 560 (1997).

52. See *supra*, notes 42-51 and accompanying text.

53. Chemerinsky, *supra* note 35, at 751.

54. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). The Supreme Court rebuked the declaration of martial law that included the use of military tribunals instead of courts. *Id.* "Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to constitutional protection than others The people of Hawaii are therefore entitled to constitutional protection to the same extent as the inhabitants of the 48 States." *Id.* at 318-19. The decision came five years after the declaration of martial law began in 1941 and two years after it was officially terminated in 1944. See *supra* note 48 and accompanying text.

55. See Yackle, *American Bar*, *supra* note 23. "Proponents of the death penalty seem to regard federal habeas corpus as no more than a delaying tactic." *Id.* at 191; *But see* Gottlieb & Coyne, *supra* note 51, at 209 (noting the recent studies have shown the importance of careful review of capital cases due to the high rate of error). Also, there is proof that death row prisoners do not use habeas as a delaying tactic. Blumberg, *supra* note 51, at 579 (citing the states without the death penalty do not have fewer habeas petitions).

56. *Id.* "It's as though habeas exists only for death penalty cases and no longer tests the validity of human incarceration more generally." *Id.* It has also been argued that the reason for the AEDPA habeas legislation is that Congress and much of the public assume habeas claims are almost always frivolous. Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1489 (1996); See also Gottlieb & Coyne, *supra* note 51, at 202 (noting AEDPA was primarily designed to deal with habeas petitions in capital cases).

57. Yackle, *American Bar*, *supra* note 23, at 192. The writ of habeas corpus is a restraint on governmental power. *Id.* It allows a court to review the validity of a criminal detention. *Id.* There are broader consequences when a court can review the use of power of another branch than the narrow emphasis on the writ as recourse for capital defendants. *Id.*

58. Gottlieb & Coyne, *supra* note 51, at 202. An innocent person who is convicted wrongly must serve the criminal sentence while the habeas petition is filed. *Id.*

59. Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F,"* 36 U. FLA. L. REV. 252, 264-65 (1984) ("To exact [forfeiture of potentially meritorious

consuming process of the petition that critics focus on and not the philosophic underpinnings of the civil liberty.⁶⁰

B. *Antiterrorism and Effective Death Penalty Act*

The 1995 bombing of the Oklahoma City Federal Building was a turning point for the writ of habeas corpus.⁶¹ Proposed reforms of habeas corpus were already in Congress at this time.⁶² Coming upon the

claims] for any procedural default is callous; to exact the ultimate penalty for a lawyer's procedural default is truly monstrous." There is no recourse for the convicted after the death penalty is executed. *Id.*

60. See 1995 Department of Justice Study, *supra* note 20. Recent studies have refuted common misconceptions about the death penalty. The 1995 study by the Bureau of Justice Statistics was specifically aimed at explaining "case processing time," because "assumptions about timeliness underlie almost all of the various positions in the policy debate." *Id.* at v. Additionally, a 1991 Department of Justice study found that only 1% of all state prisoners filed habeas petitions in federal court. Blumberg, *supra* note 51, at 577. *But see* VICTOR E. FLANGO, NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 14 tbl.1 (1994) (showing the number of habeas corpus petitions filed by state prisoners in federal court grew from 1,030 in 1961 to 10,323 in 1991). Also, the length of time that habeas petitions take depends largely on the number of issues presented. Blumberg, *supra*, at 579. This kind of emphasis on procedural and administrative issues undermines the original purpose of the writ.

It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defense of personal freedom." Mr. Chief Justice Chase, writing for the Court, in *Ex Parte Yergler*, 75 U.S. 85, 95 (1868). Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments. The significance of the writ for the moral health of our kind of society has been amply attested by all the great commentators, historians and jurists, on our institutions.

Brown v. Allen, 344 U.S. 443, 512 (1953). There is even some support by death penalty advocates for the proposition that the focus on procedure over substance is not correct. Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1782 (2000). Overemphasis on Eighth Amendment procedures by the federal courts and too little emphasis on individual, substantively warranted remedies has led to an over-reversal of death sentences. *Id.*

61. Rundlet, *supra* note 20, at 701. One-hundred and sixty-eight people were killed when a bomb inside of a truck exploded in front of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, on the morning of April 19, 1995. The Bombing (1996) at <http://www.cnn.com/us/okc/bombing.html> (March 20, 1996). This catastrophic event was only two years after the 1993 bombing of the World Trade Center. *Id.* "The [Oklahoma City] bombing appears to have renewed Congressional resolve to respond to the need to reform federal habeas corpus procedure." Rundlet, *supra* note 20, at 701. The AEDPA was signed into effect just after the one year anniversary of the April 19th attack. Kochan, *supra* note 21, at 399. "The American people do not want to witness the spectacle of these terrorists abusing our judicial system and delaying the imposition of a just sentence by filing appeal after meritless appeal." 142 CONG. REC. S3352, S3354 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

62. Rundlet, *supra* note 20, at 690. In June 1988, retired Associate Justice Lewis F. Powell chaired a study on habeas in capital cases that the Congress consulted in numerous habeas

one-year anniversary of the bombing, Congress sought to pass a bill aimed at combating terrorism.⁶³ Killing two birds with one stone, Congress added several habeas petitions to a bill aimed at combating domestic terrorism.⁶⁴ The result was the Antiterrorism and Effective Death Penalty Act (AEDPA).⁶⁵ There is evidence that the final product did more to change the law of habeas corpus than to combat terrorism.⁶⁶

amendment proposals between 1990 and 1995. *Id.* at n.169.

63. Blumberg, *supra* note 51, at 582. The need to appear tough on crime in an election year was a decisive factor in passing AEDPA. *Id.* “[AEDPA] was adopted, in part, as a reaction to acts of domestic terrorism and, in part, due to political pressure exerted by Chief Justice Rehnquist and others on the Court.” *Id.* Further, “[d]ebates in the House and the Senate leading up to the vote on AEDPA reveal that many of the changes that were made to habeas corpus were not responsive to the needs of the victims of the Oklahoma City bombing.” Rundlet, *supra* note 20, at 701.

64. *Id.* The restrictive habeas corpus measures would apply to any subsequent criminal convictions related to the bombing. See statement of Sen. Hatch, *supra* note 61. In June 1997, a jury convicted Timothy McVeigh of the Oklahoma City bombing and sentenced him to die by lethal injection. Oklahoma City Bombing Trials (1997) available at www.cnn.com/us/9703/okc.trial. Michael Fortier and Terry Nichols were also convicted, in separate trials, for acts relating to the bombing. The Worst Terror attack on U.S. Soil: April 19, 1995 (Dec. 30, 1995) available at <http://www.cnn.com/US/OKC/daily/9512/12-30/index.html>. McVeigh’s conviction was affirmed on appeal by the 10th Circuit Court of Appeals. *United States v. McVeigh*, 153 F.3d 1166, 1222 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999). McVeigh filed a habeas claim under the AEDPA’s § 2255 asserting ineffective assistance of counsel, denial of a fair and impartial jury and denial of due process because the government withheld evidence. *United States v. McVeigh*, 118 F. Supp.2d 1137, 1139 (D. Co. 2000). The petition was denied by the district court. *Id.* at 1155. McVeigh filed a motion to forgo any further judicial appeals, citing *United States v. Hammer*, 226 F.3d 229, 236-237 (3d Cir. 2000) (holding a death penalty defendant can waive his rights to direct appeal). Transcript of McVeigh hearing, Dec. 28, 2000 available at <http://www.cnn.com/2000/LAW/12/28/mcveigh.hearing.transcript/index.html>. He did not, however, waive his right to request an executive appeal. *Id.* Judge Richard Matsch noted the seriousness of this request in light of the restrictions Congress had levied against habeas procedures in the AEDPA and told McVeigh, “[Y]ou can not in any way assume or count on the availability to you of a new, as you say, habeas or a new motion to vacate the sentence under 2255.” *Id.* Five days before the scheduled execution the same court denied a stay of execution. *United States v. McVeigh*, No. 96-CR-68-M, 2001 U.S. Dist. LEXIS 7151 at *1 (D. Co. June 6, 2001). Upon affirming the district court the next day, the Tenth Circuit, in the alternative, also denied the appeal as a petition for a subsequent habeas appeal. *United States v. McVeigh*, 9 Fed. Appx. 980 (10th Cir. Jun 7, 2001) (per curiam). Under § 2244(b)(3), a court of appeals must authorize a successive habeas petition before it is filed in the district court. 28 U.S.C. § 2244 (b)(3) (2000). That decision is not appealable. 28 U.S.C. § 2244 (b)(3)(E) (2000). McVeigh, the first federal prisoner to be executed in thirty-eight years, died by lethal injection on Monday, June 11, 2001 in a federal prison in Indiana. The Execution of Timothy McVeigh 2001 at <http://www.cnn.com/SPECIALS/2001/okc/>.

65. The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244-2266 (2000). The AEDPA passed in the Senate by a 91-8 vote. 142 Cong. Rec. D322-02 (daily ed. Apr. 17, 1996) (Vote No. 71). It passed in the House by a 293-133 vote. 142 Cong. Rec. D334-01 (daily ed. Apr. 18, 1996) (Roll No. 126).

66. See *infra* notes 46-51 and accompanying text. Several of the people held in Guantanamo Bay, Cuba by the United States military after being captured abroad during the hostilities in Afghanistan that followed the terrorist attacks of September 11, 2001, were recently denied access to the American court system altogether, thus the habeas corpus portion of “anti-terrorism” bill will

The AEDPA amended 28 U.S.C. sections 2241-2255 and added sections 2261-2266.⁶⁷ The amended section 2244 limits the availability of successive habeas petitions, imposes a procedural hurdle and extends the deference given to the state court decisions.⁶⁸ It also creates a statute of limitations period, which is subject to a tolling provision, for filing a federal habeas petition.⁶⁹ Section 2254(d) limits the scope of review of a state court decision by a federal court in habeas cases.⁷⁰ Section 2254 also maintains an exhaustion requirement.⁷¹ Section 2261

also not apply to them. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The detainees were not within the territory of the United States at any point, and therefore:

[N]o court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241 We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.

Id. at 1141. These foreign nationals, “cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them.” *Id.* at 1145.

67. See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (providing a thorough review of the changes AEDPA has made to habeas). The list of changes and additions, *infra*, is meant only to be illustrative for the case at hand and is not meant to be exhaustive. The AEDPA changes to title 153 (2241-2255) affects both capital and non-capital cases where as, the addition of title 154 deals only with death penalty cases. Yackle, *supra* at 385.

68. 28 U.S.C. § 2244 (a)-(c) (2000). The Supreme Court further restricted successive petitions in *Tyler v. Cain*, 533 U.S. 656, 661 (2001). See Ronn Gehring, Note, *Tyler v. Cain: A Fork in the Path for Habeas Corpus or the End of the Road for Collateral Review?*, 36 AKRON L. REV. 181, 211 (2002) (arguing *Tyler*'s virtual elimination of the availability of successive habeas petitions is a violation of the Suspension Clause).

69. 28 U.S.C. § 2244 (d)(1) (2000). § 2244(d)(1) provides that “[a] one-year time period of limitation shall apply to an application for a writ of habeas corpus.” The limitation period can start running from the latest of four events: final review of the conviction, the removal of state action that caused an impediment to filing, the addition of a constitutional right by the Supreme Court or the discovery, through due diligence of facts to underlie a constitutional claim. *Id.* See *supra* note 6 and accompanying text. Also, 28 U.S.C. § 2244(d)(2) (2000) allows “the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” That tolling provision is at the heart of *Carey v. Saffold*, 536 U.S. 214 (2002). Another issue, not in controversy in *Carey*, but also judiciable under the tolling provision is in regards to equitable tolling. See *infra* Part IV.C. Equitable tolling allows a court to continue with an action, even though the statutory time limit has expired, because justice requires it. See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 94-6 (1990).

