THE POLITICS OF FEAR AND DEATH: SUCCESSIVE PROBLEMS IN CAPITAL FEDERAL HABEAS CORPUS CASES

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The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted by Congress in 1996 in the wake of the Oklahoma City bombing, curtailed habeas corpus review in numerous respects, including establishing severe restrictions on prisoners' ability to file successive federal habeas corpus petitions. In this Article, Professor Bryan Stevenson examines the origins, nature, and effects of these expanded restrictions on successive filings. In reviewing the history of the legal system's treatment of successive petitions, Stevenson demonstrates that the Supreme Court's and Congress's choices in this area were shaped not only by doctrinal considerations but also political variables and unexamined assumptions about prisoners and their lawyers. Stevenson uses actual examples to illustrate the apparently unintended consequences of AEDPA's successive petition provisions, including the foreclosure of certain types of constitutional claims and the injection of numerous procedural complexities that undermine reliability and fairness. The Article identifies a variety of potential remedies, including congressional reform, liberal judicial interpretation of the statute's provisions, expanded use of the Supreme Court's original habeas corpus jurisdiction, and alternative procedural devices like Federal Rule of Civil Procedure 60(b) and expanded successive state postconviction review. Stevenson concludes that these devices are a necessary part of a much larger process of rethinking America's flawed capital punishment system.

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INTRODUCTION

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996[1] was drafted, enacted, and signed in an atmosphere of anger and fear. The legislation, which includes substantial cutbacks in the federal habeas corpus remedy, was Congress's response to the tragedy of the Oklahoma City bombing. During the congressional hearings on the bills that culminated in AEDPA, the proponents of the legislation claimed that its habeas corpus restrictions and other provisions were necessary to fight domestic terrorism.[2] The Senate bill was approved by the House on April 18, 1996,[3] the day before the one-year anniversary of the Oklahoma City bombing.[4] President Bill Clinton invoked the bombing in a statement he issued at the time of the Senate's passage of the legislation[5] and again when he signed the legislation into law.[6]

Even at the time of the debates, some courageous legislators were willing to denounce the fallacious connection that the bill's proponents drew between the bombing and the broader issues of the scope

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.).

[2] See, e.g., 141 Cong. Rec. 15,095 (1995) (statement of Sen. Dole) ("The most critical element of this bill, and the one that bears most directly on the tragic events in Oklahoma City, is the provision reforming the so-called habeas corpus rules."); Hearing on Terrorism Before the Senate Comm. on the Judiciary, 104th Cong. (1995) (statement of Sen. Specter, Member, Sen. Comm. on the Judiciary), at 1995 WL 247423 (F.D.C.H.) ("I am committed, as I believe is every Senator on this Committee and in this body, to taking any and every step necessary to assure that there is never another devastation like Oklahoma City.").

[3] 142 Cong. Rec. 7973 (1996). The bill passed by a vote of 293 to 133. Id.

[4] The members of the House were, of course, quite aware of the symbolic timing of their action. As one member of the House said at the time of passage,

> Mr. Speaker, tomorrow this country will pause in sorrowful remembrance as we observe the 1-year anniversary of the tragic bombing of the Murrah Federal Building in Oklahoma City. This incident shook the fabric of our Nation and illustrated the threat posed to us all by terrorism. Oklahoma City is the driving force behind the renewed push for anti-terrorism legislation.

Id. at 7968-69 (statement of Rep. Pelosi).

[5] Statement on Senate Passage of Antiterrorism Legislation, 1 Pub. Papers 830 (June 7, 1995) ("I am gratified that the Senate has passed a sweeping, bipartisan antiterrorism bill, as I called for in the wake of the bombing in Oklahoma City. This legislation will give law enforcement the tools it needs to do everything possible to prevent this kind of tragedy from happening again.").

[6] Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630 (April 24, 1996), available at 1996 WL 203049 (White House, April 24, 1996) ("After the tragedy in Oklahoma City, I asked Federal law enforcement agencies to reassess their needs and determine which tools would help them meet the new challenge of domestic terrorism. . . . I am pleased that the Congress included most of . . . [the agencies'] proposals in this legislation.").

and availability of habeas corpus review.[7] Many of the habeas corpus restrictions ultimately built into AEDPA had been under consideration by Congress since 1990,[8] though none had been adopted.[9] The congressional proponents of these restrictions seized upon the Oklahoma City tragedy as a means of accomplishing their longstanding goal to scale back federal habeas corpus review.[10]

AEDPA has dramatically altered federal habeas corpus practice in a number of respects. The Act establishes a statute of limitations for habeas petitions the first time;[11] revises the procedures for treatment of unexhausted claims in various ways that benefit the state and

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[7] E.g., 142 Cong. Rec. 7972 (1996) (statement of Rep. Young) ("I strongly feel this legislation is a knee-jerk reaction to a most heinous crime. This body has passed enough legislation in previous years to catch and punish criminals who commit these atrocious acts against humanity."); id. at 7965 (statement of Rep. Berman) ("Shame on those who invoke the names of innocents slaughtered in Oklahoma City . . . in their quest to effectively abolish the writ of habeas corpus.").

Legislators such as Representatives Young and Berman, who predicted the irrelevance of the legislation to prosecutions stemming from the Oklahoma City bombing, certainly were proven correct in the case of the lead defendant, Timothy McVeigh, who abandoned his appeals (and any federal habeas corpus review). See Steven K. Paulson, Judge Allows McVeigh to Drop Appeals; Convicted Bomber Has Until Jan. 11 to Change Mind, Wash. Post, Dec. 29, 2000, at A20 (reporting that McVeigh knew his rights and understood consequences of his request to drop all further appeals); Lois Romano, McVeigh Halts Appeals; U.S. Court Rejects Delay; Bomber to Die Monday, Wash. Post, June 8, 2001, at A1 (reporting that McVeigh also halted new round of legal actions spawned by FBI's last-minute revelation of numerous documents withheld from defense team). The cases of the other individuals charged with the Oklahoma City bombing similarly have not fit the Antiterrorism and Effective Death Penalty Act (AEDPA) proponents' prototypical scenario of endless appeals and federal habeas corpus proceedings. See 141 Cong. Rec. 15,095 (1995) (statement of Sen. Dole) (noting that "these landmark reforms will go a long, long way to streamline the lengthy appeals process" and claiming that "[i]t is dead wrong that we must wait 8, or 9, or even 10 years before a capital punishment is carried out"). Terry Nichols was convicted of lesser charges of manslaughter and sentenced to life in prison, although he still faces a possible capital-murder prosecution in state court in Oklahoma; Michael Fortier, who was convicted of charges stemming from his failure to notify authorities of the conspiracy, was sentenced to twelve years in prison. Lois Romano, McVeigh Is Executed; Bomber Is 1st Federal Prisoner Put to Death Since 1963, Wash. Post, June 12, 2001, at A1.

[8] See infra notes 118-121 and accompanying text.

[9] See infra note 121 and accompanying text.

[10] AEDPA's opponents made this point during the congressional debates. See, e.g., 142 Cong. Rec. 7965 (1996) (statement of Rep. Berman) ("A decision was made by the Republican majority to jam into this bill, in the name of fighting terrorism, their long-sought objective of—for all intents and purposes—abolishing the ancient writ of habeas corpus."). For discussion of the measures that were under consideration before the Oklahoma City tragedy, see infra notes 118-121.

[11] See 28 U.S.C. § 2244(d)(1) (Supp. V 2000) (providing one-year statute of limitations for filing petition in cases not governed by AEDPA's "opt-in" provisions); 28 U.S.C. § 2263 (Supp. V 2000) (granting 180-day statute of limitations for states that have qualified for AEDPA's "opt-in" provisions for capital cases).

disfavor the petitioner;[12] creates a new, additional hurdle for petitioners seeking appellate review of a federal district court's denial or dismissal of a petition;[13] significantly curtails the opportunities for federal habeas corpus petitioners to file a second or "successive" petition in cases in which a claim could not be filed or fully adjudicated at the time of the first petition;[14] and, in what appeared to be the most profound change, alters the standard of habeas corpus review in ways that appeared to call for greater deference to state court rulings on legal issues and mixed questions of fact and law.[15]

Although the Supreme Court thus far has shown a willingness to interpret AEDPA's provisions narrowly so as to preserve preexisting protections and safeguard the availability of federal habeas corpus review,[16] there are several open and hotly debated issues that remain

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12 See § 2254(b)(2) (changing preexisting practice by authorizing federal court to respond to failure to exhaust state remedies by denying claim on merits instead of dismissing without prejudice); id. § 2254(b)(3) (changing preexisting practice by limiting judicial findings of waiver to cases in which state expressly waives defense).

13 See § 2253(c)(3) (changing preexisting practice by requiring that petitioner establish right to appeal for each appellate claim rather than case as whole).

14 The changes that AEDPA effected in the rules for successive petitions are described in detail infra Part II.A.

15 See § 2254(d)(1) (limiting federal habeas corpus relief to cases in which state court's adjudication of claim either was "contrary to, or involved an unreasonable application of, clearly established . . . [Supreme Court] law"). The Court held in Williams v. Taylor, 529 U.S. 362 (2000), that this provision of AEDPA does not sweep nearly as broadly as the statutory language appears to suggest. In adopting this construction of the statute, the Court in *Williams* rejected lower court interpretations that called for substantial deference to state court rulings on legal and mixed legal-factual rulings. Id. at 376-79.

16 For instance, in Slack v. McDaniel, 529 U.S. 473, 483 (2000), the Court rejected the restrictive interpretation of AEDPA advanced by the state; instead it explained that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights" and that "Congress expressed no intention to allow [the statutory provision in question] . . . to bar vindication of substantial constitutional rights." Similarly, in Williams v. Taylor, 529 U.S. 420, 436-37 (2000), the Court rejected the state's argument that the AEDPA provision governing federal evidentiary hearings should be construed to bar a hearing where the petitioner was not at fault for failing to develop facts in state court. See also Williams v. Taylor, 529 U.S. 362, 376-79 (2000) (rejecting lower court interpretations of § 2254(d)(1) that read statute to require significant deference to state court rulings on legal issues and mixed questions of fact and law); Hohn v. United States, 524 U.S. 236, 249-51 (1998) (rejecting literal reading of AEDPA so as to preserve Court's jurisdiction to review lower court denials of applications for certificates of appealability); Stewart v. Martinez-Villareal, 523 U.S. 637, 644-46 (1998) (declining to construe AEDPA literally and instead reaching back to pre-AEDPA law to deem successive petition rules inapplicable to cases in which prior petition was dismissed for technical reasons). The Supreme Court, however, on some occasions has adopted a narrow, restrictive view of certain AEDPA provisions. Thus, in Tyler v. Cain, 533 U.S. 656 (2001), the Court narrowly construed AEDPA's § 2244(b)(2)(A), which permits the filing of a successive petition if the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as requiring that the rule actually be declared retroactive by the Supreme Court itself. Id. at 660 (internal quotations omitted); see

unresolved. This Article examines one such issue—the virtual foreclosure by AEDPA's successive petition rules of certain constitutional claims that are sometimes not reviewable until the successive petition stage.

The Congressional Conference Committee Report on AEDPA stated that Congress's goal in adopting new rules for successive petitions was to "curb the abuse of the statutory writ of habeas corpus."[17] To this end, the Report stated that the new legislation changed the existing rules to provide that:

> Successive petitions must be approved by a panel of the court of appeals and are limited to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict or that involve new constitutional rights that have been retroactively applied by the Supreme Court.[18]

This description of the new provisions does not indicate that the legislation would change existing practice by foreclosing some constitutional claims from federal habeas corpus review. Nor is there anything on the face of the statute to suggest this result. As the Conference Report indicates, the statutory language appears to change the procedures for filing successive petitions[19] and to establish certain substantive preconditions for filing them: The petitioner must justify the failure to litigate a claim at the time of the previously filed petition by showing that the claim is founded on either "newly discovered evidence" or a newly recognized constitutional right.[20]

As this Article shows, however, the component parts of AEDPA's successive petition rules coalesce to virtually exclude certain types of constitutional claims. The claims affected by this preclusive feature of the legislation are generally those relating to the constitutionality of an execution (as contrasted to the constitutionality of the trial, capital sentencing hearing, or appeal). These include, for example, Eighth Amendment claims that an execution is impermissible because the prisoner is mentally incompetent at the time of execu-

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also Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (construing AEDPA's statute of limitations restrictively so as to exclude period during which petition is pending before federal court from ambit of provision tolling limitations period); Felker v. Turpin, 518 U.S. 651, 658-59 (1996) (construing AEDPA to preclude certiorari review of circuit court's denial of authorization to file successive petition).

17 H.R. Conf. Rep. No. 104-518, at 111 (1996). The Conference Committee Report is the only available congressional report on the legislation; there are no committee reports from either the House or the Senate.

18 Id.

19 For a description of the precise changes that AEDPA effected in the procedures for filing successive petitions, see infra Part II.B.

20 For a detailed discussion of AEDPA's substantive requirements for the filing of a successive claim, see infra Part II.B.

tion,[21] that a certain method of execution is cruel or unusual,[22] and that carrying out a death sentence many years after its imposition strips the act of execution of whatever penological value that theoretically could exist.[23] Significantly, these claims typically cannot be adjudicated until the successive petition stage.[24] Accordingly, AEDPA's virtual preclusion of successive petitions has the effect of removing these claims from federal habeas corpus review altogether.

As the Article shows, AEDPA has a similarly preclusive effect on conviction-related and sentencing-related claims that become available for the first time at the successive petition stage because the Supreme Court indicates its willingness to reconsider a prior decision rejecting the claim's validity. Although the successive petition rules' "new law" provision logically would be thought to encompass a situation of this sort, the scenario falls within a gap created by the interaction of various provisions of the statute. This Article examines the nature and effects of that gap in the context of an actual case involving a challenge to the execution of a mentally retarded prisoner.[25]

This Article suggests that these review-stripping features of the successive petition provisions are not what Congress intended—or even realized it was adopting. As the courts and commentators have pointed out, AEDPA is replete with ambiguities and apparent inconsistencies.[26] These are quite obviously the products of the haste with which the statute was drafted and the emotional context in which it was debated and enacted. The following discussion argues that these factors led Congress to adopt a set of successive petition provisions that are even more restrictive than the drafters and enactors intended.

Part I of this Article describes the standards that governed the filing of successive petitions prior to AEDPA and the changes that it made in those standards. This section explores the functions that the standards were designed to accomplish and shows that much of the judicial and congressional rulemaking in this area, especially in the last twenty years, has been activated by fears of abuses by prisoners and their defenders—fears that simply are not grounded in reality.

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21 See infra Part II.B.1.

22 See infra Part II.B.2.

23 See infra Part II.C.2.

24 See infra Parts II.B & II.C.

25 See infra Part II.C.3.

26 E.g., Lindh v. Murphy, 521 U.S. 320, 336 (1997) ("All we can say [about AEDPA] is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."); Anthony G. Amsterdam, Foreword to Randy Hertz & James S. Liebman, 1 Federal Habeas Corpus Practice and Procedure at v, v (4th ed. 2001) ("The statutory language teems with problems and non-obvious alternative interpretations that need to be identified and sorted out by reference to a tangled legislative history.").

Part II focuses specifically on AEDPA, analyzing what Congress wrought as a result of its fears of alleged abuses of the habeas corpus remedy. This section demonstrates the detrimental—and apparently unintended—effects of AEDPA in preventing the use of successive petitions to litigate the above-described types of claims. In order to ground the discussion in the actual mechanics and constraints of habeas corpus practice, this section uses real cases to examine AEDPA's effects and the courses of action open to a prisoner.

Part III examines potential remedies for the problems identified in the preceding sections. This section first explores the possibilities for correcting AEDPA's excesses through legislative reform or judicial construction of the existing statutes. Finally, the section considers ways to improve alternative mechanisms for raising those claims that are currently foreclosed by AEDPA.