70. 28 U.S.C. § 2254 (d) (2000). The Supreme Court has addressed this “standard of review” provision in *Williams v. Taylor*, 529 U.S. 362 (2000). Before AEDPA, *Teague v. Lane*, 489 U.S. 288 (1989), placed a limitation on granting habeas where the existing law was not already established. See generally Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996) (listing pre-AEDPA restrictions on habeas in general).

71. 28 U.S.C. § 2254 (a)-(c) (2000). The Court first adopted the “exhaustion doctrine” in *Ex parte Royall*, 117 U.S. 241 (1886). In *Rose v. Lundy*, 455 U.S. 509, 510 (1982), the Court held that all claims in a multi-part petition could be dismissed if the petitioner failed to exhaust state remedies with respect to any one of the claims.

addresses procedural issues unique to capital habeas petitions.⁷² Many of the changes concern procedural requirements.⁷³

The AEDPA has stirred a lot of controversy since its inception.⁷⁴ Many people have expressed their concerns about the potential of the Act.⁷⁵ There is much speculation as to whether the AEDPA codified previous common law or changed the law.⁷⁶ The Supreme Court will

72. 28 U.S.C. § 2261-2266 (2000). These provisions were designed to “combat lengthy habeas appeals, the favorite misconception of habeas critics.” Blumberg, *supra* note 51, at 584.

73. See *supra* notes 67-72 and accompanying text.

74. E.g., Yackle, *American Bar, supra* note 23, at 171; Sessions, *supra* note 10, at 1531 (arguing the new AEDPA statute of limitations provision cannot be justified by its supporters, is poorly written, and makes it practically impossible for state prisoners to present their claims adequately within the mandatory one-year deadline). Between hurdles placed in front of federal habeas petitions in the AEDPA and Congress’ cutting of funds for Post-Conviction Defender Organizations, the American Bar Association (ABA) proposed a moratorium on the death penalty. James E. Coleman, Jr., 61 LAW & CONTEMP. PROBS. 1, 3 (1998); Yackle *American Bar, supra* at 171. The ABA took part in many forums and debates concerning habeas reform prior to 1996, but concluded that a moratorium would be the only effective way to draw attention to the problems of the current system. Yackle, *American Bar, supra* at 175-76. Specifically, the time limits imposed by AEDPA were far more rigid than the ABA had thought appropriate. *Id.* at 183.

75. See Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY’S L.J. 297, 337-39 (1996) (noting that when considered in the aggregate, the new limitations on the scope of the federal writ substantially reduce the role of the federal judiciary in overseeing the criminal justice systems of the states); Blumberg, *supra* note 51, at 585 (finding the new law favors finality and timeliness over justice); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 32-4 (1996) (asserting that Congress “guttled” the writ of habeas corpus when it passed the AEDPA); Gottlieb & Coyne, *supra* note 51, at 202 (holding the procedural requirements placed on habeas petitioners in recent decades have made difficult barriers impossible); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002) (arguing the default doctrine as applied permits states to deprive state death row inmates of any meaningful post-conviction review); Kochan, *supra* note 21, at 399 (arguing AEDPA fails to address problems in habeas law that were present before AEDPA); Melissa L. Koehn, *A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus*, 32 TULSA L.J. 389, 401 (1997) (arguing that, because of the AEDPA, “habeas has probably ceased to exist altogether”); Mark Tushnet & Larry W. Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 3 (1997) (suggesting that the AEDPA is a symbolic statute passed for political reasons that has done nothing, but caused interpretive problems for the courts and real problems for prisoners); Ward, *supra* note 5, at 28 (stating the already imposing odds against a federal habeas petitioner worsened under AEDPA); Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act’s Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998) (presenting the argument that one could argue AEDPA is unconstitutional).

76. Gottlieb & Coyne, *supra* note 51, at 202. The Act “does relatively little to change the balance already achieved by the Court over the past generation. Instead, it can be read primarily as a codification of much of the Court’s work.” *Id.* But see Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 222 (1998) (arguing the Act may codify *Teague* without including *Teague*’s exceptions or safeguards). President Clinton’s signing

have to deal with these challenges presented by the AEDPA one by one.⁷⁷

C. *The California System*

A state prisoner can petition the California courts for habeas corpus review of his criminal conviction.⁷⁸ “Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such

statement also leaves ambiguity as to the intent of the AEDPA on the issue of codification. *Id.* at 223. He stated his faith in the federal courts to “interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.” *Id.*

77. *E.g.*, *Lindh v. Murphy*, 521 U.S. 320 (1997) (finding the AEDPA’s retroactivity was improper where new legal consequences attached); *Breard v. Greene*, 523 U.S. 371 (1998) (finding a foreign national who did not exercise his rights under a treaty could not complain of a constitutional violation in federal habeas); *Calderon v. Thompson*, 523 U.S. 538 (1998) (finding an abuse of discretion to allow further habeas petitions two days before the execution date and 13 years after the crime); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (holding AEDPA does not require a mature habeas petition to seek authorization for a subsequent petition when the first petition was dismissed because it was pre-mature); *Calderon v. Ashmus*, 523 U.S. 740 (1998) (finding a declaratory judgment upon whether California qualifies under chapter 154 of AEDPA is inappropriate where there is no case or controversy); *Slack v. McDaniel*, 528 U.S. 949 (1999) (asking does AEDPA control the proceedings on appeal); *Smith v. Robbins*, 528 U.S. 259 (2000) (holding California’s Wende procedure provided the criminal appellant with minimum safeguards necessary to make an effective appeal in pursuance of the 14th Amendment); *Williams v. Taylor*, 529 U.S. 420 (2000) (holding the petitioner was entitled to an evidentiary hearing on misconduct at trial because he was diligent in his effort to develop those facts in the state proceeding); *Slack v. McDaniel*, 529 U.S. 473 (2000) (finding a habeas petition filed after the initial petition was dismissed for failure to exhaust state remedies is not a successive petition); *Artuz v. Bennett*, 531 U.S. 4 (2000) (stating the alleged failure of petitioner’s application to comply with state procedure, did not render it improperly filed for purposes of federal review); *Duncan v. Walker*, 533 U.S. 167, 172-73 (2001) (finding a federal habeas petition is not an application for state review and so, the limitation period was not tolled during the time of the first federal habeas petition); *INS v. St. Cyr*, 533 U.S. 289 (2001) (finding the IIRIRA did not apply retroactively); *Tyler v. Cain*, 533 U.S. 656, 668 (2001) (holding an inmate can not submit a successive habeas petition where the Supreme Court did not hold the new rule to be retroactive to cases on collateral review); *Carey v. Saffold*, 536 U.S. 214 (2002) (holding the petition for state court collateral review was pending in the time between the lower state court’s decision and the filing of a new petition in a higher court and as such, that time can be tolled for filing a federal habeas petition). The Supreme Court has heard 20 cases dealing with the AEDPA since its adoption in 1996, including, *Hohn v. United States*, 524 U.S. 236 (1998), *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), *Martin v. Hadix*, 527 U.S. 343 (1999), *Knight v. Florida*, 528 U.S. 990 (1999); *Williams v. Taylor*, 529 U.S. 362 (2000), and *Horn v. Banks*, 536 U.S. 266 (2002).

78. See CAL. CONST. art. VI, §§ 10, 11. As of December 31, 2000, there were 161,808 inmates in California. *State by State profiles: California*, at <http://www.abanet.org/moratorium/states.html>. There were 613 inmates on death row in 2002. *Id.* Also, 128 inmates were removed from death row between 1973 and 2000, including 118 inmates whose convictions or sentences were overturned. *Id.*

imprisonment or restraint.”⁷⁹ The California Constitution grants the district courts, appellate courts and the state supreme court concurrent jurisdiction to grant writs of habeas corpus.⁸⁰ The state supreme court also has jurisdiction to review an appeals court decision.⁸¹ Thus, a state prisoner has two avenues to seek California Supreme Court review; he can seek review of an appellate court decision or he can file an original habeas petition.⁸² The time limitations allotted to each avenue of review are significantly different.⁸³ If a petition for a writ of habeas corpus

79. CAL. PEN CODE § 1473 (2001). The scope of the writ has been expanded to include “use by one lawfully in custody to obtain a declaration and enforcement of rights in confinement.” *In re Bittaker*, 55 Cal. App. 4th 1004, 1010 (Cal. Ct. App. 1997). Interestingly, in California, while the writ of habeas corpus actually fails the definition of a criminal action, it is still governed by the penal code. *Id.* The California Penal Code defines a criminal action as “the proceeding by which a party charged with a public offense is accused and brought to trial and punishment,” but the writ has not officially been changed to a civil proceeding. *Id.* It has also been suggested that the restrictions imposed by the AEDPA apply to “purely criminal habeas corpus petitions by death row inmates.” *Id.* *But see* *Fisher v. Baker*, 203 U.S. 174, 181 (1906) (finding habeas corpus is a civil and not a criminal proceeding). The California Constitution also contains a suspension clause; “[h]abeas corpus may not be suspended unless required by public safety in case of rebellion or invasion.” CAL. CONST. art. I, § 11.

80. CAL. CONST. art. VI, § 10.

81. CAL. CONST. art. VI, § 11. The appellate jurisdiction is defined as “the power to review and correct error in trial court orders and judgments.” *Leone v. Med. Bd. of Cal.*, 995 P.2d 191, 196 (Cal. 2000). This jurisdiction is exercised by either a direct appeal or in a habeas proceeding. *Id.* at 195. This exercise of jurisdiction is different from conferring a “right of appeal” to litigants. *Id.* at 194. Indeed, there is no appeal from a denial of habeas corpus by a superior court. CAL. PENAL CODE § 1506 (2000). A petitioner must file a new petition in the appellate court. *Durdines v. People*, 90 Cal. Rptr. 2d 217, 220 (Cal. Ct. App. 1999).

82. *See supra* notes 74 & 81. Thirty-seven states, including California allow the “high court both to reverse the denial of habeas corpus in the lower court and to grant an original petition for habeas outright.” *Carey*, 536 U.S. at 228 (Kennedy, J., dissenting). However, in California, judicial preference however, has been expressed for the appellate process. *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). The U.S. Supreme Court noted that the original writ system functions like the appellate system for several reasons. *Carey*, 536 U.S. at 221-22. *But see* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 5-18, *Carey v. Saffold*, 536 U.S. 214 (2002) (No. 01-301) (arguing the California system is different in kind from typical “appeal” states, thus a petition for habeas relief is not “pending” between a lower state court’s decision and the filing of a further state action). First, an appellate court in California can refuse to issue a writ in a petition that was not first filed in the lower court. *In re Ramirez*, 108 Cal. Rptr. 2d 229, 231-232 (Cal. Ct. App. 2001). Second, an appellate court can give substantial deference to a lower court’s factual findings, thus acting as a review of the lower court. *In re Resendiz*, 19 P.3d 1171, 1184 (Cal. 2001).

83. Cal. Rules of Court, R 28(e), states a petitioner has ten days from the appeals court decision to file an appeal in the Supreme Court. The original petition in the California Supreme Court must be filed within a reasonable time after the denial of the writ by the appellate court. *In re Harris*, 855 P.2d 391, 398 (Cal. 1993). The direct appeal from a criminal conviction is “the basic and primary means” for establishing justice. *In re Robbins*, 959 P.2d 311, 316 (Cal. 1998). Habeas corpus is an “extraordinary remedy” and by necessity requires procedural safeguards, such as time limits to govern its proper use. *Id.*

states a prima facie case for relief, then a hearing on the merits will be held.⁸⁴ The writ by itself is not enough to entitle the petitioner to be released from jail.⁸⁵ The relief sought is only granted after the petitioner presents a successful case on the merits.⁸⁶

III. STATEMENT OF THE CASE

A. *Statement of Facts*

After a night of drinking and using cocaine, Tony Eugene Saffold and Rodney Reece⁸⁷ arrived at the El Mexicano Restaurant owned by Maria and Augustin Michel shortly after the store opened at 7:00 am on the morning of September 29, 1989.⁸⁸ Saffold entered the store, took beer from the refrigerator and then at gun point demanded that Augustin

84. *Durdines*, 90 Cal. Rptr. 2d at 220. The writ does not entitle the petitioner to his release, but instead, a writ “triggers adversarial proceedings” and requires the respondent to file a reply, if the petitioner has stated a prima facie case for relief. *Id.* Additionally, a meritless petition that does not make a prima facie case for relief can be denied without a subsequent hearing. *Id.* at 221. Also, in California, a summary denial of a petition for habeas is permitted. For example in *Powers v. City of Richmond*, 893 P.2d 1160, 1177 (Cal. 1995), the California Supreme Court explained that an appellate court may deny a writ petition summarily. A summary denial is a denial “without issuing an alternative writ or order to show cause, without affording the parties an opportunity for oral argument, and without issuing a written opinion—and that this power of summary denial distinguishes writ review from direct appeal.” *Id.* The California Supreme Court summarily denied Saffold’s writ petition based on the merits and for lack of diligence. *In re Saffold*, No. S065746, 1998 Cal. LEXIS 3379, at *1 (Cal. May 27, 1998). Under the AEDPA, only a petition properly filed in the state court qualifies for the tolling provision. *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000). Whether a petition is “properly filed” depends on state law, so that if a state court accepts and entertains it on the merits it has been “properly filed,” but if the state court rejects it as procedurally irregular it has not been “properly filed.” *Id.* Therefore, a summary denial based on a time limitation would not be considered properly filed, whereas a summary denial based on the merits would. *Harris v. Super. Ct.*, 500 F.2d 1124, 1126 (9th Cir. 1974). If a state court denies a petition for post conviction relief on procedural grounds, the petitioner has not exhausted his state remedies because the state exhaustion remedy requires a petition to be denied on the merits of the case. *Id.* Additionally, California determines the timeliness for filing an original writ petition on a “reasonableness” standard and does not specify a time limit. *Carey*, 536 U.S. at 221. The reason for the California Supreme Court’s denial of the writ is unclear. *Id.* at 225-27. In order to determine whether the filing of Saffold’s petition is considered reasonable within the California system, the U.S. Supreme Court remanded the case. *Id.* at 227.

85. *See Durdines*, 90 Cal. Rptr. 2d at 220.

86. *Id.* There are many forms of relief that a habeas petition can facilitate. *See, e.g.*, *Galvan v. Press*, 347 U.S. 522, 525 (1954) (petitioner filed a habeas petition for relief from deportation).

87. Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus at *42a-4a, 2001 WL 34093978 (Joint Appendix) (No. 01-301), *Carey v. Saffold*, 536 U.S. 214 (2002) [hereinafter Memorandum]. Reece was originally charged with the robbery and murder at issue in this case. *Id.* at *41a. Pursuant to a negotiated plea, Reece pled guilty to robbery and testified for the prosecution as to the events of September 28-29, 1996. *Id.*

88. *Id.* at *44a.

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give him the money from the cash register.⁸⁹ After Augustin claimed there was no money in the register, Saffold fired at him twice, but only hit him once in the neck.⁹⁰ Subsequently, Saffold demanded the money from Maria, she gave it to him and he fled.⁹¹

B. Procedural History

On April 3, 1990, Tony Eugene Saffold was convicted of first degree murder, assault with a firearm and two counts of robbery in the San Joaquin County Superior Court.⁹² The California Court of Appeal for the Third District modified his sentence, but affirmed the conviction.⁹³ His conviction became final on direct review on April 15, 1992.⁹⁴

On April 17, 1997, one week before the federal deadline for filing a federal habeas claim, imposed by the AEDPA,⁹⁵ Saffold, acting pro se, filed a state habeas petition in the San Joaquin County Superior Court for ineffective assistance of counsel.⁹⁶ The state trial court denied his petition.⁹⁷ He filed a further petition in the California Court of Appeals five days later.⁹⁸ That petition was denied.⁹⁹ Saffold maintains that he

89. *Id.* According to the theory of the case presented by the defense, it was Reece, not Saffold who committed the robbery and murder. *Id.* at *49a.

90. Memorandum, *supra* note 87, at *44a.

91. *Id.* at *45a.

92. Respondent's Brief, *supra* note 24, at 2. The jury trial took place in the San Joaquin County Superior Court. *Id.* The superior court sentenced him to thirty years to life in state prison. *Id.*

93. *Id.* The court stayed the concurrent sentence for assault with a firearm and affirmed the judgment as modified. *Id.*

94. *People v. Saffold*, No. S025445, 1992 Cal. LEXIS 1709, at *1 (Cal. April 15, 1992) (denying Saffold's petition for review of the appellate court affirmance of his state criminal conviction).

95. 28 U.S.C. § 2244(d)(1)(A) (2000) states that:

A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

However, Saffold's conviction became final before the AEDPA took effect, so the new one year federal statute of limitations began to run on AEDPA's effective date, April 24, 1996, pursuant to Rule 6(a). *See Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001). The limitations period for Saffold to file a federal habeas claim would have ended on April 24, 1997, in the absence of tolling. *Id.*

96. Respondent's Brief, *supra* note 24, at 2. Saffold delivered the petition to the San Joaquin prison authorities to be filed in the California Superior Court. *Id.*

97. *Carey*, 536 U.S. at 217.

98. Respondent's Brief, *supra* note 24, at 2. Still acting pro se, Saffold again delivered the petition to the prison authorities to be filed in the appeals court. *Id.*

99. *Id.* The state appellate court issued its opinion on June 26, 1997. Saffold contends that he

was unaware of the appeals court decision until four and a half months later, at which time he then filed a petition in the California Supreme Court.¹⁰⁰ One week after the denial by the California high court, Saffold filed a federal habeas corpus petition in the United States District Court for the Eastern District of California.¹⁰¹ The District Court denied the petition because he had failed to comply with the AEDPA's one year deadline.¹⁰² The court held the federal statute of limitations period was not tolled during the intervals between the denial of one state petition and the filing of the next because no application was "pending" within the meaning of the AEDPA.¹⁰³ On appeal, the Ninth Circuit reversed, holding the word "pending" included those intervals.¹⁰⁴

was not made aware of that decision until November 10, 1997. *Id.* at 3.

100. *Id.* Saffold filed the original petition to the state supreme court, still acting pro se, by delivering it to the prison authorities on the same day that he received notice of the appellate court decision, although it was not formally filed in the supreme court until November 13, 1997. *Id.* The California Supreme Court denied the petition on the merits and for lack of diligence on May 27, 1998. *In re Saffold*, No. S065746, 1998 Cal. LEXIS 3379, *1 (Cal. May 27, 1998).

101. *Saffold v. Newland*, D.C. No. CV-98-01040-DFL. David F. Levi, District Judge Presiding. Saffold was still acting pro se. Respondent's Brief, *supra* note 24, at 3. Anthony Newland was the original defendant in this action and Tom L. Carey is his predecessor. Pursuant to Fed. R. App. P. 43 (c)(2), Carey was substituted as the defendant when the case was before the United States Supreme Court. *Compare Saffold v. Carey*, 295 F.3d 1024, 1024 (9th Cir. 2002) with *Saffold v. Carey*, 122 S.Ct. 2134, 2134 (2002) (listing Carey as the warden-defendant), and *Newland v. Saffold*, 534 U.S. 971 (2001) (granting certiorari to Saffold and listing Newland as the warden-defendant). Rule 43 allows the automatic substitution of a party who is an office-holder:

When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

FED. R. APP. P. 43 (c)(2).

102. *Id.* Under 28 U.S.C. § 2244(d)(1)(A) (2000), there is a one-year statute of limitation period that began to run from "the date on which the judgment became final by the conclusion of direct review" in the state court system.

103. 22 U.S.C. § 2244(d)(2) (2000). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* Because the petition was denied on procedural grounds, the substantive issues of the habeas claim were not addressed. *In re Saffold*, No. S065746, 1998 Cal. LEXIS 3379, *1 (Cal. May 27, 1998).

104. *Saffold v. Newland*, 250 F.3d 1262, 1264-65 (9th Cir. 2001), *cert. granted*, *Newland v. Saffold*, 534 U.S. 971 (2001), *vacated by, remanded sub nom. Carey v. Saffold*, 536 U.S. 214 (2002). After the district court announced its judgment, the Ninth Circuit decided how the tolling period for the exhaustion of state remedies should be tolled in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999). The Ninth Circuit Court held "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge" on the merits. *Id.* at 1006. The Ninth Circuit held the rule in *Nino* was applicable to Saffold's case. *Saffold*, 250 F.3d at 1265. The Ninth Circuit also held that the

C. U. S. Supreme Court Decision

In a five-to-four decision,¹⁰⁵ the Supreme Court vacated and remanded the Ninth Circuit decision.¹⁰⁶ The Court addressed three issues concerning the word “pending.”¹⁰⁷ First, the Court decided the word “pending” does cover the time between a lower court’s decision and the filing of a notice of appeal to a higher state court.¹⁰⁸ Second, the Court determined that rule also applies to California’s state collateral review system, which allows for a further original state habeas petition in a higher court instead of a notice of appeal.¹⁰⁹ Third, the Court left open the question, to be determined on remand, of whether the petition at issue was pending during the four and a half month interval between the state appellate court decision and the filing of the further petition in

“mailbox rule” for pro se prisoners applied to Saffold’s habeas petitions to the state court and the federal court for calculating time tolled under AEDPA. *Id.* The mailbox rule for pro se prisoners allows the date of filing to be the date on which the prisoner gives the document to the prison authorities. *Houston v. Lack*, 487 U.S. 266, 270 (1988); *see also State ex rel. Johnson v. Whitley*, 648 So.2d 909 (La. 1995) (following *Houston* and finding a Louisiana prisoner’s pro se application is “filed” when he delivers it to the prison authorities). The reasoning is that a prisoner, by giving the document to the prison authorities to forward to the clerk of courts within the time limit, has done all that he can be expected to do to have his appeal properly filed when he is without a lawyer. *Id.* In this case, Saffold’s first state habeas petition was post-marked April 21, 1997, and the county court considered the petition filed as of May 1, 1997. Memorandum, *supra* note 87, at 17a-18a. However, Saffold contends that he gave the petition to the prison authorities April 17, 1997, which was accepted by the district court for purposes of the decision. *Saffold*, 250 F.3d at 1265. Saffold’s case was reversed and remanded for further proceedings in the District Court to determine “whether and when Saffold delivered his petitions to prison authorities.” *Saffold*, 250 F.3d at 1265.

105. Justice Breyer delivered the majority opinion in which Justices Stevens, O’Connor, Souter and Ginsburg joined. *See Carey*, 536 U.S. at 216. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. *Id.* at 227 (Kennedy, J., dissenting).

106. *Id.* at 227. For a synopsis of the other criminal decisions rendered by the Supreme Court during the 2001-2002 term, see Charles H. Whitebread, *Recent Criminal Decisions of the United States Supreme Court: The 2001-2002 Term*, 39 COURT REVIEW 26 (2002). The five-to-four decision in *Carey* was the most divisive of the four federal habeas cases that the Supreme Court heard. *Id.* The decision in *Lee v. Kemna*, 534 U.S. 362 (2002) (holding that the failure to comply with state requirements for continuance motions, in extraordinary cases, does not constitute adequate state grounds to bar federal habeas review), was six-to-three; the decision in *Bell v. Cone*, 535 U.S. 685 (2002) (holding that a federal habeas petition challenging specific acts of an attorney’s representation is governed by *Strickland v. Washington*), was eight-to-one; and the decision in *Horn v. Banks*, 535 U.S. 266 (2002) (holding that Teague inquiries precede and are separate from the AEDPA inquiries), was per curiam.