I
THE GENESIS OF AEDPA'S RULES FOR SUCCESSIVE HABEAS CORPUS PETITIONS

A. The Road to AEDPA: The Evolution of Rules for Successive Petitions

Until the early twentieth century, the Supreme Court and the lower federal courts generally adhered to the common law rule that there are no limitations on a prisoner's filing of successive habeas corpus petitions to relitigate claims presented in a prior petition or to raise new (i.e., previously unraised) claims. Habeas corpus, it was said, is not subject to a res judicata bar on relitigation.[27]

Although the lack of a res judicata bar remains a defining feature of federal habeas corpus review,[28] the Court and Congress have lim-

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[27] For example, the Supreme Court stated:

> At common law the doctrine of res judicata did not extend to a decision on habeas corpus refusing to discharge the prisoner. The state courts generally have accepted the rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point. . . . We regard the rule as well established in this jurisdiction.

Salinger v. Loisel, 265 U.S. 224, 230 (1924) (emphasis omitted); see also 1 W.F. Bailey, A Treatise on the Law of Habeas Corpus and Special Remedies § 59, at 206 (1913) ("As a general rule res judicata has no application to habeas corpus proceedings where there has been a refusal to discharge on the writ."); William S. Church, A Treatise on the Writ of Habeas Corpus § 386, at 570 (2d ed., San Francisco, Bancroft-Whitney 1893) (stating that at common law res judicata was not applicable to habeas decisions).

[28] See, e.g., McCleskey v. Zant, 499 U.S. 467, 480-84 (1991) (recognizing that res judicata historically has not applied to decisions on habeas corpus); Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) ("Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings."); Kaufman v. United States, 394 U.S. 217, 228 (1969) ("Con-

ited the circumstances under which a federal court can entertain a successive petition. These restrictions emerged over the course of the twentieth century in a series of sequential actions by the Court and Congress, in which each institution reacted to the other's latest pronouncement on the subject.

The first of these steps took place in 1924 with the Supreme Court's issuance of two decisions on successive habeas corpus petitions—*Salinger v. Loisel*[29] and *Wong Doo v. United States*.[30] After observing that the then-controlling habeas statute did "not lay down any specific rule on the subject" of relitigation,[31] the Court in *Salinger* adopted the rule that a federal court may consider "and even give[ ] controlling weight . . . [to] a prior refusal to discharge on a like application" in determining how best to implement the statute's directive to dispose of a petition "'as law and justice may require.'"[32] In both *Salinger* and *Wong Doo*, the Court indicated that a central factor in determining whether to dismiss a petition on grounds of successiveness is the good or bad faith of the petitioner in re-presenting a claim previously adjudicated by the courts.[33]

When Congress revamped the Habeas Corpus Act in 1948 as part of its adoption of a new judicial code,[34] it codified the principles announced in *Salinger* and *Wong Doo*.[35] The Judicial Code and Judiciary Act of 1948 authorized the federal courts to deny a successive

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gress has determined that the full protection of . . . constitutional rights requires the availability of a mechanism for collateral attack.").

29 265 U.S. 224 (1924) (affirming denial of habeas relief).

30 265 U.S. 239 (1924) (rejecting res judicata as applied to successive habeas petitions but affirming judicial discretion to dismiss such petitions).

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

32 Id. (internal citations omitted); accord *Wong Doo*, 265 U.S. at 240 ("In *Salinger v. Loisel*, . . . we held that . . . where the prisoner presents a second petition, the weight to be given to the prior refusal is to be determined according to a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the subject."). The Court in *Salinger* derived this rule from an earlier decision by Justice Field, ruling in his capacity as Circuit Justice. See *Salinger*, 265 U.S. at 231-32 (quoting Ex parte Cuddy, 40 F. 62, 65-66 (C.C.S.D. Cal. 1889)).

33 See *Wong Doo*, 265 U.S. at 241 (affirming dismissal of second petition because "petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, *good faith* required that he produce the proof then" (emphasis added)); *Salinger*, 265 U.S. at 232 ("[T]he rules we here have outlined will accord to the writ of *habeas corpus* its recognized status as a privileged writ of freedom, and yet make against an abusive use of it.").

34 Judicial Code and Judiciary Act, ch. 646, §§ 2241-2255, 62 Stat. 869, 964-68 (1948) (codified as amended at 28 U.S.C. §§ 2241-2255 (1994 & Supp. V 2000)).

35 Congress's adoption of the Court's rule on relitigation was part of an overall pattern in the Judiciary Act of 1948, which generally codified existing habeas corpus practice. See H.R. Rep. No. 80-308, at A177-80 (1947) (explaining purpose of modifications to "follow[ ] the actual practice of the courts, . . . [and] to conform to existing practice as approved by judicial decisions").

federal habeas corpus petition if its claims had been previously presented and rejected and if the new "petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."[36]

The Supreme Court returned to the subject of successive federal habeas corpus petitions in 1963 in *Sanders v. United States*,[37] when it construed the statutory standard that Congress had adopted in 1948. The Court in *Sanders* differentiated two types of successive petitions: those that present claims previously raised in the prior petition and those that present "new" claims that were not included in the prior filing.[38] With respect to the former category, the Court announced that dismissal of a same-claim successive petition is warranted if the claims previously were rejected on the merits and if the "ends of justice" do not call for permitting the petitioner to relitigate the claim or claims.[39] With respect to the latter category, which was not covered by Congress's new provision, the Court declared that new-claim successive petitions may be dismissed on grounds of successiveness only if the petitioner deliberately abandoned the claims at the first hearing, withheld the claim on the prior occasion for a strategic reason, or had filed the new petition solely for the purpose of harassment or delay.[40]

When Congress revised the habeas corpus statutes again in 1966,[41] the Supreme Court's most recent gloss on the successive petition rules once again became part of the controlling statutes. Congress codified *Sanders*'s "abuse of the writ" standard for new-claim successive petitions.[42] Thereafter, in 1976, Congress similarly placed

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36 Judicial Code and Judiciary Act § 2244, 62 Stat. at 966.

37 373 U.S. 1 (1963).

38 See id. at 16-17. For more recent explanations of the distinction between the two scenarios, see, for example, Schlup v. Delo, 513 U.S. 298, 318 n.34 (1995) (distinguishing between "successive" petitions, which raise grounds identical to those raised in prior petition, and "abusive" petitions, where prisoner raises grounds that were previously available but not asserted); Sawyer v. Whitley, 505 U.S. 333, 338 (1992) (distinguishing between successive claims, new claims, and procedurally defaulted claims).

39 *Sanders*, 373 U.S. at 15 (footnote omitted).

40 Id. at 18 ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.").

41 Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104.

42 The 1966 statute provided that "a subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ." 80 Stat. 1104. The statute further stated that a court need not hear the application "unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." 80 Stat. 1104.

this standard in the Rules Governing § 2254 Cases.[43] In an odd omission, Congress wholly failed to address the subject of new-claim successive petitions in either the 1966 version of the habeas corpus statutes or the § 2254 Rules. The Supreme Court treated that omission as insignificant, declaring that Congress intended to maintain the "ends of justice" standard announced by the Court in 1924 and thereafter codified by Congress in the 1948 version of the statute.[44]

These rules for new-claim and same-claim successive petitions controlled practice for approximately a quarter of a century. Then, in 1991 in *McCleskey v. Zant*,[45] the Court announced a new standard for new-claim successive petitions. Under this new rule, which incorporated concepts and terms the Court had established to regulate "procedural defaults,"[46] the state's raising of the affirmative defense of "abuse of the writ"[47] shifted the burden to the petitioner. The burden

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[43] According to Rule 9:

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

28 U.S.C. § 2254 R. 9(b) (1994) (enacted by Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976)) (Rules Governing § 2254 Cases in United States District Courts).

[44] See, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (declaring that "successive federal habeas review should be granted only in rare cases" but "should be available when the ends of justice so require"); id. at 468 (Brennan, J., dissenting) ("Congress clearly intended that courts continue to determine which successive petitions they may choose not to hear by reference to the *Sanders* end-of-justice standard."); accord Schlup v. Delo, 513 U.S. 298, 320 (1995) (noting that "[i]n *Kuhlmann*, seven Members of this Court squarely rejected the argument" that 1966 Amendments intended to do away with "ends of justice" standard); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (citing *Kuhlmann* approvingly).

[45] 499 U.S. 467 (1991).

[46] The "procedural default" doctrine, which was first announced in Wainwright v. Sykes, 433 U.S. 72 (1977), bars federal court consideration of a claim that the state courts denied on adequate and independent state procedural grounds, unless the petitioner can excuse the default by showing "cause" for the default and resulting "prejudice," or else by showing that the federal court's refusal to hear the claim would result in a "miscarriage of justice." Id. at 90-91; see also generally Randy Hertz & James S. Liebman, 2 Federal Habeas Corpus Practice and Procedure §§ 26.1-26.4 (4th ed. 2001) (providing detailed discussion of procedural default doctrine). Defendants in criminal cases may have constitutional claims procedurally barred if they fail to object contemporaneously at trial or if they abandon the claim by failing to present it on appeal. Claims may also be deemed defaulted if an appellant fails to comply with a state procedural rule or filing deadline or does not adequately state the basis of the constitutional violation. Id. § 26.1.

[47] *McCleskey* resolved a question that had divided the lower federal courts by making clear that the successive petition doctrine functioned as an affirmative defense and therefore applied only if the state expressly invoked it. See *McCleskey*, 499 U.S. at 494 (stating that "[w]hen a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ" and that burden then shifts to petitioner to "disprove abuse").

consists of excusing the failure to raise the claim in the prior petition by either showing "'some objective factor external to the defense'"[48] that provided "cause" for the omission and resulting "prejudice,"[49] or demonstrating that the court's failure to entertain the claim would result in a "miscarriage of justice."[50] The *McCleskey* majority described its new rule as "consistent" with prior decisions.[51] But, as Justice Marshall pointed out in dissent, the *McCleskey* decision incontestably curtailed the availability of successive petitions by replacing a good faith test with a "strict liability" standard that precludes successive petitions even in some situations in which counsel reasonably did not raise a claim in the earlier petition.[52]

The new status quo prevailed for only five years. With AEDPA in 1996, Congress radically changed both the procedures and the substantive standards for filing successive petitions. Disregarding the long history of federal habeas corpus review of same-claim successive petitions and the documented need for such a form of review,[53] Congress abolished this type of petition altogether, limiting successive petitions to new claims that were not previously presented in a federal habeas corpus petition.[54] The ability to raise new claims also was curtailed, as AEDPA eliminates the practice of requiring the state to raise a challenge to a successive petition. Instead it imposes upon the petitioner the obligation to obtain leave to file a successive petition by filing a motion with a panel of three circuit court judges.[55] The substantive standard that this "gatekeeping panel" is to apply—and that is to be applied again by the district court if the gatekeeping panel

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48 Id. at 493 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

49 Id. at 494; accord *Schlup*, 513 U.S. at 318-19 (articulating cause and prejudice standard for successive claims). For discussion of the criteria the Supreme Court and the lower federal courts developed to define "cause" and "prejudice" under *McCleskey*, see Hertz & Liebman, supra note 46, § 28.3c; see also id. §§ 26.3b-26.3c (describing courts' definitions of "cause" and "prejudice" in procedural default context).

50 *McCleskey*, 499 U.S. at 494-95; accord *Schlup*, 513 U.S. at 320-21 (explaining continued vitality of "miscarriage of justice" exception). For further discussion of the "miscarriage of justice" concept, see Hertz & Liebman, supra note 46, § 26.4.

51 *McCleskey*, 499 U.S. at 495 ("Although the cause and prejudice standard differs from some of our language in Price v. Johnston, 334 U.S. 266 (1948), it is consistent with *Cuddy*, *Salinger*, *Wong Doo*, and *Sanders*, as well as our modern abuse-of-the-writ decisions . . . .").

52 Id. at 510 (Marshall, J., dissenting) ("[E]ven counsel's *reasonable* perception that a particular claim is without factual or legal foundation does not excuse the failure to raise that claim in the absence of an objective, external impediment to counsel's efforts.").

53 For discussion of the historical lineage of same-claim successive petitions and citations to Supreme Court decisions recognizing their important role in the federal postconviction process, see supra notes 29-39 and accompanying text.

54 28 U.S.C. § 2244(b)(1) (Supp. V 2000).

55 See § 2244(b)(3), (4). For further discussion of this procedure, see infra notes 165-69 and accompanying text.

authorizes the filing[56]—is far more restrictive and unforgiving than its antecedent. The AEDPA version limits successive petitions to those cases in which the petitioner can show either (1) that the legal rule on which
s/he relies is new and has been made retroactively applicable to his or her case by the Supreme Court[57] or (2) that the facts on which s/he relies were unavailable previously[58] and that "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the . . . [petitioner] guilty of the underlying offense."[59]

B. The Hidden Story: Factors That Shaped the Sequential Sets of Successive Petition Rules

To understand truly the history of successive petition rules in the twentieth century and how that history culminated in AEDPA's new restrictions, it is necessary to expand the account to include a variety of factors that operated behind the scenes, including judges' and legislators' assumptions and preconceptions.

1. The Beginning of the Story

It could be said that the modern, twentieth-century treatment of successive petitions is a product of judicial fears of prisoner or attorney manipulation of the legal system. The two 1924 decisions that marked the watershed in the treatment of successive petitions—*Salinger v. Loisel*[60] and *Wong Doo v. United States*[61]—both involved apparent manipulation of the successive petition remedy. In *Wong Doo*, in which an immigrant had filed successive petitions to challenge an order of deportation, the Court expressed its suspicions that the petitioner withheld proof at the time of the first filing in order "[t]o reserve the proof for use in attempting to support a later petition"[62]

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56 See Tyler v. Cain, 533 U.S. 656, 660 n.3 (2001) (finding that after petitioner satisfactorily makes "'prima facie showing' [to gatekeeping panel] that the application satisfies the statutory standard," district court assesses whether applicant has shown that "the claim satisfies the standard").

57 § 2244(b)(2)(A).

58 § 2244(b)(2)(B)(i).

59 § 2244(b)(2)(B)(ii). For the discussion of the standard that AEDPA establishes, see infra Part II.A.

60 265 U.S. 224 (1924). For a discussion of *Salinger*, see supra notes 29-36 and accompanying text.

61 265 U.S. 239 (1924); see also supra notes 30-36 and accompanying text.

62 *Wong Doo*, 265 U.S. at 241.

(which would, in modern parlance, be called "sandbagging"[63]). In ruling against the petitioner, the Court added an admonitory note about the risk of manipulation of the system: "If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years."[64]

2. *The Changing of the Narrative*

Although the *Salinger* and *Wong Doo* decisions evidence the Supreme Court's concerns about possible misuse of the system, there is nothing in the reasoning or language of these decisions to suggest that the Court viewed such cases as anything other than aberrations. By the mid-1940s, however, at least some federal judges were in the grip of a storyline about a new type of manipulation of the successive petition remedy—a prisoner's abusive filing of numerous petitions. In a decision issued in 1945, the Court of Appeals for the District of Columbia Circuit wrote:

> Today, in the District of Columbia, . . . petitions for the writ [of habeas corpus] are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5.[65]

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[63] For example, Wainwright v. Sykes, 433 U.S. 72 (1977), justified the adoption of its restrictive, pro-state doctrine of procedural default on the ground that the preexisting rule of deliberate bypass "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." Id. at 89.

[64] *Wong Doo*, 265 U.S. at 241. Similarly, in *Salinger*, the Court recounted, in great detail, the petitioner's history of using habeas corpus petitions in New York and Louisiana to avoid extradition to South Dakota, where he was wanted for jumping bond while pending trial in a criminal case. Salinger fled South Dakota after posting bond, then challenged his arrest in New York by filing a petition for a writ of habeas corpus and again posting a bond and fleeing. See *Salinger*, 265 U.S. at 226-27. He then reacted to his apprehension in New Orleans by filing a habeas corpus petition and gaining release on bail pending a hearing on the petition. Id. at 227. He finally contested his rearrest in New Orleans by filing a third habeas corpus petition. Id. at 228.