107. *Carey*, 536 U.S. at 216. It is a trademark of Justice Breyer, who authored the majority opinion here, to look at three things, “legislative intent, the factual context in which the dispute arises, and the likely consequences of alternative resolutions of the dispute.” Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 751 (1995).

108. *Carey*, 536 U.S. at 221.

109. *Id.* at 221-25. Saffold did not appeal the decision of the state appeals court, but filed a new habeas petition with the California Supreme Court. *Id.*

the state supreme court, or was not pending because it failed to comply with state procedural rules.¹¹⁰

The tripartite analysis began with the dictionary definition of the word “pending.”¹¹¹ A habeas petition is pending in state court until the completion of the collateral review process.¹¹² This includes, the time between the final decision of one court and the filing of an appeal in a higher court.¹¹³ The Court reasoned that “until the application has achieved final resolution through the State’s post-conviction procedures, by definition it remains ‘pending’.”¹¹⁴ On a policy basis, the Court recognized the inconsistency of requiring a state prisoner to file a federal petition before the state courts have properly finished their determination on the issue.¹¹⁵

Next, the Court determined that rule was applicable to the procedures for state habeas corpus petitions in California.¹¹⁶ The Court made a distinction between “appeal” states and states, like California, that allow original petitions.¹¹⁷ The intervals between an appeal of a denial of a writ and the filing of a new petition after the denial of a writ were both considered applicable to the definition of “pending.”¹¹⁸

110. *Id.* at 225-27. The Supreme Court remanded the case to the Ninth Circuit Court of Appeals to decide the question of whether the California Supreme Court’s denial “on the merits and for lack of diligence” meant that Saffold’s petition was untimely in the state court and therefore ineligible for tolling the federal statute of limitations. *Id.* at 227. The Supreme Court left open the option for the court to certify the question to the California Supreme Court. *Id.* at 226-27.

111. *Id.* at 219; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1669 (3d ed. 1993) (defining “pending” when used as an adjective, as “in continuance” or “not yet decided” and when used as a preposition, as “through the period of continuance . . . of” and “until the . . . completion of.”).

112. *Carey*, 536 U.S. at 219-20.

113. *Id.* at 219.

114. *Id.* at 220. The Court recognized this reading of the AEDPA allows for the complete exhaustion of state remedies by the petitioner before having to file a federal claim. *Id.* at 219-20. The Court also noted that no appellate court had interpreted the word “pending” in the manner proposed by California in this case. See *Hizbullahankhamon v. Walker*, 255 F.3d 65, 72 (2d Cir. 2001); *Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001); *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002); *Swartz v. Meyers*, 204 F.3d 417, 424-25 (3d Cir. 2000); *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000); *Taylor v. Lee*, 186 F.3d 557, 560-61 (4th Cir. 1999); *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 132, 1323 (10th Cir. 1999). *But see* *Robinson v. Ricks*, 163 F. Supp. 2d 155, 156 (E.D.N.Y. 2001).

115. *Carey*, 536 U.S. at 220.

116. *Id.* at 223.

117. *Id.* at 223-25; *see also supra* note 81 and accompanying text.

118. *Carey*, 536 U.S. at 224-25. The rule when applying a federal statute that interacts with state procedure is to look at the function of the state procedure and not the name. See *Richfield Oil Corp. v. State Bd. of Equal.*, 329 U.S. 69, 84 (1946); *Dep’t of Banking v. Pink*, 317 U.S. 264, 268 (1942). The Court found “California’s system functions in ways sufficiently like other state systems

Finally, the Court reserved judgment on the application of the AEDPA tolling provision to this case.¹¹⁹ The California Supreme Court originally denied Saffold's state habeas petition on the merits and for lack of diligence.¹²⁰ It is unclear from that summary denial if Saffold's petition was properly filed within the California system and therefore, qualifies for the AEDPA tolling provision.¹²¹ The Supreme Court remanded the case for a determination of that issue.¹²²

The dissent disagrees with both the majority's "pending" rule and the characterization of the California habeas procedures.¹²³ First, Justice

of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word "pending." *Carey*, 536 U.S. at 223.

119. *Carey*, 536 U.S. at 225-226. A habeas petition must be filed within a "reasonable" time. See *supra* note 78 and accompanying text. If Saffold's petition is found to have been filed outside of a "reasonable" time, then his application would not be considered as pending after the denial of his petition in the appellate court. *Carey*, 536 U.S. at 226.

120. *Id.*

121. *Id.* While the Ninth Circuit considered the California Supreme Courts' summary denial to have addressed the merits of the case, the United States Supreme Court remained unconvinced. *Id.* at 225-26.

122. *Id.* at 227. The Ninth Circuit remanded the case for an evidentiary hearing and subsequently recalled the mandate on Saffold's request. *Saffold v. Carey*, 295 F.3d 1024, 1025 (9th Cir. 2002), *recalled by* *Saffold v. Carey*, 295 F.3d 1380 (9th Cir. 2002). The question to be briefed simultaneously by the parties, in the Ninth Circuit is: "What is the proper disposition to be ordered by this court on remand from the Supreme Court of the United States, in light of the Supreme Court's opinion . . ." *Id.* On December 4, 2002, the Ninth Circuit found Saffold's contention that the phrase "lack of diligence" referred to Saffold's five-year delay in filing his initial state habeas petition and not the four and one-half month delay in filing his petition before the state supreme court to be persuasive. *Saffold v. Carey*, 312 F.3d 1031, 1034-35 (9th Cir. 2002). The state argued that because "collateral review of Saffold's conviction is functionally equivalent to direct review thereof, the time within which he is required to seek review from a higher court should likewise be the same for both forms of review." *Id.* The Ninth Circuit, however, rejected that argument in light of five different orders denying habeas petitions that the California Supreme Court had issued at or around the same time as the denial of Saffold's petition. *Id.* at 1035. Those decisions were important because they had been filed with the California Supreme Court more than four and one-half months after the court of appeals rejected their petition, which was longer than Saffold, and none of those orders were denied for "lack of diligence." *Id.* This suggests the denials were made solely on the merits of the claims and had nothing to do with the delay between the denial of the appellate court and the filing in the supreme court. *Id.* The Ninth Circuit held "these contemporaneous court orders demonstrate that the court's finding of 'lack of diligence' applies instead to Saffold's five-year delay in *initially* filing his habeas petition in state court." *Id.* Furthermore, California's timeliness rule is not a condition to filing, but rather a condition to obtaining relief. *Artuz v. Bennett*, 531 U.S. 4, 11 (2000) See also *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir. 2002). The Ninth Circuit concluded that since Saffold's petition was not denied as untimely, he was "entitled to tolling for the four and one-half month period in question" under the AEDPA and the federal district court should review his federal petition on the merits. *Saffold*, 312 F.3d at 1036. Thus, the case was remanded to the district court. *Id.* The Ninth Circuit limited its decision to Saffold's case and declined to provide any "bright-line" rule for determining what constitutes "unreasonable" delay under California's system. *Id.* at n.1.

123. *Carey*, 536 U.S. at 236-37 (Kennedy J., dissenting).

Kennedy argues that the majority defines the word “pending” without reference to the application involved.¹²⁴ It is difficult to conceptualize how a petition could be “pending” the day before the application was actually filed.¹²⁵ Further, California law treats an appeal and an original writ as significantly different options.¹²⁶ The Ninth Circuit should be reversed, the dissent argues, because an application cannot be pending if it has not been filed.¹²⁷

IV. ANALYSIS

The writ of habeas corpus is more than just a part of the complex system of procedural rules and substantive laws that make up the criminal justice system, it is the “symbol and guardian of individual liberty” in the United States.¹²⁸ A state prisoner is able to seek both state and federal habeas corpus review because both court systems share

124. *Id.* at 228-29. An “application” is defined as a “document.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Within the context of the AEDPA, an application refers to “a specific legal document.” *Carey*, 536 U.S. at 229 (Kennedy J., dissenting). Kennedy argues that the majority has determined “that ‘an application is pending as long as the ordinary state collateral review process is ‘in continuance.’”” *Id.* That proposition can only be true if the word “application” is interpreted to mean the “ordinary state collateral review process.” *Id.* He argues that the rule requires including “the multiple petitions, appeals, and other filings that constitute the ‘ordinary state collateral review process,’” into the definition of application. *Id.*

125. *Carey*, 536 U.S. at 228-29. The majority’s rule allows Saffold’s application to the California Supreme Court for a writ of habeas corpus to be considered “pending” before the application itself is actually filed as long as the application is filed within the time limitation imposed by the California system. *See id.*

126. *Id.* at 231 (Kennedy J., dissenting). First, while an original petition is permitted under California law, an appeal from an appellate court decision is preferred. *In re Reed*, 663 P.2d 216, 217 (Cal. 1983). Second, a petitioner has ten days to appeal to the state supreme court. CAL. RULE OF COURT R 28(b), 50(b) (2002). The application remains “pending” in the lower court because the state supreme court could order the lower court to grant the application. *Carey*, 536 U.S. at 230. Also, if the appeal is not taken within ten days, the state supreme court loses jurisdiction over it and the decision of the appellate court becomes final. *See CAL. RULE OF COURT R 24* (2002). An original writ, however, begins “a new proceeding that ha[s] no proximate connection to the proceedings in the California Court of Appeal.” *Carey*, 536 U.S. at 231; *see also* *People v. Romero*, 883 P.2d 388 (Cal. 1994). Thus, in order for an original writ to be considered pending under California law it must first be filed. *See In re Zany*, 130 P. 710 (Cal. 1913). The federal courts should respect this distinction in California law. *Carey*, 536 U.S. at 233 (Kennedy J., dissenting).

127. *Carey*, 536 U.S. at 234-35. Justice Kennedy admonishes the majority’s rule as impractical: “Whether an application is pending at any given moment should be susceptible of a yes or no answer. On the Court’s theory the answer will often be ‘impossible to tell,’ because it depends not on whether an application is under submission in a particular court but upon events that may occur at some later time.” *Id.*

128. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (finding that a prisoner serving consecutive sentences was in custody for federal habeas purposes to challenge any one of the sentences because the opposite former rule undermined habeas corpus proceedings as the instrument for resolving fact issues not adequately developed in the original proceedings).

jurisdiction over constitutional claims.¹²⁹ It is the declaration of the Supreme Court that state review must be sought first.¹³⁰ It is the declaration of the legislature that certain time restrictions should be laid upon federal habeas review.¹³¹ These procedural requirements serve legitimate governmental interests.¹³² However, to the extent that they can not both be met, their combined existence raises serious questions as to the future of habeas corpus.¹³³ The vindication of constitutional rights through habeas corpus becomes almost impossible if the procedural requirements for review cannot be met.¹³⁴ In a country where liberty is

129. See *supra* note 2 and accompanying text. Compare article three, section two of the United States Constitution, which states the federal judicial power shall extend to all cases arising under the Constitution, with article six, which states that state judges are bound by the United States Constitution. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 499 (1993) (noting the Supreme Court has the ultimate power to interpret the Constitution; however the Court relies on state courts “to fulfill the constitutional role as primary guarantor of federal rights” because certiorari review is limited); see also *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) (holding the United States Supreme Court has appellate jurisdiction over all cases arising under state tribunals).

130. See *infra* notes 169-173 and accompanying text. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991). The Supreme Court barred a state petitioner’s habeas claim because he failed to properly exhaust his state procedural requirements for state habeas. *Id.* at 730. Coleman had failed to appeal his state habeas claims to the Virginia Supreme Court within the thirty day time limitation. *Id.* at 727. The exhaustion requirement comes ultimately from the federal system of government. A state prisoner can seek federal habeas relief if a state court finds his federal (constitutional) claim to be without merit because “he seeks his release on a claim of unconstitutional denial of a right secured to him by the federal Constitution, the last word as to its merits is for federal and not state [courts].” Brennan, *supra* note 2, at 4-5.

131. 28 U.S.C. § 2244(d) (creating the first ever statute of limitations in federal habeas corpus); see also *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (stating that judgments about the proper scope of the writ are normally for Congress to make); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar*); *Wyzykowski v. Dep’t of Corr.*, 226 F.3d 1213, 1215 (11th Cir. 2000) (quoting *Felker*).

132. See *Stone v. Powell*, 428 U.S. 465, 494 (1976). When the Supreme Court held state violations of Fourth Amendment rights are not grounds for federal habeas relief, it explained that, “in some circumstances considerations of comity and concerns for the orderly administration of criminal justice requires a federal court to forgo the exercise of its habeas corpus power.” *Id.* (quoting *Francis v. Henderson*, 425 U.S. 536 (1976)). But see *Nowaczyk v. Warden*, 299 F.3d 69, 81 (1st Cir. 2002) (explaining that the norm in civil actions, including habeas proceedings is that a district court must exercise its full statutory jurisdiction).

133. *C.f.* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 66 (1922). “The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence . . .” *Id.* Despite the tolling provision in the AEDPA, the limitations period is often difficult to overcome. Ward, *supra* note 5, at 28. The AEDPA limitations period is an insurmountable obstacle. *Id.*

134. *C.f.* Michael Ansaldi, *The German Llewellyn*, 58 *BROOK. L. REV.* 705 (1992). There is some irony that this procedural safeguard has become embroiled with so many requirements in order to even qualify for the opportunity to use the safeguard:

[T]he central problem of all law has to do with this still almost completely neglected descriptive science, with this “legal sociology,” this natural science of living law What we need to study, what we must know, is not how a legal rule reads, . . . but what

held to be an unalienable right¹³⁵ it seems hardly plausible that comity, finality and then fairness, would be the guiding values that inform our habeas jurisprudence.¹³⁶ And yet they are.¹³⁷ While there are important policy concerns on both sides of the argument, the values in the utility of administration must yield to the higher values of liberty and justice or else there is no future for the writ of habeas corpus.¹³⁸

A. *Time Tells: The Purpose of Habeas Corpus*

The purpose of habeas corpus is to allow a forum to address constitutional violations arising out of criminal trials.¹³⁹ State prisoners petition the federal court to hear the claims of illegal confinement arising out of a constitutional denial of rights.¹⁴⁰ Justice Brennan once described the writ as, “that most important writ to a free people, affording as it does a swift and imperative remedy in cases of illegal restraint or confinement.”¹⁴¹ This concept of vindicating constitutional rights is in conflict with a statute of limitations.¹⁴² A statute of

the legal rule *means*. Not in . . . the heaven of legal concepts, but in human experience.

What happens in life with it? What does a law mean to ordinary people?

Id. at 748-49 (emphasis added).

135. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) available at http://www.archives.gov/exhibit_hall/charters_of_freedom/declaration/declaration_transcription.html (Feb. 28, 2003) (holding “these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”). See also *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stating that concern about the injustice that results from the conviction of an innocent person is reflected in the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”).

136. *Withrow v. Williams*, 507 U.S. 680, 697-701 (1993) (O’Connor, J., concurring in part and dissenting in part). *But see*, Barry Friedman, *Failed Enterprise: The Supreme Court’s Habeas Reform*, 83 CAL. L. REV. 485, 491 (1995) (suggesting the listed habeas values of comity, finality and fairness are in the wrong order). Comity is the idea that “federal courts should respect the determinations of state courts regarding the adjudication of constitutional claims.” *Id.* at 489.

137. See *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 364 (2000)). The exhaustion requirement in federal habeas specifically furthers the values of comity, finality and federalism. *Id.* See also *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (explaining that 2244(b) as amended by the AEDPA is grounded in respect for the finality of criminal judgments; the AEDPA’s central concern is that “merits of concluded criminal proceedings not be revisited in absence of a strong showing of actual innocence”).

138. See *infra* IV. C.

139. See *Ex parte Watkins*, 28 U.S. 193, 202 (1830).

140. Brennan, *supra* note 2, at 4. See also *supra* note 23 and accompanying text.

141. Brennan, *supra* note 2, at 4.

142. See Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly*, 29 SETON HALL L. REV. 885, 886 (1999). “Limitations periods are by their very nature harsh because they cut off a person’s rights without regard to the merits of the claim.” *Id.*

limitations has as its goal, the extinguishment of substantive rights.¹⁴³

Justice Breyer noted the statutory purpose of the AEDPA is to encourage “prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.”¹⁴⁴ This is in direct contradiction to the role of the courts in the American legal system.¹⁴⁵ To encourage prompt filings is one thing; to prevent a federal claim because it is old, is quite another. The responsibility of the Supreme Court is to the Constitution of the United States and not to judicial economy.¹⁴⁶

The Constitution of the United States grants both procedural and substantive rights to individuals.¹⁴⁷ Additionally, the Constitution outlines a two-tier system of government split between the federal and state governments.¹⁴⁸ While the writ of habeas corpus is a procedural

143. See *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (citing *Duncan v. Walker*, 533 U.S. 167, 178 (2001)).

144. *Carey*, 536 U.S. at 226. Justice Breyer seems to be alluding to the idea that if a petitioner does not meet the state procedural requirements, the substantive merits of his claim are irrelevant even to the Supreme Court. *Id.*

145. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*. (J. P. Mayer ed., Harper & Row 1988) (1966). As Alexis de Tocqueville noted at a very early stage in United States history, “the Americans have given their judges the right to base their decisions on the *Constitution* rather than on the laws. In other words, they allow them not to apply laws which they consider unconstitutional.” *Id.* at 100-01 (emphasis added).

146. See *Chessman v. Teets*, 354 U.S. 156, 165 (1957). Justice Breyer’s statement is directly opposed to Justice Harlan’s understanding of the role of the Court:

[T]he overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal . . . has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.

Id.

147. See Brennan, *supra* note 2, at 4. Due process in criminal proceedings includes the rights to a public and speedy trial, to put on a defense and the assistance of counsel, the prohibition against undue coercion or force, no cruel or unusual punishment, the presumption of innocence and the burden on the prosecution to prove guilt of every element of a crime beyond a reasonable doubt. *Id.* The Due Process Clause of the Fourteenth Amendment provides redress for any of those violations. *Id.* Additionally, the writ of habeas corpus affords an opportunity for redress for these violations. The Fourteenth Amendment and the writ of habeas corpus are closely linked. In 1867, when Congress proposed the Fourteenth Amendment, the Congress also extended the writ of habeas corpus to state prisoners who have alleged violations of constitutional rights. *Id.* Those guarantees in the Constitution are “the higher law.” *Id.* See also *Living the Gospel of Life: A Challenge to American Catholics, A Statement by the Catholic Bishops of the United States* (June 30, 2003), available at <http://www.nccbuscc.org/prolife/gospel.htm> (noting that “[a]t the center of the moral vision of [the American] founding documents is the recognition of the rights of the human person”).

148. See Jack M. Beermann, 68 B.U.L. REV. 277, 335 (1988). The relationship between the federal and state court systems may be enhanced by “a dialogue between the two systems” which

device used to protect constitutional rights,¹⁴⁹ it is also a procedural device that must operate within both the state and federal judicial systems.¹⁵⁰ The relationship between state governments and the federal government and specifically, between the state courts and the federal courts, affect habeas jurisprudence.¹⁵¹ Federal habeas takes into consideration both federal and state rules and interests.¹⁵² States' interests in finality are protected through federal procedural rules, including the statute of limitations. However, the AEDPA statute of limitations, in essence, puts an unreasonable time frame upon the validity of constitutional claims.¹⁵³ Once the time limit is up, it is as if the claims are no longer valid.¹⁵⁴ This forces the federal courts to

allows them to engage in dialogue regarding the proper treatment of constitutional issues. *Id.* Both the state courts and the federal courts share in the enforcement of the Constitution. A state prisoner can seek habeas redress in both court systems; however, “[s]ince he seeks his release on a claim of unconstitutional denial of a right secured to him by the federal Constitution, the last word as to its merits is for federal and not state tribunals.” Brennan, *supra* note 2, at 5. This “suprastate procedure” provides an opportunity to vindicate “the guarantees which are the foundation of our free society.” *Id.* This is a powerful incentive for state courts to protect against federal constitutional violations in the first instance. *Id.*

149. See Hartman & Nyden, *supra* note 37, at 387. For instance, the Warren Court used the writ “as its enforcement arm for the provisions of the Bill of Rights.” *Id.*

150. Beerman, *supra* note 148, at 335. Habeas is an exception to the rule that relitigation is not allowed. *Id.* The exception exists because it contributes to the effective cooperation between federal and state governments regarding criminal justice. *Id.*

151. See 1995 Department of Justice Study, *supra* note 20, at 1. Habeas corpus issues “highlight the complex interrelationship between the State and Federal courts in a Federal system of government.” *Id.* Specifically, federal courts have the jurisdiction to review state court criminal proceedings and possibly overturn them because of possible violations of federal constitutional provisions, despite the resources the state court system has already devoted on both the trial and on subsequent considerations of reversible error. *Id.* When a prisoner petitions the federal courts for habeas review on the claims already litigated in state court, this is essentially a request for relitigation. Yackle, *American Bar*, *supra* note 23, at 172. This “availability of federal habeas corpus as a sequel to state criminal prosecution can be a source of friction between the two systems.” *Id.* For a discussion concerning the recent trend in the Supreme Court to favor states’ rights, see JOHN T. NOONAN, JR., NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

152. Judge Friendly lists the states’ interests as deterring criminal activities, preventing long delays that create evidentiary difficulties, preserving judicial resources and achieving finality of criminal convictions. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146-49 (1970).

153. Yackle, *American Bar*, *supra* note 23, at 181. A federal district court will not hear a prisoner’s constitutional claims in his habeas petition if the petition is not filed properly before the one-year statute of limitations has run out. *Id.*

154. See *id.* at 183 (finding the §2244 time limitation to “shut the federal courts’ doors” no matter who “comes knocking and whatever may be the nature or merits of the claims presented”). The 1990 ABA report on habeas corpus had recommended a one-year limitations period as “a substitute mechanism to move the case toward reasonably prompt completion, *but only with adequate and sufficient tolling provisions* to permit full and fair consideration of a petitioner’s claims.” *Id.* at 182 (emphasis added).

choose the value of finality over any constitutional obligations. It has been Congress' job to set the scope of habeas corpus, but as the AEDPA provisions illustrate, Congress has picked an unfairly arbitrary time limit.¹⁵⁵ If federal habeas is to continue to have a role as the "great writ of liberty" despite the AEDPA system, the Supreme Court must move away from formalities and back towards fairness.¹⁵⁶

Before the advent of the AEDPA, the Supreme Court dealt with the issue of time restrictions within habeas jurisprudence.¹⁵⁷ The only statutory time limitation upon filing federal habeas petitions was contained in Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts.¹⁵⁸ The Supreme Court interpreted the scope of Rule 9(a) shortly before the AEDPA was passed and specifically cautioned against any rule that would deprive a petitioner of "the protections of the Great Writ."¹⁵⁹

The original premise in federal habeas was equity which left no reason for "simple rigid rules."¹⁶⁰ It remains true that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."¹⁶¹ Indeed,

155. See *supra* note 74 and accompanying text. See also Vicki Jackson, *Congress and the Courts: Jurisdiction and Remedies: Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement and Hierarchy*, 86 GEO. L.J. 2445, 2446-2448 (1998) (stating one reason for the AEDPA and other legislation restricting the jurisdiction of the federal courts may be the conflict between Congress and the courts regarding the treatment of prisoners by the courts).