[65] Dorsey v. Gill, 148 F.2d 857, 862 (D.C. Cir. 1945).

Although the appellate court also was concerned with an overall increase in the number of filings,[66] the language in the above-quoted passage evidences that the court was particularly troubled by the apparent ability of a relatively small number of prisoners to flood the courts with an overwhelming number of petitions. That same concern emerges powerfully from a federal district court judge's address at the 1947 Annual Conference of the Ninth Circuit:

> The most common abuse in this district is the filing of successive petitions by inmates of Alcatraz Prison. During the past ten years, 180 Alcatraz inmates filed 368 petitions for the writ in our court, which would, at first blush, appear to be an average of about two petitions to one inmate. But that is not the real picture. 117 inmates filed one petition each. The remaining 63 filed 251 petitions. And when we break down these figures, we find that 26 inmates filed 167 petitions. And a further analysis discloses that one inmate filed 16 successive petitions, one man filed 15 successive petitions, one filed 14 petitions, one filed 9 petitions, etc.[67]

When in 1948 the Supreme Court decided *Price v. Johnston*, a successive petition case,[68] it was apparent that the Justices, too, were concerned with this apparent trend. The *Price* majority remarked upon the systemic pressures and problems that flowed from "the increased use of this writ" of habeas corpus "in recent years."[69] Yet the Court majority resisted the temptation to scale back the availability of successive petitions, instead maintaining the existing rules and manifesting the Court's readiness to administer those rules to safeguard

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[66] See id. (documenting "a growth of filings in the District Court from 32 in the fiscal year 1934 to 276 in 1944; and 101 petitions filed during the first four months of the fiscal year 1945").

[67] Louis E. Goodman, Use and Abuse of the Writ of Habeas Corpus, Address at the 1947 Annual Conference of the Ninth Circuit, in 7 F.R.D. 313, 315 (1948). For a table showing the number of petitioners who filed habeas corpus petitions and the number of petitions filed by each petitioner, see id. at 315 n.8.

[68] Price v. Johnston, 334 U.S. 266, 293-94 (1948) (holding that district court erred in dismissing habeas petition despite its being prisoner's fourth attempt at habeas relief).

[69] Id. at 269. The Court continued, "The writ of *habeas corpus* has played a great role in the history of human freedom. . . . But in recent years the increased use of this writ, especially in federal courts, has created many procedural problems which are not easy of solution." Id. Justice Jackson, in dissent, spoke more pointedly about the abuses of the system:

> This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to retry their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoners make the best of increased opportunities to escape.

Id. at 301 (Jackson, J., dissenting).

prisoners' legitimate interests in resorting to successive petitions when necessary.[70]

In the succeeding two decades, the Court maintained the contours of the successive petition remedy, notwithstanding judicial fears about possible abuses. As explained earlier,[71] the Court issued a decision in 1963 in *Sanders v. United States*[72] to clarify the standards for same-claim and new-claim successive petitions. The majority opinion in *Sanders*, written by Justice Brennan, emphasized the importance of preserving prisoners' access to successive petitions when necessary to guard against deprivations of constitutional rights.[73]

By the mid-1980s, however, an entirely new narrative emerged in the way that the majority of the Supreme Court dealt with the subject of successive petitions. In a 1984 opinion concurring in a decision to vacate a stay of execution, Justice Lewis F. Powell, Jr., joined by four other Justices, stated:

> This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ. . . . Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.[74]

Only a year earlier, Justice Powell had inveighed against such manipulation of the system by capital prisoners and their lawyers and had called for legislation to limit successive petitions.[75] In a 1986 decision,

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[70] See id. at 286-94 (holding that lower federal courts erred in denying prisoner's fourth petition without affording him an opportunity to justify successiveness). The Court in *Price* also stated, in language later rejected in McCleskey v. Zant, 499 U.S. 467, 483 (1991), that "the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition." *Price*, 334 U.S. at 289.

[71] See supra notes 40-43 and accompanying text.

[72] 373 U.S. 1 (1963).

[73] In *Sanders*, the Court emphasized 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." 373 U.S. at 8. In order for the government to "be accountable to the judiciary for a man's imprisonment, . . . access to the courts on habeas must not be thus impeded." Id. (citation omitted). Thus, "[t]he inapplicability of *res judicata* to habeas . . . is inherent in the very role and function of the writ." Id.

[74] Woodard v. Hutchins, 464 U.S. 377, 377-78, 380 (1984) (Powell, J., joined by Burger, C.J., and Blackmun, Rehnquist & O'Connor, JJ.).

[75] Lewis F. Powell, Jr., To Die or Not to Die? The Abuse of Repeatedly Asking, 69 A.B.A. J. 1000 (1983) (providing excerpts from Justice Powell's remarks at Eleventh Circuit Conference in Savannah, Georgia). For other remarks by Justice Powell expressing similar sentiments, see Lewis F. Powell, Jr., Review of Capital Convictions Isn't Working, A.B.A. Sec. Crim. Just., Winter 1989, at 10, 10-13 (adapting Justice Powell's address to Criminal Section of American Bar Association on Aug. 7, 1988); see also Anthony G.

Justice Powell further stated, on behalf of a plurality of the Court, that the "[a]vailability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime."[76] Chief Justice Burger, a member of that plurality, issued a separate concurring opinion, declaring that "the abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to, the 'sporting contest' theory of criminal justice so widely practiced today."[77]

The dramatic transformation in the Court's rhetoric from the 1960s to the 1980s is at least partly attributable to changes in the composition of the Supreme Court, as the Warren Court was succeeded by the Burger Court. But the rhetorical metamorphosis also tracks, and seems integrally connected to, a number of changes that took place in the nature of capital federal habeas corpus practice during these years.

3. *The Changing of Habeas Corpus Practice*

Prior to the Supreme Court's decision in *Furman v. Georgia*[78] in 1972, most condemned prisoners could not obtain the legal assistance required to initiate an application for a writ of habeas corpus; even fewer were able to file successive petitions for habeas corpus relief. Most death-sentenced prisoners directed their relief efforts to state governors or executive boards in the hope of receiving clemency, commutation, or a pardon.[79]

Amsterdam, In Favorem Mortis: The Supreme Court and Capital Punishment, A.B.A. Sec. Individual Rts. & Responsibilities, Winter 1987, at 14, 50-52 (describing and discussing remarks made by Justice Powell at Eleventh Circuit Judicial Conference in 1983).

[76] Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (plurality opinion) (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.).

[77] Id. at 461 (Burger, C.J., concurring).

[78] 408 U.S. 238, 239-40 (1972) (per curiam) (holding that death penalty, as then administered in Georgia and Texas, violated Eighth and Fourteenth Amendments).

[79] See Michael A.G. Korengold et al., And Justice for Few: The Collapse of the Capital Clemency System in the United States, 20 Hamline L. Rev. 349, 357-59 (1996) (describing pre-*Furman* capital clemency practices). Although death row prisoners still seek clemency and commutation in the modern era, sometimes successfully, executive commutation is infrequent in most death penalty jurisdictions. "[T]he frequency of commutations has dropped off completely since the death penalty was reinstituted—five hundred twelve persons have been executed since 1976, but only thirty-nine death sentences have been commuted. Thus, only about 7.5% of death sentences have been commuted." Daniel T. Kobil, Chance and the Constitution in Capital Clemency Cases, 28 Cap. U. L. Rev. 567, 572 (2000). Yet, "[e]ven this low number overstates the availability of clemency, however, because one-third of that thirty-nine were issued by two governors." Id. "Richard Celeste of Ohio, commuted eight individuals on Death Row as he left office and Tony Anaya, governor of New Mexico, commuted all five individuals on his state's Death Row as he left office." Id. Michael Radelet and Barbara Zsembik have gathered statistical data showing that "clemency in a capital case is extremely rare, particularly in light of the high number of inmates whose death row status makes them eligible for such mercy." Michael L. Radelet & Barbara A. Zsembik, Executive Clemency in Post-*Furman* Capital Cases, 27 U. Rich. L. Rev. 289, 304 (1993). Radelet and Zsembik conclude "that the exercise of execu-

The Supreme Court's capital punishment decisions of the 1970s changed this situation by signaling a readiness on the part of the federal judiciary to protect death row prisoners from arbitrary or unfair imposition of the death penalty. This was quite obviously the message of *Furman*, which invalidated virtually all capital punishment statutes in existence at the time.[80] But even when the Court subsequently upheld the constitutionality of capital punishment in 1976, the Court demonstrated a continued willingness to invalidate some capital punishment statutes,[81] warning that "death is different" and that heightened standards of review and appellate scrutiny would be constitutionally required in capital cases.[82] In the following years, the Supreme Court and the lower federal courts displayed an inclination

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tive clemency in post-*Furman* cases is idiosyncratic at best, and arbitrary at worst[,] . . . add[ing], rather than subtract[ing], an element of luck in the ultimate decision of who ends up being executed." Id. at 305. Executives and judges unwilling to grant relief in capital cases have sometimes engaged in a type of "shell game" in which courts use the availability of clemency as an excuse for limiting the availability or scope of judicial review. See, e.g., Herrera v. Collins, 506 U.S. 390, 411 (1993) (Rehnquist, C.J.) (holding that assertions of actual innocence generally are not cognizable in federal habeas corpus and observing that "[t]his is not to say . . . that petitioner is left without a forum to raise his actual innocence claim" as Texas law provides that "petitioner may file a request for executive clemency"). At the same time, executives often rely on the intense judicial review process as a basis for declaring that a capital prisoner's inability to secure relief in court reinforces the legitimacy of a death sentence. See, e.g., Tamar Lewin, Vast Discretion for Governors in Decisions on Death Penalty, N.Y. Times, May 20, 1992, at A14 (quoting John Ashcroft, then Governor of Missouri, as saying that he would intervene to stop an execution only if he had "'information that the justice system has failed to operate'").

80 Although only the Georgia and Texas death penalty statutes were before the Court in *Furman*, the Court's per curiam opinion, together with the separate opinions of the five Justices who made up the majority, made it apparent that the then-prevailing capital-sentencing scheme was unconstitutional because it left juries with absolute sentencing discretion. See, e.g., Lockett v. Ohio, 438 U.S. 586, 597-600 (1978) (describing aftermath of *Furman* ruling).

81 On July 2, 1976, the Court issued five decisions holding that capital punishment does not violate, per se, the Eighth Amendment but that certain types of statutory schemes for capital-sentencing will not pass constitutional muster. The Court upheld "guided discretion" statutes in Jurek v. Texas, 428 U.S. 262, 276-77 (1976), Proffitt v. Florida, 428 U.S. 242, 259-60 (1976), and Gregg v. Georgia, 428 U.S. 153, 206-07 (1976), but struck down mandatory death penalty statutes in Roberts v. Louisiana, 428 U.S. 325, 336 (1976), and Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

82 See *Woodson*, 428 U.S. at 305 ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long, [as d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). The Court has reiterated this admonition on many occasions since then. E.g., Kyles v. Whitley, 514 U.S. 419, 422 (1995) (stating that "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case" (citation omitted)). Yet, the Court often does little more than pay lip service to this principle. See, e.g., Pulley v. Harris, 465 U.S. 37, 50-51 (1984) (rejecting argument that Eighth Amendment requires appellate review of proportionality of death sentences).

to regulate, and even sometimes categorically prohibit, executions when constitutional values or norms were at stake.[83]

Consequently, by the late 1970s and early 1980s, capital litigation was not considered "final" until all available state and federal post-conviction review had been completed.[84] The new prototype for capital litigation was a nine-step process that almost always included petitions for a writ of habeas corpus in federal court.[85]

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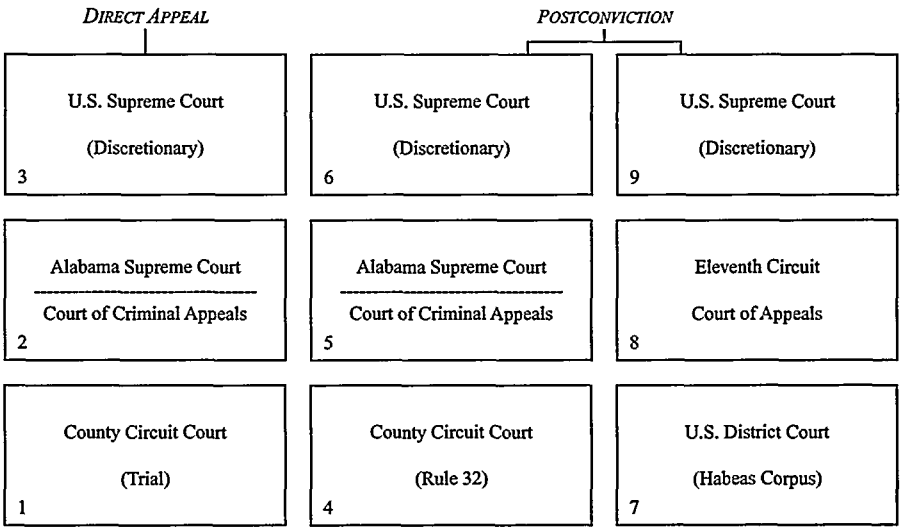
[83] See, e.g., Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that death penalty is unconstitutionally disproportionate for murder absent proof that defendant killed, attempted to kill, or intended for killing to take place or lethal force to be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that death penalty is impermissibly disproportionate punishment for crime of rape). This pattern of Supreme Court and lower federal court scrutiny of capital cases (and its implicit message to capital prisoners that federal court review offered some hope of postconviction relief) was noted—and bemoaned—by then-Justice Rehnquist, who viewed these practices as "ma[king] it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes." Coleman v. Balkcom, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari); see also id. at 958 ("Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs.").

[84] This pattern is implicit in the record of the first executions that took place after the end of the de facto ten-year moratorium on executions in 1977. Of the six individuals executed between 1977 and 1982, four were individuals who abandoned available legal remedies and sought their own deaths. See William J. Bowers et al., Legal Homicide: Death As Punishment in America, 1864-1982, at 173 (1984).

[85] The Alabama Postconviction Manual sets out for volunteer capital attorneys a nine stage formulation which comprises the trial, appeal, and postconviction process:



Equal Justice Initiative of Alabama, Alabama Capital Postconviction Manual 22-23 (3d ed. 1998); see also, e.g., Hertz & Liebman, supra note 26, § 3.5a (presenting equivalent description of stages of case prior to federal habeas corpus review).

With the expansion of capital litigation came a burgeoning capital punishment jurisprudence,[86] which had the effect of generating a steady stream of novel constitutional claims.[87] As a result, new bases for habeas corpus relief might emerge after a petitioner's first habeas corpus petition had already been resolved, thereby necessitating a second or successive petition.[88] In a substantial number of cases, such successive petitions based on intervening legal rulings succeeded in overturning an unconstitutional conviction or capital sentence.[89] Notwithstanding the proven merit of many of these petitions, however, the sheer volume of filings, the relatively rapid increase in number,

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[86] The Supreme Court went from virtually no death penalty opinions in the years following *Furman v. Georgia* in 1972 to a death docket that rose steadily after the 1976 cases and ultimately dominated the Court's time and attention. The Court issued an average of three opinions a year in death penalty cases between 1977 and 1981, seven opinions a year between 1982 and 1986, sixteen opinions a year between 1987 and 1991, and eleven opinions a year between 1992 and 1996. Equal Justice Initiative of Alabama, supra note 85, at 311-339.

[87] An overview of the types of claims flourishing in the Supreme Court and lower federal courts during this era can be gleaned from the lengthy list of federal habeas corpus claims that have prevailed. See Hertz & Liebman, supra note 26, § 11.2c.