156. Duker, *supra* note 35, at 3.

157. E.g., *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *United States v. Smith*, 331 U.S. 469 (1947).

158. Pub. L. No. 94-426, 2(7), (8), 90 Stat. 1335 (1976) (current version at 28 U.S.C. app. § 2254, R. 9(a) (2000)). Rule 9(a) provides: "A petition may be dismissed if it appears that the state . . . has been prejudiced in its ability to respond to the petition by delay in its filing." *Id.*

159. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). *Lonchar* was decided on April 1, 1996. *Id.* The specific issue in that case was whether Rule 9(a) should be applied to a first habeas corpus petition. *Id.* at 316. The Court held that a first federal habeas petition should not be dismissed for reasons not encompassed within the framework of Rule 9(a). *Id.* at 322. Specifically, the Court stated, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324. The Court was aware of the statute of limitations provision in the habeas reform bills in Congress at the time and cautioned, "the interest in permitting federal habeas review of a first petition is quite strong," and "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 328-330.

160. JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.2 (3d ed. 1998).

161. *United States v. Sanders*, 373 US 1, 8 (1963). The understanding of habeas included a timelessness. *United States v. Smith*, 331 U.S. 469, 475 (1947). "[H]abeas corpus provides a remedy for jurisdictional and constitutional errors at the trial, without [the] limit of time." *Id.*

“swift justice demands more than just swiftness.”¹⁶² There is a fundamental difference between an ordinary right violation and a constitutional right violation.¹⁶³ The harshness of a time limitation is starkly illustrated in cases where a habeas petitioner is facing a long prison sentence or the death penalty.¹⁶⁴ Recent studies call into question the wisdom of instituting rigid rules within habeas when there is growing statistical evidence of wrongful convictions.¹⁶⁵ The Court’s decision in *Carey* allows a state petitioner more time to meet the AEDPA regulations; however the reasoning of the Court suffers from the same disdain for equity that the minority opinion makes explicit.¹⁶⁶

B. For Whom Does the AEDPA Toll?

The AEDPA’s tolling provision inserts some measure of equity into the statutory limitations period. Assuming the purpose of the writ is still to safeguard individual liberties,¹⁶⁷ the Supreme Court’s ruling in *Carey*

Statutes of limitation, however, are generally based on the notion of repose. *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993) (noting that the policy behind the statute of limitations is “to bar stale suits”).

162. *Henderson v. Bannan*, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting).

163. *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Justice Cardozo described constitutional rights as those “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Justice Powell explained that fundamental rights as those “deeply rooted in this Nation’s history.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

164. On average, there are nine years between being sentenced to death and exoneration. Death Penalty Info. Ctr., *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited April 5, 2004). The New York Times recently noted that of the 247 executions that happened in Texas between 1992 and 2002, nearly all were preceded “by an effort to obtain habeas corpus review in the federal courts.” *Greenhouse*, *supra* note 12, at A1. Note the article stated an “effort” to obtain habeas review and not that most petitioners actually received habeas review.

165. *See* RONALD C. HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 54 (1996). The national wrongful conviction rate is 0.5%. *Id.* *See also* EDWARD CONNORS, ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, available at <http://www.ilj.org/infotech/dnaevid.pdf> (June 1996) (looking at the forensic factors in 28 cases of wrongful convictions); Death Penalty Info. Ctr., *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (noting that between 1973 and 2002, 102 people on death row have been exonerated); *but see* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A., Fall 1998, at 1 (noting that from roughly the same time period, 1973 to 1998, there have been 5,879 death sentences and 481 executions).

166. *See infra* part IV. C.

167. *See Harris v. Nelson*, 394 U.S. 286, 290-291 (1991). In *Harris*, the Supreme Court recognized that “[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action” and therefore, the writ must be “administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.” *Id.* *See also* *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th

v. *Saffold*,¹⁶⁸ in so far as it finds time in which state prisoners have to file a federal habeas petition, is a victory for equity.

1. The Textual Argument

Both the majority and dissenting opinions in *Carey v. Saffold*¹⁶⁹ use a textual argument, but arrive at very different conclusions.¹⁷⁰ The disagreement is over which word from section 2244 (d)(2) should be interpreted. The majority chose to focus on the word “pending” and the dissent chose the word “application.” All things considered they are both correct as far as the meaning of the words go.¹⁷¹ The split in the Court arises from the source of the intratextual interpretation.¹⁷² The majority opinion uses section 2254 to explain that the statute of limitations can not be meant to conflict with the exhaustion requirement.¹⁷³ The dissent, on the other hand, cites specific usage of

Cir. 1991) (quoting *Harris*).

168. *Carey v. Saffold*, 536 U.S. 214 (2002).

169. *Id.*

170. Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433 (2001). “Textual analysis looks to the language used in the legal document under review, whether it is a constitution, a statute, a regulation, a contract, or a will.” *Id.* at 441. The starting point for understanding federal habeas is the text of the AEDPA and the specific provision at issue: “Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no further. The correspondence ascertained, his duty is to obey.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1921). However, if the language of the text is ambiguous, there must be more to the analysis. There are three methods of textual interpretation: the plain meaning rule, intratextual arguments and canons of construction. Huhn, *supra*, at 441-42. Each method “purports to achieve an objective definition of the words of the text.” *Id.* at 443. The intent of the lawgivers, precedent, policy and tradition are also valid sources of law. Huhn, *supra*, at 440. Precedent and policy are also relied on by both sides to support their holdings. *See infra*, section IV. B. 2.

171. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 104, 1669 (1993) (defining pending as “in continuance” and defining application as “something applied or used in applying”). However, in the dissent’s view, “pending” can only apply to a filed “application.” In the majority view, “pending” does not strictly require an application.

172. *See* Huhn, *supra* note 170, at 442. Intratextual arguments are a “powerful technique for interpreting statutes.” *Id.* at n.37. In this technique, one part of the document is used to give meaning to another part. *Id.* at 442. *E.g.*, *M’Culloch v. Maryland*, 17 U.S. 316, 414-15 (1819); *Dunnigan v. First Bank*, 585 A.2d 659, 663 (Conn. 1991).

173. *Carey v. Saffold*, 536 U.S. 214, 219-21 (2002). “[A]n application is pending as long as the ordinary state collateral review process is ‘in continuance’ In other words, until the application has achieved final resolution through the State’s post-conviction procedures, by definition it remains ‘pending.’” *Id.* at 220. *See also* 28 U.S.C. 2254 (b)(1) (stating “[a]n application for a writ of habeas corpus on 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”). Previously, in *Duncan v. Walker*, 533 U.S. 167 (2001), the Supreme Court held, as a matter of statutory interpretation and legislative purpose, that when

the word “application.”¹⁷⁴ For the majority, an application is pending until there is no possibility of further state review.¹⁷⁵ For the dissent, an application is only pending if a legal document has been filed and a state court is actively reviewing the claim.¹⁷⁶

2. The Policy Argument¹⁷⁷

The majority opinion acknowledges that a state petitioner must comply with both the one-year time limit and the exhaustion requirement.¹⁷⁸ Exhaustion requires the petitioner to “invoke[e] one complete round of the State’s established appellate review process.”¹⁷⁹

Congress used the phrase “State post-conviction or other collateral review” in the tolling provision of 28 U.S.C. § 2244 (d)(2), the word “State” was intended to modify the entire phrase “post-conviction or other collateral review.” *Id.* at 174. Therefore, a pending prior *federal* habeas petition did not toll the limitation period under AEDPA. *Id.* at 171-82.

174. *Carey*, 536 U.S. at 228-29 (Kennedy, J. dissenting). An “application” is a “document.” *Id.* (citing the legal meaning of “application” as derived from *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) and 28 U.S.C. §§ 2242-43). This type of reliance on the text of the statute is a trademark of Justice Scalia, who joined the dissenting opinion in this case. “For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often decisive, ingredient of his analysis. . . .” David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1389 (1999). Justice O’Connor, on the other hand, who joined the majority opinion in this case, draws a line at strict textual interpretation, “[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems” and instead suggests that the Court should “construe the statute to avoid such problems.” Huhn, *supra* note 170, at n.276 (quoting *Rust v. Sullivan*, 500 U.S. 173, 223 (1991) (O’Connor, J. dissenting)). A strict interpretation of “application” creates a constitutional problem by preventing a petitioner from complying with both the exhaustion requirement and the filing deadline in the AEDPA. The majority’s construction of the word “pending” alleviates that problem.

175. *Carey*, 536 U.S. at 219-20.

176. The intent of the lawmakers, in this case the legislature, is a principle method of interpretation. *See* Huhn, *supra* note 170, at 443. However, that is not relied upon heavily in this case. One reason could be the haphazard way the AEDPA legislation was pushed through Congress. *See supra* note 21 and accompanying text. Another reason could be that the AEDPA largely codified existing common law and so the Court need only look to precedent for support of the text. *See supra* note 76 and accompanying text.

177. *See* Huhn, *supra* note 170, at 446-49. In the policy analysis, the court first “predicts the consequences that will flow from giving the law one interpretation or another” and then chooses and evaluates the consequences to determine which is consistent with “the underlying values of the law.” *Id.* at 449.

178. *Carey*, 536 U.S. at 219-20. “A federal habeas petitioner must exhaust state remedies before he can obtain federal habeas relief.” *Id.* *See also* *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999) (holding that the time must be tolled until all of the state remedies were exhausted). Before the AEDPA, *Rose v. Lundy*, 455 U.S. 509 (1982), articulated the common-law rule of exhaustion. *See supra* note 71 and accompanying text.

179. *Carey*, 536 U.S. at 220 (quoting *O’Sullivan v. Boerckerl*, 526 U.S. 838, 845 (1999)). Exhaustion is “[a] dialogue between the two systems.” Beerman, *supra* note 148, at 335. *See also Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990), where the court explains that exhaustion is

By incorporating the entire state appellate review process into the tolling provision, the Court allows the state petitioner to meet the requirements of exhaustion first and then deal with the limitation period.¹⁸⁰ A federal district court can not hear a state petition prior to exhaustion under section 2254.¹⁸¹ This intra-textual interpretation allows the state petitioner to comply with both requirements separately.¹⁸²

The dissent's intra-textual interpretation relies on the letter of the law. The dissent ignores the inherent conflict between the statute of limitations and exhaustion.¹⁸³ Instead, they focus on the word "application" as it pertains to an actual document.¹⁸⁴ The dissent opines that California habeas law further supports this definition because the original petition in the trial court has no proximate connection to the new

satisfied when the highest court in the state in which the petitioner was convicted has been given the opportunity to make a decision on the petitioner's claims. *Id.* at 881. Further, "[t]he fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion." *Id.* at 883. Exhaustion applies even if a claim was procedurally defaulted in state court, because in such cases there are no longer remedies available for the petitioner to exhaust. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982).

180. *Carey*, 536 U.S. at 219-21. If the one-year deadline was running during the state appellate process and the time limit was up before the appellate process was concluded, then a state petitioner would be forced to file a federal habeas petition to meet the deadline and yet, the district court could not hear it because exhaustion has not been met. *See id.* It would put the federal courts in an awkward position of having "to contend with habeas petitions that are in once sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the one-year statute of limitations)." *Id.* *C.f. Cowans v. Artuz*, 14 F. Supp. 2d 503 (S.D.N.Y. 1998) (finding the statute of limitations cannot be circumvented by filing a habeas petition containing only unexhausted claims, and then by having that petition held in suspense until petitioner exhausts state remedies). *But see* 28 U.S.C. § 2254 (b) (2) (stating a habeas petition may be denied on the merits in federal court, "notwithstanding the failure of the applicant to exhaust the remedies available" in state courts).