[88] For example, a defendant tried in 1978 may have sought to introduce his good prison or jail record as mitigating evidence at his capital-sentencing hearing, only to find that evidence excluded by the trial judge. By 1985, that prisoner would have completed (or nearly completed) federal habeas corpus proceedings and probably would have failed to secure relief at any stage on his constitutional challenges to the exclusion of the evidence. With the Supreme Court's announcement in Skipper v. South Carolina, 476 U.S. 1, 3-4 (1986), that the exclusion of prison adjustment evidence violates the Eighth and Fourteenth Amendments, the prisoner would need to resort to a successive petition to challenge a sentencing procedure that was unquestionably unconstitutional.

[89] Data on federal habeas corpus during this era shows a staggeringly high number of grants of the writ at either the initial or successive petition stage. In their study of 5760 capital cases and 4578 appeals between 1973 and 1995, James Liebman et al. show an overall error rate in the American capital punishment system of sixty-eight percent, with forty-one percent of capital sentences overturned by state courts and forty percent of the remaining death sentences overturned by federal courts in habeas corpus proceedings. James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 Tex. L. Rev. 1839, 1846-50 (2000). Justice Blackmun offered similar findings:

> Of the capital cases reviewed in federal habeas corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error. The total reversal rate of capital cases at all [appellate as well as postconviction] stages of review during the same time period was estimated at 60% or more.

McFarland v. Scott, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing James S. Liebman, More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 537, 541 n.15 (1990-1991)); see also Am. Bar Ass'n, Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus 157-58 (Ira P. Robbins Project Reporter, 1990) [hereinafter ABA Report] (describing cases in which successive petitions succeeded on basis of newly announced decisions).

and the complexity of the issues they presented inevitably left some federal judges feeling beleaguered and resentful about a dramatically expanded workload.[90]

Such resentment was exacerbated sharply by the timing and pace of successive litigation in the death penalty context. Successive petitions, usually accompanied by an application for a stay of execution, often were filed within days—sometimes hours—of a scheduled execution date.[91] As a result, judges frequently were placed in the position of having to review pleadings and rule on difficult issues in a concentrated period of time—often requiring, as one circuit court judge observed at the time, that federal judges and their "law clerks work on weekends and late into the night."[92] As that judge observed, "work done in this manner is necessarily less thorough and . . . the time allowed for the consideration of issues is less than is desirable."[93]

Overwhelmed, irritated judges were prone to attribute the last-minute timing of the stay applications to dilatoriness or gamesmanship on the part of the defense attorneys who filed them.[94] A careful examination of the circumstances, however, reveals a much different, more complex set of causes.

The number of capital cases rose from the mid-1970s to the 1980s: In the late 1970s, there were approximately 500 people under sentence of death; by the end of the 1980s, that figure had grown to 2500.[95]

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[90] In 1984, Justice Powell complained that he had recently spent "at least the equivalent of two full days . . . devoted to the repetitive petitions that clearly were an abuse of habeas corpus." Stuart Banner, The Death Penalty: An American Tragedy 293 (2002) (quoting Letter from Lewis F. Powell, Jr., Justice, to Warren E. Burger, Chief Justice (Jan. 31, 1984) (The Lewis F. Powell, Jr. Papers, Washington & Lee University School of Law)); cf. Williams v. Lockhart, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring) (referring to "courts which feel self-plagued from prisoner writs" and responding to those courts by presenting strong defense of legitimacy and propriety of prisoners' uses of habeas corpus remedy).

[91] See ABA Report, supra note 89, at 114-19.

[92] Letter from Judge Alvin B. Rubin to Professor Ira P. Robbins (Jan. 16, 1989), in ABA Report, supra note 89, at 116.

[93] Id.

[94] See supra notes 74-77 and accompanying text (quoting such statements by Justice Powell and Chief Justice Burger). The case of Woodard v. Hutchins, 464 U.S. 377 (1984), which prompted the above-quoted criticism of the capital defense bar by Justice Powell, see supra note 74 and accompanying text, was later used by Judge Donald W. Stephens, a North Carolina Superior Court judge and member of the American Bar Association Task Force on Death Penalty Habeas Corpus, as a prototypical story of strategic delay on the part of capital defense attorneys. See Letter from Judge Donald W. Stephens to Professor Ira P. Robbins (Jan. 25, 1989), in ABA Report, supra note 89, at 116-17. Stephens's views of the case and of the defense bar were undoubtedly affected by the fact that he had been counsel for the State of North Carolina in the case. See id. at 116.

[95] Richard H. Burr, III, Representing the Client on Death Row: The Politics of Advocacy, 59 UMKC L. Rev. 1, 1 & n.1 (1990) (citing NAACP Legal Def. and Educ. Fund, Inc., Death Row, U.S.A. Reporter 101 (1990)).

Yet, as the need for lawyers was growing, the ranks of available lawyers were shrinking. The federal courts had shown an unwillingness to recognize a federal constitutional right to counsel for death row prisoners in the state or federal collateral review processes[96] (a view the Supreme Court embraced in the late 1980s[97]), and there were fewer lawyers willing to represent death row prisoners on a pro bono basis.[98] Thus, an ever-shrinking corps of lawyers was forced to shoulder the

[96] See, e.g., Meeks v. Cabana, 845 F.2d 1319, 1322 (5th Cir. 1988) ("[T]his circuit has long held that the state need not appoint counsel for indigent defendants in all post-conviction and collateral proceedings."); Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983) (en banc) ("Counsel competence in habeas proceedings is not a constitutional inquiry, since a state has no constitutional duty to provide counsel in collateral proceedings."); Robinson v. Fairman, 704 F.2d 368, 371 n.6 (7th Cir. 1983) ("[D]ue process does not require appointment of counsel in collateral attack proceedings.").

[97] In Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), the Court declined to hold that "prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions," although the Court appeared to leave open the question. In Murray v. Giarratano, 492 U.S. 1, 6-8 (1989), a four-Justice plurality announced its view of *Finley* as having held that there is no federal right to postconviction counsel. Thereafter, in Coleman v. Thompson, 501 U.S. 722, 755 (1991), a six-Justice majority of the Court stated that "*Finley* and *Giarratano* establish[ ] that there is no right to counsel in state collateral proceedings," except perhaps "where state collateral review is the first place a prisoner can present a challenge to his conviction."

[98] See ABA Report, supra note 89, at 119 (noting that "it is extremely difficult to recruit lawyers when an execution date has been set"). As Executive Director of the Missouri Capital Punishment Resource Center, Sean O'Brien observed that "[t]he vast majority of attorneys who are asked to suffer such an appointment [to capital postconviction case] decline to accept, not just because of the tremendous workload and responsibility, but because of legitimate concerns that they are not competent to do an adequate job." Sean O'Brien, Addressing the Needs of Attorneys for the Damned, 58 UMKC L. Rev. 517, 518 & nn.6-7 (1990) (citing results of study in unpublished manuscript); see also Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. 3239, 3240 (1989) ("A . . . serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review. . . . Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems."). Most recruitment of volunteer attorneys for capital cases was managed by a handful of organizations that provided assistance to death row prisoners. The tasks of coordinating the cases needing counsel and recruiting lawyers for them often were immensely time-consuming. See, e.g., O'Brien, supra, at 518 n.7 ("The author recently contacted 54 attorneys before finding one who was both qualified and willing to accept a particular appointment."). In 1986, the American Bar Association created a "Death Penalty Representation Project" to assist in the recruitment of private law firm attorneys to provide pro bono assistance to condemned prisoners. See Am. Bar Ass'n, Death Penalty Representation Project, at http://www.abanet.org/deathpenalty (last visited Apr. 5, 2002) (providing mission statement and contact information for volunteer attorneys). While private law firms did become involved in the effort, see id., scores of death-sentenced prisoners remained without aid. The ability of private firms to meaningfully protect the legal needs of death row prisoners has continued to fade, with a general decrease in pro bono assistance on the part of large law firms. In 1992, lawyers at the 100 highest-grossing law firms volunteered an average of fifty-six hours a year; in 1999 the lawyers at those same firms averaged thirty-six hours a year. Greg Winter, Legal Firms Cutting Back on Free Services for Poor, N.Y. Times, Aug. 17, 2000, at A1.

load of an increasing number of cases involving the highest stakes imaginable. State officials stepped up the pressure by setting execution dates as early and as often as they possibly could,[99] seeking to publicly display their "tough-on-crime" stance in the high-profile context of capital cases.[100] The net effect was to force overloaded capital lawyers to resort to a triage approach of concentrating their energies on whatever cases most urgently needed attention at the moment, i.e., the cases with impending execution dates.[101]

The significant expansion of capital habeas corpus practice in the 1970s and 1980s was paralleled by equivalent increases in the filing of habeas corpus petitions in noncapital cases, especially by indigent prisoners filing pro se petitions. "Three Strikes" policies and the "War on Drugs" resulted in the imprisonment of more people per capita in the United States than any other nation in the world.[102] Between 1972 and 2000, the jail and prison population in the United

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[99] The ABA Report describes representative comments of "n[u]merous Task Force witnesses" who criticized states' "setting of artificial execution dates" including, Caprice Cosper, an Assistant District Attorney in Houston, who "remarked that the setting of execution dates 'is perhaps the single most substantial impediment to the orderly administration of capital habeas cases in Texas. . . . It makes a chaotic mess out of the system of administering these cases.'" ABA Report, supra note 89, at 118-19. An execution date might be scheduled after direct appeal to the state appellate court. It would have to be stayed by the United States Supreme Court to permit the first certiorari review. This practice continued throughout the 1980s and into the early 1990s. By the end of this period, state officials in a growing number of states were employing the more responsible practice of deferring the setting of an execution date as long as a prisoner was pursuing actively available judicial remedies. See Hertz & Liebman, supra note 26, § 6.3, at 191-95.

[100] See ABA Report, supra note 89, at 119 (observing that "the setting and constant resetting of execution dates or signing of death warrants" is "typically done in a political manner"). Scheduled executions brought media attention and high drama, affording "tough-on-crime" politicians an opportunity to posture further about the need for more executions. See id.

[101] In 1989, Stephen Bright, Director of the Southern Prisoners Defense Committee, now known as the Southern Center for Human Rights, described his experience several years earlier of "being asked to represent James Raulerson, who was scheduled to be executed in three weeks by Florida . . . [even though Bright had] never seen the record in his case or even read the state court opinion affirming his conviction." Letter from Stephen B. Bright to Professor Ira P. Robbins (Feb. 14, 1989), in ABA Report, supra note 89, at 118. Bright therefore had three weeks to prepare the case, handle the hearing in state court, argue in the Florida Supreme Court, and seek federal habeas corpus relief. Id. Assistant Attorneys General had their own view of the matter: They characterized execution dates as a device the states were using to give capital defense attorneys an "incentive" to cease delaying and to act "diligently." See ABA Report, supra note 89, at 226-27 (quoting statements to this effect by Attorneys General of Texas, Florida, and Virginia, including Virginia Attorney General's statement to Supreme Court of United States during oral argument).

[102] See, e.g., Marc Mauer, Race to Incarcerate 9 (1999) ("[A] complex set of social and political developments have produced a wave of building and filling prisons virtually unprecedented in human history. . . . [and the United States] locks up offenders at a rate six to ten times that of most comparable countries."); The Real War on Crime: The Report of

States rose from 200,000 to nearly 2,000,000.[103] Prisons were constructed at a pace that amounted to one prison opening each week in the United States during the ten-year period between 1985 and 1995.[104] Predictably, there was a significant increase in the number of pro se habeas corpus filings.[105]

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the National Criminal Justice Commission 36 (Steven R. Donziger ed., 1996) (noting that anticrime proposals significantly increase American prison population).

[103] Compare Bureau of Justice Statistics, U.S. Dep't of Justice, National Correctional Population Reaches New High—Grows By 126,400 During 2000 to Total 6.5 Million Adults, http://www.ojp.usdoj.gov/bjs/pub/press/ppus00pr.htm (last modified Aug. 28, 2001) (stating that as of December 31, 2000, there were 1.9 million men and women incarcerated), with Mauer, supra note 102, at 9 (claiming that prison population in 1972 was "just under 200,000," but that total incarcerated population in 1997 was 1.7 million). The most recent data on prison populations shows a modest decline (a drop of 6200 inmates in state prisons in the latter half of 2000), the first decline since 1972. Fox Butterfield, Number of People in State Prisons Declines Slightly, N.Y. Times, Aug. 13, 2001, at A1.

[104] Mauer, supra note 102, at 1. Thus, as Mauer observes, "[m]ore than half of the prisons in use today have been constructed in the last twenty years." Id. at 9. The boom in prison construction has been fueled in part by rural communities' perception of prisons as a steady source of employment for members of the local community. See, e.g., Michael Tonry & Joan Petersilia, American Prisons at the Beginning of the Twenty-First Century, in 26 Prisons 1, 12 (Michael Tonry & Joan Petersilia eds., 1999) ("Although prison administrators needing to build new facilities were often before 1980 stymied by not-in-my-backyard (NIMBY) movements, communities now compete for new prison construction as local economic development initiatives."); Peter T. Kilborn, Rural Towns Turn to Prisons to Reignite Their Economies, N.Y. Times, Aug. 1, 2001, at A1 ("As in many other small towns around the country, a three-year old, $37 million, 1,440-inmate, 270-employee, all-male prison is responsible for lifting . . . [this small Oklahoma town's] spirits and reigniting its economy."). Accordingly, as the declining crime rate has begun to cause corrections officials in some areas to consider a shift in fiscal priorities away from the construction and expansive support of prisons, the communities that are economically dependent upon prisons have offered sharp resistance to any such changes in criminal justice policy. See David Rohde, A Growth Industry Cools as New York Prisons Thin, N.Y. Times, Aug. 21, 2001, at A1 (reporting that "[p]rison employees expressed fear, anger, and suspicion" about state's plan to freeze hiring and eliminate jobs at rural prisons).

[105] As Ira Robbins pointed out in a 1987 article, statistics on the number and rate of habeas corpus filings could be interpreted in radically disparate ways. At that time, the Attorney General of the United States was decrying "the flood of habeas corpus petitions engulfing our federal courts," but studies showed that "while the annual number of habeas corpus petitions increased a bit in the last 15 years, habeas corpus cases as a percentage of the federal courts' civil caseload have actually been *decreasing*, to about 3.5% last year." Ira P. Robbins, Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term, 111 F.R.D. 265, 266-67 (1987) (footnote omitted). The judiciary's perceptions with regard to pro se filings of habeas corpus petitions by prisoners undoubtedly was affected at least in part by the number of pro se prisoner filings of § 1983 civil actions to challenge prison conditions. The substantial increases in the prison population inevitably produced an increase in the number of § 1983 civil actions to challenge conditions of confinement, adequacy of medical care, misconduct by guards and staff, access to courts, and a host of other issues. The same Congress that adopted AEDPA to restrict the federal habeas corpus remedy for prisoners also enacted the Prison Litigation Reform Act (PLRA) of 1995 to limit indigent prisoners' use of the § 1983 remedy. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 18, 28, and 42 U.S.C.). The PLRA requires, among other things, that "prisoner[s] seeking to bring a civil action or appeal a

4. *The Resulting Narrative and Its Impact on Successive Petition Rules in the Years Leading up to AEDPA*

Driven by anger and frustration over the demands of habeas corpus litigation, some of the Supreme Court Justices and lower federal court judges sought to assign blame for the problems that plagued the system. They found convenient targets in indigent capital petitioners and the capital defense bar. As already seen, the story of the abusive prisoner had been percolating in the federal courts since the 1940s.[106] And, as Professor Anthony G. Amsterdam has observed in an examination of the Burger and Rehnquist Courts' pattern of granting state applications to vacate stays of execution, the conservative wing of the Court embraced a mythical conception of the capital defense bar as "a tiny but immensely powerful cabal of schemers" that manipulates the system to prevent the orderly implementation of lawful sentences of death.[107] These narratives had great force, for they spoke directly to fundamental conceptions of fair play and equity. Moreover, they rested upon familiar images of the prisoner as "con man" and the defense lawyer as trickster.[108]

These portraits certainly were apparent in the Supreme Court's decisions on the subject of successive petitions in the mid-1980s[109] and even more starkly evident in the actions that Chief Justice Rehnquist and Justice Powell took during those years to try to initiate legislative reforms (or, more precisely, restrictions) of the habeas corpus remedy. In June 1988, Chief Justice Rehnquist, who had been openly critical of the federal habeas corpus process,[110] acted in his capacity as chief ex-

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judgment in a civil action or proceeding," 28 U.S.C. § 1915(a)(2) (Supp. V 2000), "pay the full amount of a filing fee" or a partial filing fee supplemented by monthly installments from the litigant's prison account. § 1915(b)(1).