181. 28 U.S.C. § 2254. The AEDPA clearly defines the exhaustion requirement: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). However, § 2254(b)(2) allows a federal court to deny relief on the merits despite the failure of a prisoner to exhaust state remedies.

182. The Ninth Circuit's main reason in deciding the tolling rule, which the Supreme Court adopted in *Carey*, affected exhaustion. *Nino v. Galaza*, 183 F.3d 1003, 1104 (9th Cir. 1999) (considering the time tolled for exhaustion of state remedies pursuant to 28 U.S.C.S. § 2244(d) included the interval between the disposition of an appeal or post-conviction petition and the filing of an appeal or successive petition at the next state appellate level and determining that for purposes of 28 U.S.C.S. § 2244(d), the time must be tolled for the entire period in which a petitioner was appropriately pursuing and exhausting his state remedies).

183. *See Tushnet, supra* note 75, at 6, 29.

184. *Carey*, 536 U.S. at 229 (Kennedy, J., dissenting). "The word, 'application,' appears in numerous other places in the laws governing federal habeas corpus." *Id.* "Application" cannot support the meaning that the majority seeks to give it. *Id.*

petition that is required to start a proceeding in an appellate court.¹⁸⁵ The dissent is concerned that the majority's rule will require federal courts to unnecessarily define the "ordinary collateral review process" of each state.¹⁸⁶ It would have been "easier" to apply the clear words of the statute to the "clear law in California."¹⁸⁷

185. *Id.* "When a prisoner files an appeal, the original application remains pending in the lower court, but when a prisoner files an original writ, there is no application pending in any lower court." *Id.* at 231. See also *People v. Romero*, 883 P.2d 388, 391 (Cal. 1994).

186. *Carey*, 536 U.S. at 233.

187. *Id.* at 237. However, it seems that California law is not always clear. There seems to be no uniform time limit that triggers the label of a petition that was "unreasonably delayed" in California. See *In re Sanders*, 981 P.2d 1038, 1056 (Cal. 1999) (finding a three year delay between the denial of certiorari by the United States Supreme Court and the filing of a state habeas motion excused because of attorney error); *In re Robbins*, 959 P.2d 311, 317 (Cal. 1998) (finding petitioners claims were not time barred due to the demonstration of good cause for the delay); *In re Harris*, 855 P.2d 391 (Cal. 1993) (finding no delay in petitioner's collateral attack on his sentence due to his status as a juvenile even though it was not brought up on direct appeal); *In re Clark*, 855 P.2d 729, 762 (Cal. 1993) (denying a subsequent habeas petition filed six years after the conviction was final, but only two years after the new habeas rules were adopted because no cause for delay was shown); *In re Stankewitz*, 708 P.2d 1260, 1262 (Cal. 1985) (granting a habeas petition containing allegations of jury misconduct despite a year delay in filing); *In re Moss*, 221 Cal. Rptr. 645 (Cal. Ct. App. 1985) (finding a nine month delay in filing a habeas petition was not time barred because petitioner could not obtain counsel); *In re Spears*, 204 Cal. Rptr. 333 (Cal. Ct. App. 1984) (finding an eighteen month delay excused); *In re Saunders*, 472 P.2d 921 (Cal. 1970) (allowing a petition because the lack of competent counsel caused the delay); *In re Mitchell*, 437 P.2d 289, 292 (Cal. 1968) (finding petitioner's ignorance of the law sufficient to overcome a timeliness bar due to a four year delay); *In re James*, 240 P.2d 596, 600-601 (Cal. 1952) (holding the state habeas claim was not "unreasonably delayed" despite the passage of some time). But see *In re Tsaturyan*, 2002 WL 1614107 (Cal. 2002); *People v. Miller*, 8 Cal. Rptr. 2d 193, 198-199 (Cal. Ct. App. 1992) (finding a ten year delay between the conviction and the habeas petition was untimely); *In re Wells*, 434 P.2d 613, 615 (Cal. 1967) (finding a habeas claim as to a first conviction while serving time for a second conviction is time barred); *In re Hancock*, 136 Cal. Rptr. 901, 903 (Cal. Ct. App. 1977) (holding the state habeas claim was "unreasonably delayed"). Additionally, the supposed "clear" words of the AEDPA's statute of limitations and tolling provisions have created a lot of litigation. *E.g.*, *Brooks v. Walls*, 279 F.3d 518, 521 (7th Cir. 2002) (finding that even if a state court referred to the merits of an untimely petition, it does not mean the petition is considered timely and therefore "properly filed" for the purposes of the AEDPA); *Brown v. Roe*, 279 F.3d 742, 746 (9th Cir. 2002) (reversing a magistrate's decision because it failed to consider an equitable tolling claim under the AEDPA); *Johnson v. United States*, 246 F.3d 655, 657-58 (6th Cir. 2001) (Although the AEDPA, does not expressly define when a conviction becomes final, the appellate court presumes Congress to have been aware that, for purposes of a collateral attack, a conviction becomes final at the conclusion of direct review and direct review for a federal prisoner who files a petition for certiorari with the Supreme Court concludes when the court either denies the petition or decides the case on the merits); *Valentine v. Francis*, 270 F.3d 1032, 1034-35 (6th Cir. 2001) (holding that a state petition for post-conviction or other collateral review that does not address one or more of the grounds of the federal habeas petition in question is not a review with respect to the pertinent judgment or claim within the meaning of § 2244(d)(2), and therefore does not toll the AEDPA one-year statute of limitations); *Bronaugh v. Ohio*, 235 F.3d 280, 286 (6th Cir. 2000) (finding the one-year statute of limitations does not begin to run until the time for filing a petition for a writ of certiorari for direct review in the United States Supreme Court has expired).

3. It Tolls for Saffold

Eugene Saffold is entitled to statutory tolling under the AEDPA provision.¹⁸⁸ The Ninth Circuit made a critical distinction between the time that had elapsed between Saffold's original conviction and his first filing of a habeas petition and the time between the denial by the appellate court and his subsequent filing in the California Supreme Court.¹⁸⁹ On remand, it was decided that since the California court did not deny Saffold's petition as untimely, his petition is considered "properly filed" for the purposes of the federal tolling provision and so he qualified for statutory tolling under § 2244(d)(2).¹⁹⁰

The key to the Ninth Circuit's decision was the procedural decision that the California Supreme Court made.¹⁹¹ In order for the AEDPA to toll, it is now very important to know on what grounds the state court denied the state petition.¹⁹² Any state petition found to be untimely under the state procedural rules will not qualify as "properly filed" (addressing the dissent's concerns) under the AEDPA and so the issue of tolling is foreclosed.¹⁹³ The federal courts look to state procedural rules

188. Saffold v. Carey, 312 F.3d 1031 (9th Cir. 2002); see *supra* note 121 and accompanying text.

189. Saffold, 312 F.3d at 1034-35 (distinguishing *In re Sampson*, No. S066428, 1998 Cal. LEXIS 3404 (May 27, 1998) (a nine-month delay); *In re Davis*, No. S067677, 1998 Cal. LEXIS 3484 (May 27, 1998) (18-month delay); *In re Villegas*, No. S065899, 1998 Cal. LEXIS 3202 (May 20, 1998) (seven-month delay)); see also *Romero v. Roe*, 130 F. Supp. 2d 1148, 1149 (C.D. Cal. 2001) (15-month delay).

190. See *supra* note 70 and accompanying text.

191. The California Supreme Court denied Saffold's state habeas petition without an opinion, stating only that the petition was denied, "on the merits and for lack of diligence." *In re Saffold*, 1998 Cal. LEXIS 3379, *1 (Cal. May 27, 1998).

192. See, e.g., *Brooks v. Walls*, 301 F.3d 839, 842-43 (7th Cir. 2002). There is however, some indication that individual district courts have not all reached the same decision. See *Varnado v. Cain*, No. 02-1286, 2003 U.S. Dist. LEXIS 3351, *30 (E.D. La. Mar. 5, 2003) (noting that *Carey* may have left open some possibility that a court will address the merits of a claim despite its untimeliness).

193. See *Artuz v. Bennett*, 531 U.S. 4, 10-11 (2000), *aff'g* 199 F.3d 116 (2d Cir. 1999). In *Artuz*, a New York trial court orally denied respondent's 1995 motion to vacate his state conviction and then, the federal district court dismissed respondent's federal habeas petition as untimely, noting that it was filed more than one year after the effective date of the AEDPA. *Artuz*, 531 U.S. at 6. In reversing and remanding, the Second Circuit concluded that 28 U.S.C. § 2244(d)(2), which tolls the time that a "properly filed" application for state post-conviction relief is pending, also tolls the one-year grace period which the Second Circuit has allowed for the filing of applications challenging pre-AEDPA convictions; that, in the absence of a written order, respondent's 1995 motion was still pending under § 2244(d)(2); and that the 1995 motion was properly filed because it complied with rules governing whether an application for state post-conviction relief is "recognized as such" under state law. It thus rejected petitioner's contention that the 1995 application was not properly filed because the claims it contained were procedurally barred under New York law. *Id.* at 7. The Supreme Court affirmed the Second Circuit and held that an application for state post-

to determine whether the petition was “properly filed” and therefore “pending” for the purposes of the AEDPA.¹⁹⁴ Whether that same petition qualifies for federal tolling is a separate inquiry.¹⁹⁵ However, the federal courts must look to the state procedural decisions or make state procedural decisions in order to determine federal statutory tolling.¹⁹⁶ All the while, the merits of the petition are never addressed.¹⁹⁷

C. Fairness

The norm in federal habeas cases is that the petitions contain a procedural flaw.¹⁹⁸ While the rule in *Carey* may have allowed for more time to file a federal habeas claim, this does not mean petitioners always meet the tolling qualifications or time limit.¹⁹⁹ Despite the reality that

conviction relief is “properly filed” under 28 U.S.C. § 2244(d)(2) so long as its delivery to and acceptance by the court complies with the applicable rules governing such filings under state law. *Id.* That the application allegedly contains claims that are procedurally barred from review on the merits does not bear on whether the application was “properly filed,” but instead speaks only to whether relief is appropriate. *Id.* The question whether an application has been “properly filed” is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar. *Id.* at 9-10. Therefore, a “properly filed” and pending application for state post-conviction relief, even if it contains procedurally barred claims, is sufficient to toll the AEDPA’s one-year grace period for filing applications challenging pre-AEDPA convictions. *Id.* at 6-11. *See also* Pratt v. Greiner, 306 F.3d 1190, 1195-96 (2d Cir. 2002) (defining “properly filed”).

194. *See* Phillips v. Vaughn, No. 02-2109, 2003 U.S. App. LEXIS 1652, *5-6 (3d Cir. Jan. 29, 2003). The Third Circuit has definitively followed *Carey*. “*Carey* made [it] quite clear that to be deemed ‘properly filed,’ an application for collateral review in state court must satisfy the state’s timeliness requirements.” *Id.* at *5. The Third Circuit declared that *Carey* overruled the prior case of *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001). *Id.* at *4-5. In *Nara*, the Third Circuit, following *Artuz*, took a broad interpretation of what is “properly filed” under Pennsylvania law. 264 F.3d at 316. Initially, at least one district court read *Nara* and *Carey* as being potentially compatible by reading *Carey* as narrowly applying only to the California system. *Satterfield v. Johnson*, 218 F. Supp. 2d 715, 722 (E.D. Pa. 2002). Specifically the district court noted *Carey*’s lack of reference to *Artuz*, and so declined to decide whether *Carey* overruled *Nara* since *Carey* did not rely on *Artuz* as *Nara* did. *Id.* at 722 n.8. The subsequent decision in *Phillips*, however, has decided that question in the Third Circuit. *Phillips v. Vaughn*, No. 02-2109, 2003 U.S. App. LEXIS 1652 (3d Cir. Jan. 29, 2003).