106 See supra Part I.B.2.

107 Anthony G. Amsterdam, Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases, in The Killing State: Capital Punishment in Law, Politics, and Culture 148, 165 (Austin Sarat ed., 1999). As Professor Amsterdam explains, the Court majority's adherence to (and preoccupation with) this myth helps to explain the Court's otherwise incomprehensible pattern of summarily vacating temporary stays of execution granted by lower courts to afford capital prisoners time to respond to adverse decisions by appealing or seeking certiorari. In Professor Amsterdam's words, "the myth of the Death Penalty Defense Lawyers' Conspiracy . . . gave the Justices somebody to be mad at . . . [and] made it possible for the Justices to deny that many of the issues which they and the lower courts were deciding in death cases were close judgment calls." Id. at 164.

108 For discussion of this and other, less pejorative stock scripts about defense lawyers, see Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y.L. Sch. L. Rev. 55, 76, 106-10 (1992).

109 See supra notes 74-77 and accompanying text.

110 For example, in an address to the National Conference of Chief Justices in Williamsburg, Virginia on January 27, 1988, Chief Justice Rehnquist described the capital habeas corpus process as "disjointed and chaotic." See Lewis F. Powell, Jr., Capital Punishment,

ecutive officer of the Judicial Conference to appoint an ad hoc committee charged with examining "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in federal habeas corpus proceedings in capital cases.[111] The Chief Justice appointed Justice Powell as chair of this Ad Hoc Committee on Federal Habeas Corpus in Capital Cases.[112] The Committee's 1989 report, not surprisingly, tracked Justice Powell's earlier criticisms of capital prisoners' and defenders' manipulative use of successive petitions in capital cases:

> Another disturbing aspect of the current system is that litigation of constitutional claims often comes only when prompted by the setting of an execution date. . . . In some cases last-minute habeas corpus petitions have resulted from the unavailability of counsel at any earlier time. But in other cases attorneys appear to have intentionally delayed filing until time pressures were severe. In most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay.[113]

Among the variety of legislative reforms that the "Powell Commission" recommended was a statutory provision to curtail the availability of successive petitions.[114]

Chief Justice Rehnquist acted quickly and aggressively to seek congressional implementation of the Powell Commission's proposals. Although the Judicial Conference voted 17-7 in September 1989 to defer consideration of the proposals until its full meeting in March 1990, Chief Justice Rehnquist nevertheless sent the Powell Commission report to the Senate and Judiciary Committees on the day after the Judicial Conference's vote to defer the matter.[115] Speaking out

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102 Harv. L. Rev. 1035, 1040 & n.36 (1989) (quoting Chief Justice Rehnquist's speech). For other comments of Chief Justice Rehnquist to the same effect, see infra notes 116-117.

111 Report on Habeas Corpus in Capital Cases, supra note 98, at 3239.

112 Id. The Committee, which included circuit and district court judges from the Fifth and Eleventh Circuits, was criticized by some for its "heavily conservative" composition. Marcia Coyle, Use of Habeas Writ Imperiled by Study, Nat'l L.J., Nov. 28, 1988, at 1, 26.

113 Report on Habeas Corpus in Capital Cases, supra note 98, at 3240.

114 See id. at 3245. For a discussion of the incorporation of some of these elements into AEDPA's rules on successive petitions, see infra Part II.A.

115 Al Kamen, Rehnquist Presses for Quicker Executions; Delay in Hearings on Limiting Death Row Appeals Is Opposed, Wash. Post, Oct. 13, 1989, at A17. Fourteen judges responded to Chief Justice Rehnquist's action by sending a letter to the Chair of the Senate Judiciary Committee, Joseph R. Biden, Jr., asking Senator Biden to defer any action on the proposal until after the Judicial Conference's meeting in March. Id.; see also Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Sen. Comm. on the Judiciary, 101st Cong. 129 (1989) (statement of Chief Judge Donald P. Lay, United States Court of Appeals for the Eighth Circuit) (expressing "sincere hope that this committee and Congress will defer final action and study on any legislative reform of habeas corpus until

publicly in support of the Powell Commission's proposals, Chief Justice Rehnquist made it acutely evident that he viewed capital prisoners and their lawyers as the central problem. In noncapital cases, he said, prisoners have "every incentive" to act expeditiously "[b]ut the incentives are quite the other way with a capital defendant."[116] Given that "[a]ll Federal review of his sentence must obviously take place before the sentence is carried out . . ., the capital defendant frequently finds it in his interest to do nothing until a death warrant is actually issued by the state."[117]

When Congress took up the Powell Commission proposals, conservative senators and representatives eagerly embraced the narrative about prisoner and lawyer abuse of the federal habeas corpus remedy. During the congressional hearings, Senator Hatch of Utah presented a detailed description of the procedural history of an actual capital case from his state,[118] using a chart to show each of the prior stages of judicial review and saying:

> I hope that this simple listing will preclude anyone from stating, as often happens, that Federal habeas corpus is about giving prisoners a second bite of the apple. That frankly never occurs. Federal habeas, particularly in capital litigation, is about giving prisoners a 10th bite of the apple, even a 20th bite of the apple. If only the problem were as simple as a second bite of the apple.[119]

Senator Hatch attributed "the problem" to the habeas statute itself, claiming that "[t]he system has broken down for one simple rea-

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after the Conference can act"). Chief Justice Rehnquist reacted by sending a letter to Senator Biden stating that he was obliged to "'transmit the Powell Committee report when it became final rather than at some future time to be determined at my discretion.'" Kamen, supra (quoting Chief Justice Rehnquist's letter). Ultimately, the Judicial Conference rejected some of the Powell Commission's recommendations, including aspects of its proposals regarding successive petitions. See U.S. Judicial Conference Takes Stance on Use of Habeas Corpus in Capital Cases, 46 Crim. L. Rep. 1547, 1547-48 (1990).

116 Excerpts from Rehnquist Speech Urging Curbs on Death Penalty Appeals, N.Y. Times, May 16, 1990, at A18.

117 Id.

118 The case was that of William Andrews. See 137 Cong. Rec. 16,538-39 (1991) (statement of Sen. Hatch). Senator Hatch's extremely detailed account of the case, which included a declaration that Andrews and his co-defendant "were given a long and careful trial before a fair jury," id. at 16,538, noticeably omitted any reference to the following facts which Justice Marshall described in an opinion dissenting from denial of certiorari in the Utah case: The crime, which "may have generated racist sentiments, inasmuch as the defendants were black people and the victims were white members of the local community," was tried to an "all-white jury" after "[t]he single black member of the venire was excluded," and there was "a midtrial incident in which a juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription, 'Hang the Niggers.'" Andrews v. Shulsen, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting from denial of certiorari).

119 137 Cong. Rec. 16,538 (1991) (statement of Sen. Hatch).

son: Because the Federal habeas corpus statute is flexible enough and broad enough to allow anyone to manipulate it to their own ends."[120]

The bills designed to implement the Powell Commission's recommendations foundered in 1990 and again in 1991.[121] In the meantime, the Rehnquist Court majority took action on its own to restrict successive petitions to the extent it could, within the confines of the existing habeas corpus statutes and prior constructions of those statutes. The Court redefined—and significantly narrowed—the standard for new-claim successive petitions in 1991 in *McCleskey v. Zant*,[122] while professing that the newly announced standard was "consistent" with prior precedent and practice.[123] In 1992, the Court majority declared in dicta that the new *McCleskey* standard would be applied to same-claim successive petitions as well.[124]

The Court's moves to restrict successive petitions were accompanied by equivalent actions to narrow other aspects of the federal habeas corpus remedy. During the period from 1989 to 1993, the Court substantially curtailed the availability of habeas corpus review

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120 Id.

121 In both years, different versions of the legislation passed in the Senate and House. See S. 635, 102d Cong. (1991); H.R. 3371, 102d Cong. (1991); H.R. 5269, 101st Cong. (1990); S. 1970, 101st Cong. (1989). For discussion of the legislative proposals and the circuitous paths they traveled, see Vivian Berger, Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus, 90 Colum. L. Rev. 1665 (1990); Ronald J. Tabak & J. Mark Lane, Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals, 55 Alb. L. Rev. 1, 55-84, 88-93 (1991); Larry W. Yackle, The Habeas Hagioscope, 66 S. Cal. L. Rev. 2331, 2362-64, 2367-73 (1993).

122 499 U.S. 467 (1991).

123 See supra notes 46-53 and accompanying text. The *McCleskey* majority also seized the opportunity to characterize a restrictive plurality view about successive petitions in a mid-1980s decision by Justice Powell as a "holding." In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the Court split on the proper definition of the "ends of justice" principle. Justice Powell, who wrote for a majority of the Court on some issues in the case, was able to command only a plurality for his view that the "ends of justice" exception is limited to cases in which the "prisoner supplements his constitutional claim with a colorable showing of factual innocence." Id. at 454 (plurality opinion of Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.). In dissent, Justice Brennan, joined by Justice Marshall, advanced a broader conception of the "ends of justice" principle, see id. at 461-71 (Brennan, J., dissenting), and Justice Stevens agreed that the plurality's definition was too narrow. Id. at 476-77 (Stevens, J., dissenting). In *McCleskey*, Justice Kennedy, writing for a six-Justice majority, described the plurality's opinion on this issue as having "held" that the "ends of justice" principle authorizes "successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.'" *McCleskey*, 499 U.S. at 495 (quoting *Kuhlmann*, 477 U.S. at 454 (plurality)). As is readily apparent—and as Justice Scalia specifically has stated—"one cannot say the holding, [of *Kuhlmann*] since the opinion was a mere plurality." Schlup v. Delo, 513 U.S. 298, 347 (1995) (Scalia, J., dissenting).

124 Sawyer v. Whitley, 505 U.S. 333, 338 (1992) (stating that Court may not hear same-claim successive petitions unless cause and prejudice shown).

or relief by restricting the circumstances under which a habeas corpus petitioner could obtain the benefit of a newly announced constitutional rule;[125] limiting the opportunities for a petitioner to obtain an evidentiary hearing in federal court to adduce facts that were not developed during state court proceedings;[126] and liberalizing the standard by which the state could prevent the overturning of a conviction or sentence by showing that a constitutional error was "harmless."[127] All of these doctrinal innovations were fueled by the same fears of unlimited habeas corpus litigation (and the underlying myths of the abusive petitioner and the manipulative defense lawyer) that were at the core of the Court's curtailment of successive petitions in *McCleskey v. Zant* in 1991.

Ironically, the newly constructed procedural barriers to habeas corpus review did not advance the Rehnquist Court majority's avowed goal of streamlining and expediting capital cases. Instead, the Court threw the federal habeas corpus review process into disarray, as petitioners, their lawyers, state attorneys general, and the lower federal courts struggled to cope with a doctrinal jumble that had grown too "byzantine" for ready comprehension or utilization.[128] Into this doc-

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125 Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that new constitutional rule is not applicable to cases on collateral review, subject to two narrow exceptions). For discussion of the *Teague* doctrine, see infra note 173 and accompanying text.

126 Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Under *Tamayo-Reyes*, a habeas corpus petitioner's failure to present evidence on a certain issue in state court can in some circumstances constitute a procedural default. Id. at 8-10. This precludes a federal evidentiary hearing on that issue unless the petitioner shows "cause" for and "prejudice" from the failure to adduce the facts in state court or that the preclusion of a federal hearing would result in a "fundamental miscarriage of justice." Id. at 11-12. For discussion of this Court-created rule and AEDPA's substitution of a differently framed standard for obtaining a federal evidentiary hearing to present facts that a petitioner failed to adduce during the state court proceedings, see Hertz & Liebman, supra note 26, § 20.2b.

127 Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). In contrast to direct appeals, where a constitutional error requires relief unless the government proves that the error was harmless beyond a reasonable doubt, see Chapman v. California, 386 U.S. 18, 24 (1967), the *Brecht* decision held that "the standard for determining whether habeas relief must be granted is whether the . . . error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (citation omitted). For a detailed discussion of the *Brecht* rule, see Hertz & Liebman, supra note 46, § 31.

128 See McFarland v. Scott, 512 U.S. 1256, 1263-64 (1994) (Blackmun, J., dissenting from denial of certiorari) ("The accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review . . . make it even less likely that future . . . [habeas corpus petitioners] actually will obtain relief."); see also Edwards v. Carpenter, 529 U.S. 446, 454 (2000) (Breyer, J., concurring in judgment) ("[T]he complexity of this Court's habeas corpus jurisprudence . . . in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure."). A judge on the Eleventh Circuit made similar remarks:

> A death penalty case will be as difficult and demanding litigation as you will ever participate in. It will require a substantial investment of time. The law is

trinal quagmire stepped Congress, eager to do its part to curb even further the imagined abuses of capital prisoners and their lawyers.

5. *The Final Act: AEDPA*

After the bills prompted by the Powell Commission report stalled in 1990 and 1991, they resurfaced periodically year after year.[129] In 1995, these proposals took on new urgency when their congressional proponents folded the habeas corpus restrictions into a "terrorism prevention bill" prompted by the Oklahoma City bombing.[130] The arguments in favor of these restrictions were largely the same ones heard before, sometimes almost identical. The myth of systemic abuse again was invoked by Senator Hatch, but this time he pointed his finger more directly not only at capital prisoners but also their lawyers:

> There were 2,976 inmates on death row as of January 1995. . . . There are multiple frivolous appeals in almost every one of these almost 3,000 death row cases. If they lose on one, they conjure up another one, and then they conjure up another one, and they conjure up another one . . . .
>
> There is no finality, no way of solving these problems. It is a farce. Why is it? Because liberal judges—and I have to say active defense lawyers who are doing their jobs under a system that allows this charade to go on and on—continue to allow this to happen because they do not like the death penalty.[131]

Other senators and representatives joined in with similar condemnations of the abusive gamesmanship of capital prisoners.[132] President Clinton also invoked this narrative in his statement upon

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> difficult. It's complex. It changes every week. Research is tough. The case will be emotionally draining no matter how hard you steel yourself against it.

John C. Godbold, *Pro Bono* Representation of Death Sentenced Inmates, Seventh Orison S. Marden Memorial Lecture (Apr. 29, 1987), in 42 Rec. Ass'n B. City N.Y. 859, 871 (1987).

129 For an overview of the provisions in the various bills, see James S. Liebman & Randy Hertz, 1 Federal Habeas Corpus Practice and Procedure § 2.7, at 92-95 (2d ed. 1994).

130 For a discussion of the connections between the legislation and the Oklahoma City bombing, see supra notes 2-10 and accompanying text.

131 141 Cong. Rec. 15,062 (1995) (statement of Sen. Hatch).

132 Congressman Cox of California painted a vivid portrayal of prisoners abusing the system:

> The Federal procedural rules . . . operate in many cases as a frustration to the State system. So we find that there are egregious cases, and all too many of them, of convicted first degree murderers who have run all of their appeals in the State criminal justice system, who then get another bite, and another bite at the apple, seemingly endlessly in the Federal system, and who have been able, through the abuse of the habeas device, to postpone their executions, seemingly indefinitely. . . .
>
> . . . I am calling this the Harris amendment. It is so named after Robert Alton Harris, the notorious first degree murderer who postponed for well over a dec-

signing the legislation, albeit more obliquely, by saying, "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served."[133]

Thus, the Oklahoma City bombing provided the catalyst the congressional opponents of habeas corpus needed in order to acquire the result they had been seeking for years—the dramatic curtailment of federal habeas corpus. The fact that the Supreme Court had scaled back substantially the federal habeas corpus remedy during the years since the Powell Commission Report's issuance[134] was immaterial. For the congressional crusaders of habeas corpus "reform," even more drastic restrictions were needed. Also, presumably, it was essential to these members of Congress that they be able to claim public credit for attaining this goal and thereby promoting a "law and order" agenda, particularly in the wake of the Oklahoma tragedy.

Before examining the precise nature and effects of the successive petition rules on capital habeas petitions, it is worth saying a final word about the myths that played such a pivotal role in spawning AEDPA and the new habeas provisions. As the earlier discussion of the nature of capital practice demonstrates, the myth was not grounded in reality: Successive petitions and last-minute stay applications were the product of a variety of systemic forces, not necessarily intentional delay and gamesmanship on the part of capital prisoners and their lawyers.[135] Even at the height of the rush to curb habeas corpus review, some federal judges made this point clearly and forcefully. For example, Chief Judge Lay of the Eighth Circuit wrote in a concurring opinion in a capital habeas corpus case:

> If a prisoner seeks his liberty, human desire dictates that he or she will assert every ground known at the time that will provide a basis for release. To suggest that prisoners might hold back to play procedural games with the court is unrealistic. I have never been aware

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ade his own execution through the abuse of the device of Federal habeas corpus, statutory habeas corpus.

141 Cong. Rec. 4111 (1995) (statement of Rep. Cox); see also id. at 4086 (statement of Rep. McCollum) ("[C]onvicted murderers on death row regularly make a mockery of the criminal justice system by using every trick in the book to delay imposition of their sentences. In many cases where the people's elected representatives have passed capital punishment laws, executions never occur because of endless appeals and lawsuits.").

133 Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, supra note 6, at 631.

134 See supra notes 122-27 and accompanying text.

135 The universal view that every death row prisoner seeks delay always has been exaggerated. It is worth noting that twelve percent of executions in the post-*Furman* era, 89 out of 732, have been accomplished after death row prisoners forfeited appeals and sought expedited executions. NAACP, Legal Def. and Educ. Fund, Inc., Death Row U.S.A., Fall 2001, at 5-6.

> of such prisoner stratagem in a habeas case. It sounds good in principle as a means of thwarting the undesirability of piecemeal appeals, but it simply does not happen. There is no empirical evidence that it occurs. The presumptive desirability to achieve one's freedom is far too great to "sandbag" the court for procedural fun.[136]

The claim of improper intent was not the only overblown part of the myth. The story of the abusive prisoner who causes disorder in the courts also vastly exaggerated the harm that unmeritorious filings can cause.[137] Under the rules that govern habeas corpus practice, federal judges have the power to dismiss summarily a facially insufficient petition without even waiting for a responsive pleading from the state;[138] even if a petition makes it past this initial stage, it still can be dismissed on the basis of a motion for summary judgment by the state.[139] Moreover, in the case of an indigent prisoner (the prototypical mythical abusive litigant who files multiple pleadings because s/he is unconstrained by filing fees), the courts have the power—which they have not hesitated to exercise[140]—to deny in forma pauperis sta-

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136 Williams v. Lockhart, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring); see also, e.g., Wainwright v. Sykes, 433 U.S. 72, 103 (1977) (Brennan, J., dissenting) ("[N]o rational lawyer would risk the 'sandbagging' feared by the Court."). In April 1996, then-Chief Judge Jon O. Newman of the Court of Appeals for the Second Circuit similarly observed with regard to prisoner lawsuits that, "while there are many frivolous claims, those in responsible positions ought not to ridicule all prisoner lawsuits by perpetuating myths about them." Jon O. Newman, Not All Prisoner Lawsuits Are Frivolous, in The Celling of America 55, 57 (Daniel Burton-Rose et al. eds., 1998).

137 Narrative theory teaches that an essential element of a compelling narrative is the "disruption (the Trouble)" of "an anterior steady state," requiring "strivings to correct or cope with the Trouble." Anthony G. Amsterdam & Jerome Bruner, Minding the Law 46 (2000) (emphasis omitted). By painting a picture of a flood of unmeritorious habeas corpus petitions disrupting the courts, the opponents of habeas corpus could portray cutbacks in prisoner litigation as the desperately needed salvation.

138 See 28 U.S.C. § 2254 R. 4 (1994) (enacted by Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976)) (Rules Governing § 2254 Cases in United States District Courts):

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

139 § 2254 R. 8 (recognizing availability of "dismissal pursuant to a motion by the respondent"). For discussion of the standards and procedures for state motions for summary judgment in federal habeas corpus proceedings, see Hertz & Liebman, supra note 26, §§ 15.2, 16.1c, 16.2.

140 See, e.g., In re Whitaker, 513 U.S. 1 (1994) (ruling petitioner in civil suit is not entitled to proceed in forma pauperis because he filed twenty-three claims for relief that had all been denied without dissent); In re Anderson, 511 U.S. 364 (1994) (denying petitioner in forma pauperis status and barring him from filing further requests for extraordinary relief after he submitted twenty-two separate petitions and motions in three-year time span); In re Demos, 500 U.S. 16 (1991) (barring petitioner from making further in forma

tus[141] and even to bar prospectively in forma pauperis filings.[142] Finally, in the capital context, the courts can deny a stay of execution if the prisoner's claims are frivolous,[143] and the Supreme Court has even exercised the power to prospectively bar the lower federal courts from granting further stays.[144] Given the existence of so many mechanisms for summarily dismissing and even prospectively barring frivolous filings, it is apparent that the petitions that require time and effort on the federal judge's part are generally those that present constitutionally compelling, and potentially meritorious, claims.[145]

II
AEDPA's Impact on Claims That Cannot Be Adjudicated Until the Successive Petition Stage

In the last twenty years, the administration of the death penalty has generated a number of concerns about capital punishment that go

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pauperis filings seeking extraordinary writs, as he had already made thirty-two in forma pauperis filings with Supreme Court); In re Sindram, 498 U.S. 177 (1991) (denying petition after petitioner filed forty-two separate petitions and motions challenging speeding conviction in three-year time span, all of which were denied without dissent); In re McDonald, 489 U.S. 180 (1989) (denying motion for leave to proceed in forma pauperis where petitioner made seventy-one separate filings, all of which were rejected without dissent).

141 The Supreme Court may deny in forma pauperis status to a litigant who files a frivolous or malicious "writ of certiorari, jurisdictional statement, or petition for an extraordinary writ." Sup. Ct. R. 39(8). In promulgating this rule, the Court wrote, "This amendment makes clear that to protect itself from abusive filings the Court may enter orders similar to those entered by the lower federal courts for almost 100 years pursuant to 28 U.S.C. §§ 1915(a) and (d), and their predecessors." In re Amendment to Rule 39, 500 U.S. 13, 14 (1991) (per curiam).

142 See, e.g., In re McDonald, 489 U.S. 180, 180 (1989) (per curiam) (responding to habeas corpus petitioner's multiple nonmeritorious filings by denying in forma pauperis status and furthermore by "direct[ing] the Clerk not to accept any further petitions from prisoner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee").

143 Barefoot v. Estelle, 463 U.S. 880, 894 (1983) ("[I]t is entirely appropriate that an appeal, which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay.").

144 E.g., Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (mem.) ("No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."). For a detailed description of the Robert Alton Harris case and the Supreme Court's actions, see Judge Stephen Reinhardt, The Supreme Court, The Death Penalty, and The *Harris* Case, 102 Yale L.J. 205 (1992).

145 As a result of the array of procedural defenses that the Supreme Court and Congress have created to limit the availability of habeas corpus review, much of the time and effort the federal courts expend in habeas cases is on the adjudication of procedural defenses, not the merits of the constitutional claims. See ABA Report, supra note 89, at 94-95 ("Numerous Task Force witnesses commented on th[e] 'sisyphean' nature of procedural issues, arguing that the threshold inquiries, or 'satellite' litigation, are unfair not only because they prevent the federal courts from reviewing constitutional claims, but also because they further delay the process of death penalty review.").

beyond the culpability and punishment of an individual defendant. Much of the public debate concerning capital punishment has focused not on whether a convicted killer deserves to die for his or her crime, but on whether an imperfect state, struggling with economic, racial, and social inequities, should have the power to impose a punishment that leaves no room for error. Even those who have no moral objections to the death penalty have been shaken by exonerations of defendants who had been sentenced to death[146] and by evidence of widespread arbitrariness in the application of the death penalty,[147] based on factors such as: geography;[148] the race or status of the victim;[149] racial bias against the defendant;[150] discrimination against the

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146 For example, in early 2000, Governor George Ryan of Illinois imposed a moratorium on executions in his state in response to "the state's troubling track record of exonerating more Death Row inmates than it has executed and . . . to a recent [Chicago] Tribune investigation that exposed the death-penalty system's flaws . . . ." Steve Mills & Ken Armstrong, Governor to Halt Executions, Chi. Tribune, Jan. 30, 2000, at 1; see also Callins v. Collins, 510 U.S. 1141, 1158 n.8 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Even the most sophisticated death penalty schemes are unable to prevent human error from condemning the innocent. Innocent persons *have* been executed, perhaps recently, and will continue to be executed under our death penalty scheme." (citations omitted)). For discussions of wrongful convictions in capital and noncapital cases, see Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000); Michael L. Radelet, Hugo A. Bedau & Constance E. Putnam, In Spite of Innocence: Erroneous Convictions in Capital Cases (1992) (examining causes of erroneous convictions for criminal homicide and rape); Samuel R. Gross, Lost Lives: Miscarriages of Justice in Capital Cases, Law & Contemp. Probs., Autumn 1998, at 125; Samuel R. Gross, The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases, 44 Buff. L. Rev. 469 (1996).

147 In *Callins*, Justice Blackmun voiced his concern about states' ability to administer the death penalty constitutionally:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, 408 U.S. 238 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

Callins, 510 U.S. at 1143-44 (Blackmun, J., dissenting from denial of certiorari).

148 See, e.g., Barry Nakell & Kenneth A. Hardy, The Arbitrariness of the Death Penalty 152-53 (1987) (showing that degree to which defendants faced risk of death penalty in North Carolina depended to certain extent on judicial district processing case); Leigh B. Bienen et al., The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion, 41 Rutgers L. Rev. 27, 180-82, 231-32 & n.707 (1988) (analyzing differences in progression of death-eligible cases across various New Jersey counties); William J. Bowers, The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes, 74 J. Crim. L. & Criminology 1067, 1071-75, 1079-80, 1083-86 (1983) (reporting regional disparities in indictment, conviction, and sentencing stages of Florida death penalty cases in 1970s).

149 See, e.g., David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 157, 184-88 (1990) (observing that victim's race continues to influence post-*Furman* death penalty cases in Georgia); Samuel R. Gross & Robert Mauro, Death and Discrimination: Racial Disparities in Capital

poor;[151] and the personal interests of judges who fear that an unpopular decision in a death penalty case may impede their reappointment or re-election to the bench.[152] As is increasingly apparent in the public discourse about the death penalty, the questions of how the state executes a convicted killer and who is selected for execution reflect not only the crime of the condemned but also the character of the larger society.[153]

Sentencing 43-103 (1989) (providing empirical evidence that those convicted of murdering white victims are more likely to receive death penalty than those convicted of murdering black victims).

150 David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998) (documenting extent of racial discrimination in death penalty application in Philadelphia area); Bryan A. Stevenson & Ruth E. Friedman, Deliberate Indifference: Judicial Toleration of Racial Bias in Criminal Justice, 51 Wash. & Lee L. Rev. 509 (1994) (lamenting how pervasive racial discrimination in American criminal justice system is tolerated by judiciary and its peremptory challenge jurisprudence); see also *Callins*, 510 U.S. at 1153 (Blackmun, J., dissenting from denial of certiorari) ("Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.").

151 See, e.g., *Furman*, 408 U.S. at 251-52 (Douglas, J., concurring) ("One searches our chronicles in vain for the execution of any member of the affluent strata of this society."); Ramsey Clark, Crime in America 335 (1970) ("It is the poor, the sick, the ignorant, the powerless and the hated who are executed."); Int'l Comm'n of Jurists, Administration of the Death Penalty in the United States: Report of a Mission 127 (1996) ("Almost all accused charged with a capital offence . . . are indigent as well as often illiterate or uneducated.").

152 Justice Stevens recognized the reality of such political pressure: "The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty." Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting). "Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." Id. at 519-20 (citation omitted); see also John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 St. John's J. Legal Comment. 21, 31 (1996) ("[M]aking the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be."). For further discussion regarding the effect of an elected judiciary on the administration of the death penalty, see Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308, 312-26 (1997); Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 793-95 (1995).

153 See David Garland, The Culture of Control (2001) (describing how social, economic, and cultural developments led to American and British societies' recent responses to crime); Austin Sarat, When the State Kills: Capital Punishment and the American Condition (2001) (arguing that death penalty reflects and perpetuates American tendency to feel victimized, to demonize certain groups, and to use state to exact seemingly just retribution).

The emergence of these fundamental issues in the public arena parallels the raising of claims in individual capital cases that go beyond the guilt or sentencing of the accused and reach broader issues of the constitutionality of an execution.[154] For instance, it has long been accepted that the Eighth Amendment prohibits the execution of an individual who is mentally incompetent.[155] In recent years, cases have focused greater attention on what *more* is required under the Eighth Amendment, as exemplified by the Supreme Court's recent grant of certiorari in a case to reconsider the question of whether the Eighth Amendment prohibits the execution of mentally retarded persons.[156] The Court also has signaled its readiness to clarify Eighth Amendment constraints on the method of execution.[157] Other issues are waiting in the wings. These include, for example, the question of whether the length of time it takes a state to carry out a death sentence implicates the Eighth or Fourteenth Amendments[158] and the legal implications of an international court's issuance of an injunction against a United States execution on the basis of international law.[159]

For reasons that will be explained in the following sections, the foregoing types of claims usually cannot be adjudicated until the successive petition stage of a capital case. As the discussion also shows, the successive petition provisions that Congress adopted as part of AEDPA foreclose, or significantly impede, the litigation of these claims at that stage. Part II.A provides an examination of the precise nature of AEDPA's successive petition rules. Part II.B then illustrates, by way of case examples, how AEDPA effectively curtails successive petitions that challenge the constitutionality of an execution. Part II.C demonstrates that AEDPA also severely limits a capital habeas petitioner's ability to benefit from "new laws" on successive petitions. Finally, Part II.D suggests that Congress neither intended nor foresaw the effects that AEDPA's successive petition provisions would have on such claims.

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154 While "innocence of the death penalty" claims are also implicated in this discussion, see infra notes 180-182 and accompanying text, the focus here is on claims that are more likely to concern new constitutional rules or the execution process itself, as these are the claims that are frequently the currency of legitimate successive litigation.

155 See infra notes 189-94 and accompanying text.

156 See infra notes 312-14 and accompanying text.

157 See infra note 247 and accompanying text.

158 See infra notes 285-93 and accompanying text.

159 See infra note 335 and accompanying text.

A. AEDPA's Standards for Successive Petitions

AEDPA's impact upon same-claim successive[160] petitions is glaringly apparent. The statute wholly abolishes this long-accepted category of claims for which federal relitigation historically was permitted.[161] With regard to new-claim successive petitions,[162] the changes that AEDPA effects in the *procedures* for filing such petitions are also readily visible. As explained earlier,[163] the statute replaced what was an affirmative defense on the part of the state (which ordinarily would be waived by the state's failure to raise the defense in a timely and effective manner)[164] with an automatic procedure that requires the prisoner to obtain leave to file a successive petition by making a prima facie showing of compliance with the statute's substantive standards for successive petitions.[165] The new procedure adds to the workload of the federal courts and complicates an already-complex postconviction process. It requires that a motion for leave to file a successive appeal be heard by a three-judge circuit court panel before a petition can be filed in federal district court,[166] and the circuit court panel is to resolve the motion within thirty days.[167] Even after the

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160 For explanation of this term, see supra notes 38-39 and accompanying text.