195. *See supra* notes 192-193 and accompanying text.

196. *Carey v. Saffold*, 536 U.S. 214 (2002).

197. *See Saffold v. Carey*, 312 F.3d 1031 (9th Cir. 2002) (deeming *Carey*’s habeas petition as timely filed). The merits of *Carey*’s habeas petition have yet to be addressed. *Id.* at 1036 (remanding the case for a decision on the merits).

198. *Nowaczyk v. Warden*, 299 F.3d 69, 71 (1st Cir. 2002). *See also* *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (holding states are not required to provide counsel in habeas proceedings, not even for death row inmates). Ninety-three percent of prisoners were acting pro se in their habeas cases in 1995. 1995 Department of Justice Study, *supra* note 20, at 14.

199. *E.g.*, *Bridges v. Johnson*, 284 F.3d 1201, 1204 (11th Cir. 2002) (finding that an application for sentence review did not affect a defendant’s post-conviction remedies and thus did not toll the AEDPA one-year limitations period, and so the district court properly found that prisoner’s 28 U.S.C.S. § 2254 petition was time-barred and further, that sentence review did not

few petitioners will actually obtain federal review of the merits of their claims because of this rule, the statute of limitations has not been deemed unconstitutional.²⁰⁰ For pro se petitioners, the time limitation is even more daunting.²⁰¹ Curiously, there seems to be some support for the idea that the AEDPA was intended to incorporate notions of fairness.²⁰² There is a need to find equitable alternatives for prisoners to have a forum to present their case.²⁰³

qualify under the AEDPA as state post-conviction or other collateral review because it was not an attack on the constitutionality or legal correctness of a sentence or judgment); *Malcom v. Payne*, 281 F.3d 951 (9th Cir. 2002) (finding a clemency petition does not toll the AEDPA clock and the decision to make such a filing, in place of a federal habeas petition does not warrant equitable tolling); *Abela v. Martin*, 309 F.3d 338 (6th Cir. 2002), *reh'g en banc granted*, 318 F.3d 1155 (6th Cir. 2003) (finding the period in which the United States Supreme Court considers a petition for certiorari following the state collateral review process is not part of the actual state collateral review process as required by 28 U.S.C. § 2244(d)(2) and hence, not eligible for tolling of the one-year statute of limitations period in 28 U.S.C.S. § 2244(d)(1)). *See also supra* note 133 and accompanying text.

200. *See Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 113 (2d Cir. 2000); *Hyatt v. United States*, 207 F.3d 831, 832 (6th Cir. 2000); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1217 (11th Cir. 2000); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) (per curiam); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). *But see Sessions, supra* note 10 (arguing that the AEDPA's statute of limitations violates the Constitution).

201. *See Roscoe C. Howard, Jr., The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 914 (1996) (noting that Congress cut the funding for the program that provided attorneys for prisoners wishing to pursue post-conviction remedies); *Graham Hughes, Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-1988) (arguing that procedural default is overbroad, empirically unsupported, and punishes defendants instead of counsel); *Lurana S. Snow, Prisoners in the Federal Courts*, 9 ST. THOMAS L. REV. 295, 296 (1997) (noting that many prisoners file habeas petitions pro se); *Ronald J. Tabak, Commentary, Capital Punishment: Is There Any Habeas Left in this Corpus?*, 27 LOY. U. CHI. L.J. 523, 539 (1996) (noting the time limit will be hard for attorneys to meet).

202. *See Jake Sussman, Note, Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 24 N.Y.U. REV. L. & SOC. CHANGE 343, 359 n.74 (listing lawmakers' intent to achieve a fair result). *See, e.g., Orrin Hatch, Tighter Rules Were Needed*, USA TODAY, Jan. 20, 2000, at 16A ("Congress' reforms carefully preserve the most important function of habeas corpus, to guarantee that innocent persons will not be illegally imprisoned or executed, and explicitly permit repeated petitions that clearly and convincingly present new evidence of innocence."); 142 CONG. REC. S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Warner) (discussing Sen. Conf. Rep. on S. 735, Antiterrorism and Effective Death Penalty Act of 1996) ("I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have been violated, defendants retain very reasonable access to Federal courts to prove their innocence.").

203. *See Molly McDonough, Balance of Power: Prosecutors Challenge Historic Commutation of 171 Death Sentences*, ABA JOURNAL E-REPORT 1 (Jan. 17, 2003), at <http://www.abanet.org/journal/ereport/j17challenge.html>. The Governor of Illinois chose his own alternative to the entire problem of unconstitutional convictions by commuting 171 death sentences. *Id.* This option does not seem to be the appropriate middle ground though, because Cook County State's Attorney Richard A. Devine filed a petition, asserting Gov. Ryan "overstepped his authority in 10 of those

Equitable tolling is one way to insert equity into the AEDPA statute of limitations. The doctrine of equitable tolling stops a statute of limitation from expiring when justice requires.²⁰⁴ In other words, equitable tolling allows a court to hear an action when literal application of a statute of limitation would be inequitable.²⁰⁵ Several circuits have approached this issue already and found that the AEDPA allows for equitable tolling.²⁰⁶ To qualify for equitable tolling, a petitioner must make an additional showing of some sort of exceptional circumstance.²⁰⁷ The mistakes or miscalculations by an inmate's counsel do not usually qualify the client for equitable tolling.²⁰⁸

cases where defendants were awaiting resentencing." *Id.* "Devine contends that there was no final sentence in those cases and therefore there was no way for Ryan to commute a sentence of death to life imprisonment." *Id.* "Prosecutors are also considering reviving murder charges against defendants suspected in multiple slayings," where some charges "were dropped after the defendants were [originally] sentenced to death in the first cases to go to trial." *Id.* This is arguably a breach of the governor's power to commute sentences. *See id.* The counter argument, however, is that the entire system is unreliable. *See id.*

204. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994).

205. *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999). The second inquiry into many cases that are found to fall outside of the AEDPA's one-year statute of limitations is often whether the petitioner qualifies for equitable tolling. *See, e.g., Phillips v. Vaughn*, No. 02-2109, 2003 U.S. App. LEXIS 1652 (3d Cir. Jan. 29, 2003) (addressing first statutory tolling and then equitable tolling).

206. *Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir. 2002); *Griffin v. Rogers*, 308 F.3d 647 (6th Cir. 2002); *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *White v. Curtis*, No. 01-1493, 2002 U.S. Cir. WL 1752272, at *3 (6th Cir. July 26, 2002); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000) (finding that in theory, the AEDPA's limitation period was subject to equitable tolling); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (stating that the limitation period for filing habeas petitions may be equitably tolled in extraordinary circumstances); *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000); *Whalem/Hunt v. Early*, 204 F.3d 907, 909 (9th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (holding that the AEDPA's limitation period can be tolled for exceptional circumstances); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (finding that as a limitation, § 2244 may be subject to tolling because it is not jurisdictional); *Miller v. N.J. Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (holding that the limitations period could be equitably tolled in extraordinary circumstances); *Thurman v. Lavigne*, No. Civ. 01-CV-72312-DT, 2002 U.S. Dist. WL 31245262, at *2 (E.D. Mich. Sept. 30, 2002); *but see Miranda v. Castro*, 292 F.3d 1063, 1066-67 (9th Cir. 2002); *Testa v. Bissonnette*, No. CIV.A.01-11609-DPW, 2002 U.S. Dist. WL 31194869 (D. Mass. Sept. 27, 2002).

207. *See, e.g., Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (permitting equitable tolling when petitioner can show exceptional circumstances that are beyond his control and unavoidable with diligence); *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (allowing equitable tolling in three circumstances, if the petitioner was actively misled by the defendant, if there was an extraordinary barrier to petitioner asserting his rights, or if petitioner timely asserted his rights unwittingly in the wrong forum).

208. *E.g., Smaldone v. Senkowski*, 273 F.3d 133, 138-39 (2d Cir. 2001) (holding that the attorney's error in reading the AEDPA's statute of limitations provision did not qualify for equitable tolling); *Harris*, 209 F.3d at 330-31 (holding that the attorney's innocent misreading of the limitation period did not qualify for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 597-98 (7th

Another option for equity is an actual innocence exception.²⁰⁹ This exception is consistent with the writ's purpose to safeguard liberty.²¹⁰ There are many ways an actual innocence exception can be construed.²¹¹ The courts have dealt with this issue in a limited context.²¹²

V. CONCLUSION

Finding time in federal habeas corpus, the Supreme Court has interpreted the tolling provisions of the AEDPA to include the time between the rejection of a state petition and the filing of a new one in a higher court.²¹³ The debate over the extent of the use of the writ is ongoing and will continue for years to come.²¹⁴ The purpose of the writ of habeas corpus must always remain in the forefront of conversations about re-structuring the writ and procedural ramifications.²¹⁵ It is the role of the courts to safeguard individual liberties by interpreting the AEDPA in ways that allow prisoners access to the writ. This will ensure fairness. Other considerations of comity and finality should be second to fairness. The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized.²¹⁶ It is easy in a time of grief to

Cir. 1999) (holding that attorney's mistake in calculating the statute of limitations period did not qualify for equitable tolling).

209. See LIEBMAN & HERTZ, *supra* note 160, at § 2.5 (noting that actual innocence was almost a qualification for awarding habeas relief); Steiker, *supra* note 49, at 315 (noting that actual innocence was always a reason to overlook procedural obstacles to prevent continued incarceration or execution).

210. United States v. Quinones, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002). The Court reasoned that:

Just as there is typically no statute of limitations for first-degree murder – for the obvious reason that it would be intolerable to let a cold-blooded murderer escape justice through the mere passage of time – so too one may ask whether it is tolerable to put a time limit on when someone wrongly convicted of murder must prove his innocence or face extinction.

Id.

211. For instance, under Justice Friendly's regime, a requirement of a minimum showing of innocence would "enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done." Friendly, *supra* note 152, at 150. However, this would narrow the scope of the writ because Friendly's particular version would only extend habeas corpus to people who were probably innocent. See *id.* at 172. See also Sussman, *supra* note 202, at 349-50.

212. E.g., Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (noting that the statute of limitation is subject to equitable tolling when a prisoner is actually innocent); O'Neal v. Lampert, 199 F. Supp. 2d 1064, 1067 (D. Or. 2002) (holding the same); *but see* Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002).

213. Carey v. Saffold, 536 U.S. 214 (2002).

214. See *supra* note 16 and accompanying text.

215. *Id.*

216. Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfurter, J., dissenting); *Ex Parte Yerger*,

forsake certain liberties for the sake of security, but those same liberties may then be lost forever.²¹⁷ It is not an understatement to say that the unavailability of the writ in totalitarian societies is a clue to the importance of the writ in our democratic society.²¹⁸ The Supreme Court must find the moral leadership required to pursue justice despite the fear inspired by terror.²¹⁹ If justice does not prevail in the form of federal habeas corpus review, it will be as Alexis de Tocqueville predicted:

If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten, we may apply the methods derived from them badly; we might be left without the capacity to invent new methods, and only able to make a clumsy and an unintelligent use of wise procedures no longer understood.²²⁰

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75 U.S. 85, 95 (1868) (noting the writ “has been for centuries esteemed the best and only sufficient defense of personal freedom”).

217. See Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 *HAMLIN J. PUB. L. & POL'Y* 455, 459 (2002) (exploring the ramifications of the Patriot Act); see, e.g., *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

218. See *Brown*, 344 U.S. at 518.

219. See *supra* note 21 and accompanying text; see generally Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 *SETON HALL LEGIS. J.* 201, 201-206 (1996) (listing terrorist activities that inspired the bill that became the AEDPA).

220. DE TOCQUEVILLE, *supra* note 145, at 464.