161 See 28 U.S.C. § 2244(b)(1) (Supp. V 2000) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

162 For explanation of this term, see supra note 40 and accompanying text.

163 See supra notes 46-51 and accompanying text.

164 Under the pre-AEDPA rules, when a prisoner filed a second or subsequent application, the government bore the burden of pleading "abuse of the writ." See McCleskey v. Zant, 499 U.S. 467, 494 (1991). To satisfy that burden, the state had to "with clarity and particularity, . . . note[ ] petitioner's prior history, identif[y] the claims that appear for the first time, and allege[ ] that petitioner has abused the writ." Id.

165 See § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.").

166 § 2244(b)(3)(A)-(E).

167 § 2244(b)(3)(D) ("The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion."); see also Tyler v. Cain, 533 U.S. 656, 664 (2001) ("The court of appeals must make a decision on the application within 30 days."). The circuit courts have construed the thirty-day requirement as merely "hortatory or advisory rather than mandatory." In re Siggers, 132 F.3d 333, 336 (6th Cir. 1997); see also, e.g., Gray-Bey v. United States, 201 F.3d 866, 867 (7th Cir. 2000) ("[T]he 30-day period may be extended for those few cases which require reasoned adjudication and cannot be resolved within the statutory period."); Rodriguez v. Superintendent, Bay State Corr. Ctr., 139 F.3d 270, 272 (1st Cir. 1998) (agreeing that thirty-day limit is advisory, not mandatory); Thomas v. Superintendent, Woodburne Corr. Facility, 136 F.3d 227, 230 (2d Cir. 1997) (per curiam) ("The 30-day provision . . . is a limitation on our deliberative time, which does not begin to run until such time as we have a record sufficient to decide the question that is presented."). If the provision were deemed to be mandatory, it would raise significant separation-of-powers questions about Congress's ability to constrain the amount of time—and, thereby, the quality of consideration—that an

circuit court has determined that the circumstances warrant the filing of a successive petition, the district court must revisit that issue after the petition has been filed,[168] a repetitive stage of review that can, in turn, lead to additional rounds of review at different courts in the federal system.[169]

The changes that AEDPA made in the substantive standards for new-claim successive petitions are not quite as stark. To understand these changes, it is necessary to return for a moment to the preexisting rules for new-claim successive petitions.

Before AEDPA's enactment, no subject matter restrictions limited the types of claims that could be raised in a successive petition. The focus was instead where it should be, given the nature of successive litigation and the underlying purposes of the rules governing successive petitions—on circumstances that shed light on whether the petitioner intentionally had withheld the claim improperly at the time of the earlier filing.[170] As a general matter, therefore, any type of claim that was unavailable at the time of the earlier filing—because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner—was an appropriate candidate for inclusion in a successive petition.[171]

Article III court can devote to a case. See William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. Rev. 761, 798-801 (1997) (discussing how time limits may affect judiciary's core functions).

168 See § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.").

169 If the federal district court rules that the successive petition criteria have not been satisfied, that ruling will be appealed to the circuit court, which may (and, given its gatekeeping ruling, probably will) reverse. In the event of a reversal, the case will return to the district court for adjudication of the merits of the successive petition (and probably various procedural defenses the state raises to bar a review on the merits). Should the district court rule for the state on one of those procedural defenses, the case could travel up to the circuit court and, in the event of a reversal, back down to the district court for the oft-deferred ruling on the merits. The ruling on the merits also inevitably will generate an appeal by one party or the other. The various appeals to the circuit court will be complicated still further by AEDPA's requirement of a certificate of appealability, which itself is surrounded by a number of open questions that have divided the lower federal courts. See Hertz & Liebman, supra note 46, § 35.4b (providing detailed discussion of AEDPA's certificate of appealability process).

170 This was certainly the case before the Supreme Court's decision in *McCleskey v. Zant* in 1991. See supra notes 29-44 and accompanying text. The *McCleskey* decision diluted the clarity and coherency of the preexisting rules but, on the whole, left the general focus of the rules where it had been in prior decades. See supra notes 46-53 and accompanying text.

171 For a detailed description of this aspect of the pre-AEDPA law of successive petitions, see Hertz & Liebman, supra note 46, § 28.3c nn.106-08 and accompanying text.

On the surface at least, AEDPA's successive petition standard appears to incorporate this general approach, with one major difference. Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[172]

Section 2244(b)(2)(A) generally tracks the preexisting rule of permitting a successive filing if the legal basis for a claim was unavailable at the time of the earlier petition, although AEDPA narrows this category of successive filings by incorporating a nonretroactivity rule similar to (although more restrictive than) the one the Court adopted for other aspects of federal habeas corpus review in *Teague v. Lane*.[173] With regard to claims based on new facts, § 2244(b)(2)(B)(i) essentially mirrors the preexisting rule by establishing a "due diligence" requirement.[174] Subsection 2244(b)(2)(B)(ii) sharply diverges from

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172 § 2244(b)(2).

173 489 U.S. 288 (1989). The *Teague* doctrine precludes federal habeas corpus petitioners from gaining the benefit of a "new rule" of law that was announced after the petitioner's conviction became "final," unless (1) the rule is one that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) the rule is one that "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." Id. at 307 (plurality opinion) (citations omitted). Each of the component parts of the *Teague* doctrine has spawned extensive case law defining and applying its terms and concepts. For a detailed discussion of this case law, see Hertz & Liebman, supra note 46, § 25. The form of nonretroactivity rule that appears in AEDPA's successive petition provision is more restrictive than the *Teague* formulation in that it prevents successive petitioners from gaining the benefit of new rules announced by a federal circuit or district court. The scope of the AEDPA provision was narrowed still further by the Supreme Court in Tyler v. Cain, 533 U.S. 656, 662 (2001), which interpreted the language of § 2244(b)(2)(A) as requiring that the rule in question be one that the Supreme Court itself has "made retroactive to cases on collateral review." For further discussion of § 2244(b)(2)(A) and its preclusive effects, see infra Part II.C.1.

174 See McCleskey v. Zant, 499 U.S. 467, 498 (1991) ("The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first habeas petition.").

prior law, however, by modifying the "new facts" category to include an additional requirement that the petitioner make a showing of "innocence." An understanding of the nature and operation of this provision requires a closer look at pre-AEDPA law.

The pre-AEDPA successive petition rules had a provision for showings of "innocence." With regard to same-claim successive petitions, the Supreme Court interpreted the doctrine permitting repetitive review consistent with the "ends of justice"[175] as authorizing the filing of a successive claim in any case in which the petitioner made a "colorable claim of factual innocence,"[176] including a showing of "'alleged error[s] at the sentencing phase.'"[177] With regard to new-claim successive petitions, the standard adopted by the Supreme Court in *McCleskey v. Zant* permitted the filing of a successive claim when necessary to avert a "fundamental miscarriage of justice,"[178] a requirement that could be satisfied by a petitioner either: (1) presenting "new facts [that] raise[ ] sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial";[179] or (2) showing that the constitutional violation "'has probably resulted'" in the imposition of a capital sentence upon one who is "'actually innocent' of a death sentence."[180] This second possibility has become known as "innocence of the death penalty" or "innocence of death." Although acknowledging that "the phrase 'innocent of death' is not a natural usage of those words,"[181] the Court coined the term to refer to showings that the petitioner–regardless of whether he could show he did not commit the crime–would not have been eligible for capital punish-

175 As explained earlier, the "ends of justice" principle had been based on statutory language in the Habeas Corpus Act of 1867; when Congress omitted the relevant language as part of a statutory revision in 1948, the Supreme Court construed the revised statute as implicitly retaining the concept. See supra notes 41-44 and accompanying text.

176 See Sawyer v. Whitley, 505 U.S. 333, 339 (1992); see also, e.g., Schlup v. Delo, 513 U.S. 298, 321-23 (1995) (explaining fundamental miscarriage of justice exception as tied to colorable claims of innocence); Herrera v. Collins, 506 U.S. 390, 404 (1993) (stating that fundamental miscarriage of justice exception is available only where petitioner bolsters claim with showing of factual innocence). As explained in supra notes 51-52, the Court was divided on whether the "ends of justice" principle was limited to situations of "innocence" or extended to other types of miscarriages of justice as well.

177 *Sawyer*, 505 U.S. at 340-45 (quoting Smith v. Murray, 477 U.S. 527, 537 (1986)). For further discussion of the concept of "innocence" at the capital-sentencing stage, see infra notes 184-88 and accompanying text.

178 *McCleskey*, 499 U.S. at 495.

179 *Schlup*, 513 U.S. at 317; see also id. at 327 ("To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

180 Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); see also *Schlup*, 513 U.S. at 323 (explaining extension of miscarriage-of-justice exception to claims of innocence of death penalty); *Sawyer*, 505 U.S. at 339-45 (same).

181 *Sawyer*, 505 U.S. at 341.

ment because the state would not be able to satisfy the basic criteria for imposing a death sentence.[182] A showing of either "innocence of the crime" or "innocence of the death penalty" functioned as "a gateway through which a habeas petitioner . . . [could] pass to have his otherwise barred constitutional claim considered on the merits."[183]

Section 2244(b)(2)(B)(ii), as amended by AEDPA, maintains the preexisting conception of "innocence" as a "gateway" for overcoming a failure to present a claim in an earlier petition. The wording of the statute is ambiguous, however, on the important question of whether this gateway tracks pre-AEDPA law in encompassing not only claims of "innocence of the crime" but also "innocence of the death penalty." The lower federal courts are split on this issue: Some courts view the provision as necessarily including claims of innocence of the death penalty,[184] while other courts read the provision much more narrowly as limited to claims of innocence of the crime.[185] The decisions in the former, more protective category would seem to comport most closely with the available indicia of legislative intent.

A comparison of the statutory provision with preexisting case law on the subject strongly suggests that Congress derived its language from the formulation of "innocence" that the Supreme Court used in

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182 See id. at 345 ("Sensible meaning is given to the term . . . by allowing a showing in addition to innocence of the capital crime itself a showing in that there was no aggravating circumstance or that some other condition of eligibility [for a capital sentence] had not been met.").

183 Herrera v. Collins, 506 U.S. 390, 404 (1993). In *Herrera*, the Court rejected the broader use of a showing of innocence in federal habeas corpus as an independent constitutional claim. See id. at 400, 404. However, the Court expressly left open the possibility that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Id. at 417; accord *Schlup*, 513 U.S. at 314 n.28.

184 E.g., Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999) (interpreting provision "as permitting a petitioner to establish by clear and convincing evidence, that but for constitutional error, no reasonable jury would have found petitioner eligible for the death penalty" (citation omitted)); Thompson v. Calderon, 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc) (interpreting AEDPA to permit filing of successive petition challenging petitioner's eligibility for death sentence); cf. LaFevers v. Gibson, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting, but not resolving, question of whether § 2244(b)(2)(B)(ii) "contemplates a claim that a successive petitioner in LaFevers' position can be innocent of the death penalty").

185 E.g., In re Provenzano, 215 F.3d 1233, 1237 (11th Cir.) (per curiam) (finding that provision does not apply to "innocence-of-the-death penalty" claims), cert. denied, 530 U.S. 1256 (2000); In re Jones, 137 F.3d 1271, 1274 (11th Cir. 1998) (per curiam) (holding that AEDPA forecloses successive petition on basis of newly discovered evidence unless it challenges conviction, not merely sentence); Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997) (same).

Sawyer v. Whitley in 1992.[186] The Court's decision in *Sawyer* announced a definition that encompassed claims of "innocence of the death penalty" as well as claims of "innocence of the crime."[187] Under the customary rules of statutory construction, Congress's use of a concept that was already well-established in the case law gives rise to the presumption that Congress intended to define the concept in the generally accepted manner.[188]

Even assuming that the statute's "innocence" provision is read in this broader fashion to include "innocence of the death penalty," the standard is not elastic enough to include certain capital punishment claims that concern the constitutionality of an execution as opposed to the constitutionality of the capital sentencing determination. The next section focuses on claims of this sort and examines how they fare under AEDPA's successive petition rules.

B. Availability of Federal Review of Claims That Challenge the Constitutionality of an Execution

1. Incompetency-To-Be-Executed Claims: The Case of Ramon Martinez-Villareal

In 1986 in *Ford v. Wainwright*,[189] the Supreme Court held that the Eighth Amendment prohibits the execution of an individual who is mentally incompetent at the time of the execution.[190] Although the reasoning of the *Ford* decision is somewhat opaque—since the Court simply read into the Eighth Amendment the centuries-old prohibition

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186 Compare 28 U.S.C. § 2244(b)(2)(B)(ii) (Supp. V 2000) (stating that satisfaction of innocence requirement requires "clear and convincing evidence that, but for constitutional error, no reasonable factfinder" would have failed to conclude that petitioner was innocent), with *Sawyer*, 505 U.S. at 336 (1992) (determining that showing of "actual innocence" for purposes of pre-AEDPA successive petition doctrine requires "clear and convincing evidence that, but for a constitutional error, no reasonable juror" would have found defendant eligible for death penalty).

187 See *Sawyer*, 505 U.S. at 336, 339-48.

188 "It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.'" Evans v. United States, 504 U.S. 255, 260 (1992) (quoting Taylor v. United States, 495 U.S. 575, 592 (1989)). Or, as Justice Frankfurter observed, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, Some Reflections on the Reading of Statutes, Address Before the Association of the Bar of the City of New York (March 18, 1947), in 47 Colum. L. Rev. 527, 537 (1947); see also Slack v. McDaniel, 529 U.S. 473, 483 (2000) (applying foregoing rule of statutory construction to presume that AEDPA must be construed as "incorporat[ing] earlier habeas corpus principles" in absence of contrary evidence).

189 477 U.S. 399 (1986).

190 Id. at 409-10.

against executing the insane[191] without specifying which of the various rationales for this prohibition it deemed decisive[192]—the *Ford* rule can be understood best as resting upon the innately "abhorrent" nature of the act of executing a mentally incapacitated person[193] and the fact that such an action could not conceivably advance any legitimate penological interest.[194]

Prior to AEDPA's enactment, there was no question about the availability of the federal habeas corpus process as a means of litigating a *Ford* claim. Indeed, *Ford v. Wainwright* itself was a federal habeas corpus case.[195] Soon after the enactment of AEDPA, however, it became apparent that the new successive petition rules presented a significant impediment to the raising of such claims. Given the nature of the claim—which focuses on the prisoner's mental state at the time of execution—the claim generally is not "ripe" for adjudication until shortly before execution.[196] Since the federal habeas corpus review process generally will have been completed by that time, especially under the post-AEDPA regime, which includes a statute of limitations requiring early filing of a federal habeas corpus petition,[197] the usual means for filing a *Ford* claim would be a successive petition. But, as the Fifth, Ninth, and Eleventh Circuits recognized in decisions issued the year after AEDPA's enactment, a *Ford* claim does not appear to fit within either of the two "gateways" cre-

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191 The Court explained that "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Id. at 405. The Court then detailed the long history of the ban against executing insane prisoners. Id. at 406-10.

192 "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction [on executing the insane] finds enforcement in the Eighth Amendment." Id. at 409-10.

193 See id. at 409 ("[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.").

194 See id. ("[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

195 477 U.S. at 404-05 (1986).

196 See Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 (1998) ("[R]espondent's *Ford* claim was dismissed as premature . . . because his execution was not imminent and therefore his competency to be executed could not be determined at that time."); Herrera v. Collins, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

197 See supra note 11 and accompanying text.

ated by AEDPA's § 2244(b)(2) for the filing of successive claims.[198] Because the claim is based on a 1986 Supreme Court decision, it cannot qualify for the "new law" gateway of § 2244(b)(2)(A);[199] and, even under a broad construction of § 2244(b)(2)(B)'s "innocence" provision to include innocence of the death penalty,[200] a claim that concerns the propriety of allowing an execution to go forward would not seem to be included.[201]

While the three circuits all concluded that a *Ford* claim could not satisfy AEDPA's successive petition prerequisites, the Ninth Circuit essentially read into the statute an exemption for *Ford* claims. The Fifth and Eleventh Circuits, on the other hand, were untroubled by AEDPA's removal of *Ford* claims from successive petition review. In response to the habeas corpus petitioner's argument that AEDPA had, in effect, unconstitutionally suspended the habeas corpus remedy with regard to *Ford* claims,[202] both the Fifth and Eleventh Circuits responded that a petitioner still could obtain federal review of the claim by filing an original habeas corpus petition in the United States Supreme Court or by filing a successive postconviction petition in state court and seeking Supreme Court certiorari review of the state

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198 In re Davis, 121 F.3d 952, 955-56 (5th Cir. 1997); Martinez-Villareal v. Stewart, 118 F.3d 628, 631-32 (9th Cir. 1997) (per curiam), aff'd, 523 U.S. 637 (1998); In re Medina, 109 F.3d 1556, 1564-65 (11th Cir.) (per curiam), cert. denied, 520 U.S. 1151 (1997).

199 See *In re Davis*, 121 F.3d at 956; *Martinez-Villareal*, 118 F.3d at 631; *In re Medina*, 109 F.3d at 1564. The textual observation about the general inapplicability of § 2244(b)(2)(A)'s "new law" provision to *Ford* claims presupposes that such a claim is framed precisely as it was in *Ford* itself. One can imagine variants upon the claim that could trigger the "new law" provision. See, e.g., Scott v. Mitchell, 250 F.3d 1011, 1012 (6th Cir. 2001) (adjudicating, but denying on merits, successive claim that "the *Ford v. Wainwright* test for determining competency to be executed is inadequate in light of contemporary standards of decency").

200 See supra notes 175-88 and accompanying text.

201 See *Martinez-Villareal*, 118 F.3d at 631 (explaining that competency to be executed does not raise issue of guilt or innocence); *In re Medina*, 109 F.3d at 1565 (stating that § 2244(b)(2)(B)'s exceptions have "no application to claims that relate only to the sentence").

202 See *In re Davis*, 121 F.3d at 957; *In re Medina*, 109 F.3d at 1563-64. Article I, § 9, cl. 2 of the Constitution, commonly known as the "Suspension Clause," provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Although some judges are inclined to view the Clause narrowly, see INS v. St. Cyr, 533 U.S. 289, 336-45 (2001) (Scalia, J., dissenting), a majority of the Supreme Court has indicated its view of the Clause as guaranteeing the availability of federal habeas corpus review except where some adequate substitute exists. See id. at 2279, 2282 (majority opinion); see also Felker v. Turpin, 518 U.S. 651, 664-65 (1996) (finding that AEDPA's restrictions on successive habeas petitions do not amount to suspension of writ, in part because original habeas review remains available). For more detailed discussions of the Suspension Clause, see Hertz & Liebman, supra note 26, § 7.2d; Jordan Steiker, Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 Mich. L. Rev. 862 (1994).

court's ruling.[203] The Ninth Circuit viewed the Suspension Clause concern as far more substantial. After engaging in a detailed analysis of the various means by which a *Ford* claim could be raised in light of AEDPA and the Suspension Clause implications, the Ninth Circuit concluded that the only way to avoid a constitutional problem was to construe AEDPA's successive petition rules as exempting incompetency-to-be-executed claims from the type of showing required for successive litigation of other types of claims.[204]

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[203] See *In re Davis*, 121 F.3d at 956; *In re Medina*, 109 F.3d at 1564. For further discussion of these alternative mechanisms for review, see infra Part III.B.

[204] The Ninth Circuit began by showing that an incompetency-to-be-executed claim almost always will be deemed "premature" at the time of a first federal habeas corpus petition. In some cases, as in *Martinez-Villareal* itself, the state has not yet even issued a warrant of execution at the time of the first federal habeas corpus petition and therefore the execution cannot be regarded as imminent. See *Martinez-Villareal*, 118 F.3d at 629-30 & n.1. Even if a warrant of execution has issued, the Ninth Circuit added, a federal court almost invariably will grant a stay of execution in order to review the merits of the claim. See id. at 630 (citing Lonchar v. Thomas, 517 U.S. 314, 320 (1996)). The issuance of the stay puts off the time of execution, thereby rendering the incompetency-to-be-executed claim premature. See id.

Having shown that such incompetency claims generally cannot be raised at the time of a first petition, the Ninth Circuit then demonstrated that the phrasing of AEDPA's successive petition provisions would categorically preclude the filing of such a claim in a "successive" petition. See supra note 201 and accompanying text.

The Ninth Circuit next considered whether original habeas corpus review in the Supreme Court offered an adequate alternative. In contrast to the Fifth and Eleventh Circuits, see supra note 203 and accompanying text, the Ninth Circuit concluded that original habeas corpus review probably is not an available option. See *Martinez-Villareal*, 118 F.3d at 632. Accordingly, the Ninth Circuit concluded, the confluence of the prematurity problem and AEDPA's successive petition provisions had produced a situation in which federal habeas corpus review of incompetency-to-be-executed claims is wholly foreclosed. See id. at 631.

In the view of the Ninth Circuit, this situation presented a serious Suspension Clause problem. See id. at 631, 632; see also id. at 635 (Nelson, J., concurring) ("In my view, the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims."). For further discussion of the Suspension Clause, see supra note 202.

Accordingly, the Ninth Circuit avoided the constitutional problem by creating an escape hatch: The court declared that incompetency-to-be-executed claims must be exempted categorically from the operation of AEDPA's successive petition rules and deemed suitable for successive filing even though they do not qualify under either of the gateways created by the statute. See *Martinez-Villareal*, 118 F.3d at 632 ("We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of § 2244."). The Court's holding was "a narrow one . . . inherently limited by the unique nature of a competency claim." Id. at 634; see also id. at 634 n.7 ("Indeed, we question whether the successive petition and abuse of the writ doctrines even apply to competency claims. . . . Due to its exceptional procedural posture, a petition raising only a competency claim might not be covered by th[e] phrase ["second or successive habeas corpus application"].").

The Supreme Court granted certiorari in the Ninth Circuit case, *Stewart v. Martinez-Villareal*[205] and affirmed, but on a much narrower ground than the appellate court had employed.[206] Before examining the Supreme Court's reasoning and holding, it is useful to take a moment to examine the facts and procedural history of the case, for they offer some useful lessons about the actual nature of capital habeas corpus practice and the reasons why successive claims may not surface until late in the case.

The capital habeas corpus petitioner, Ramon Martinez-Villareal, raised the *Ford* claim for the first time in his third federal habeas corpus petition.[207] Although this fact, standing alone, would seem to support the storylines of prisoner-attorney dilatoriness and/or gamesmanship, closer examination of the case paints a very different picture.[208] A federal district court found that the lawyer who represented Mr. Martinez-Villareal at trial and on appeal had been ineffective—precisely because this lawyer irresponsibly failed to investigate Mr. Martinez-Villareal's mental health problems.[209] The

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[205] The grant of certiorari is reported at 522 U.S. 912 (1997). Short-form references to this case will use the name of the habeas corpus petitioner, Ramon Martinez-Villareal, because the other name in the caption, that of the Director of the Arizona Department of Correction, changed as new directors were appointed.

[206] See Stewart v. Martinez-Villareal, 523 U.S. 637, 644-46 (1998), discussed infra notes 223-30 and accompanying text.

[207] The Supreme Court majority opinion describes the *Ford* claim as having been raised in the "fourth habeas petition in federal court" after "three [previous] petitions for habeas relief in federal court . . . were dismissed on the ground that they contained claims on which the state remedies had not yet been exhausted." Id. at 640. This history of the *Ford* claim, although technically accurate, gives a misimpression because the third petition—the last of the petitions to be dismissed for nonexhaustion—also contained the *Ford* claim. The Ninth Circuit decision on the third petition, Martinez-Villareal v. Lewis, 80 F.3d 1301, 1304 (9th Cir.), cert. denied, 519 U.S. 1030 (1996), notes that counsel's presentation of the claim of mental incompetence was deemed by the district court to be "an unexhausted claim and [the court therefore] dismissed the third habeas petition without prejudice so that the [mental incompetence] claim could be presented to the trial court."

[208] The facts of the case presented in the text do not emerge vividly (and some of the facts are wholly absent) from Chief Justice Rehnquist's sparse description of the procedural history in his opinion for the Court in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). The broader context becomes evident when one examines the lower court opinions. See Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), aff'd on other grounds, 523 U.S. 637 (1998); Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir.), cert. denied, 519 U.S. 1030 (1996); Brief for Respondent at 4-15, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (No. 97-300), available at 1998 WL 47596.

[209] See *Martinez-Villareal*, 80 F.3d at 1305 (explaining that district court granted writ based on lawyer's ineffectiveness at penalty phase and on appeal and specifically noted lawyer's failure to investigate Martinez-Villareal's mental health).

The Ninth Circuit later overturned the district court's ruling and denied relief on the ineffectiveness claim because of a procedural default. As explained supra note 46, the "procedural default" doctrine prevents a federal habeas corpus court from reviewing a federal constitutional claim if it was not presented to the state courts in conformance with

lawyers who handled subsequent rounds of postconviction proceedings in state court also failed to investigate Mr. Martinez-Villareal's mental health.[210] The first two federal petitions were dismissed for nonexhaustion because they contained claims that the state court lawyers had failed to present to the state courts.[211]

With this backdrop of shoddy lawyering, which unfortunately is all too common in capital cases,[212] it is readily understandable why the *Ford* claim first surfaced late in the case when a new lawyer, ap-

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state procedural rules and if the petitioner is unable to excuse the default by showing "cause" and "prejudice" or a "miscarriage of justice." In *Martinez-Villareal*, the Ninth Circuit, without disputing the federal district court's finding that the lawyers' failure to investigate mental health evidence was a gross deviation from the standard of competent lawyering, reversed the district court because the claim was not properly presented in state postconviction proceedings. See *Martinez-Villareal*, 80 F.3d at 1306. As is implicit in the Ninth Circuit's analysis, the failure to adequately present the claims at the state postconviction stage was itself a manifestation of incompetent lawyering. It bears noting that one of the lawyers who caused this default at the state postconviction stage was the very same lawyer who had incompetently represented Mr. Martinez-Villareal at trial and on appeal, see id. at 1305-06, but the Supreme Court's ruling denying a right to effective assistance at the state postconviction stage, see supra note 97, prevents a lawyer's failures at the state postconviction proceeding from serving as "cause" for a default and thereby reviving the claim for purposes of federal habeas corpus review. See *Martinez-Villareal*, 80 F.3d at 1306.

210 See *Martinez-Villareal*, 80 F.3d at 1306 (finding that ineffectiveness claims were defaulted because, inter alia, nothing prevented trial and state postconviction counsel "from making a complete investigation of Martinez-Villareal's mental health or family background; they simply chose not to pursue the evidence that was readily available").

211 See id. at 1304.

212 For discussions of the problem of inadequate lawyering in capital cases, see, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 Yale L.J. 1835 (1994); Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783; Ruth E. Friedman & Bryan A. Stevenson, Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing, 44 Ala. L. Rev. 1 (1992). Justice Sandra Day O'Connor recently remarked that "'[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.'" Charles Lane, O'Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed, Wash. Post, July 4, 2001, at A1 (quoting Justice O'Connor's July 2 statement in speech to Minnesota Women Lawyers in Minneapolis). Justice Ginsburg similarly has said that she had "'yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was well represented at trial.'" Id. (quoting Justice Ginsburg's statement in April 9 speech in Washington). Justice Blackmun expressed similar sentiments just two years before the enactment of AEDPA:

> The unique, bifurcated nature of capital trials and the special investigation into a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases.

McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari).

pointed to the case by the federal district court, noticed for the first time that Mr. Martinez-Villareal was a schizophrenic who had been taking psychotropic medication prescribed by prison doctors for years.[213] Once that claim *did* surface, Mr. Martinez-Villareal's lawyer pursued the available remedies as assiduously and expeditiously as one could imagine. If there was any lawyerly gamesmanship or intentional delay in the case, it was on the part of the lawyers for the State of Arizona.[214] When Mr. Martinez-Villareal first raised the *Ford* claim, the state prevailed upon the federal district court's dismissal of the claim for failure to exhaust state remedies.[215] When Mr. Martinez-Villareal then exhausted the supposedly available state remedies[216] and returned to federal court to present the now properly exhausted *Ford* claim, the state responded by arguing that the claim was not yet ripe: "[O]nly if a warrant for [Mr. Martinez-Villareal's] execution issues, and if he still claims to be incompetent at that time, will there be a jurisdictionally sufficient case or controversy, and that will be the time to litigate the issue."[217] The district court again acceded

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213 See Brief for Respondent, supra note 208, at 5-6.

214 The habeas corpus case law is replete with cases in which prosecutors or state attorneys general have engaged in manipulation of the system. See, e.g., Strickler v. Greene, 527 U.S. 263, 289 (1999) (describing state's attorneys who covered up prosecutors' suppression of exculpatory evidence by "asserting during state habeas proceedings that petitioner had already received 'everything known to the government'"); Degarmo v. Collins, 984 F.2d 142, 143 (5th Cir. 1993) (per curiam) (ordering state's attorneys to show cause why "sanctions ought not to be imposed" for failure to adhere to stipulation). For several other examples of cases in which a petitioner's failure to raise a claim was excused because a prosecutor, state's attorney or other state official withheld information or obstructed the raising of the claim in some other manner, see Hertz & Liebman, supra note 46, § 26.3b, at 1205 n.33. For a long list of cases in which a writ of habeas corpus was granted because a prosecutor or law enforcement official suppressed exculpatory evidence, see Hertz & Liebman, supra note 26, § 11.2c, at 503-06. Notwithstanding the Fifth Circuit's proclamation of evenhandedness in *Degarmo v. Collins* that courts are no more willing to "tolerate abuse or sharp practice by counsel" for the state than by counsel for petitioner, 984 F.2d at 143, the case law indicates a double standard in which the courts routinely excuse missteps and misdeeds by attorneys for the state. See, e.g., Woolery v. Arave, 8 F.3d 1325, 1329 (9th Cir. 1993) (Reinhardt, J., dissenting) (questioning why "when states' attorneys fail to raise the appropriate legal arguments in a given case, the courts should excuse the very types of failures that we are unwilling to excuse when the petitioner is the party in default").

215 See supra note 208.

216 Mr. Martinez-Villareal's attempt to present his incompetency claim to the state courts resulted in the courts' "refus[al] to review the claim under the state's post-conviction rule." Brief for Respondent, supra note 208, at 6. Likewise, Mr. Martinez-Villareal's attempt to utilize the statutory procedure for warden-initiated judicial proceedings to determine mental fitness for execution resulted in the warden's "refus[al] to initiate the statutory procedures despite Mr. Martinez-Villareal's history of mental illness in prison." Id.

217 Id. at 7 (emphasis omitted); see also Martinez-Villareal v. Stewart, 118 F.3d 628, 630 n.1 (9th Cir. 1997) (noting State's argument in its Reply to Response to Motion for Summary Judgment that Martinez-Villareal's competency claim was not yet ripe).

to the state's urging, dismissing the *Ford* claim as "premature."[218] But when the state thereafter obtained a warrant for execution and Mr. Martinez-Villareal moved to re-open his previously filed *Ford* claim,[219] which now was clearly ripe, the state argued that AEDPA—which had been enacted in the interim—stripped the district court of jurisdiction to hear what amounted to a "successive" *Ford* claim until the petitioner had sought and obtained leave from the court of appeals to present this successive claim.[220] The district court again ruled for the state, dismissing the petition, although the court expressed on the record its doubts about Mr. Martinez-Villareal's competence.[221] It was then that counsel for Mr. Martinez-Villareal filed in the Ninth Circuit a motion for leave to file a successive petition, including the *Ford* claim, which the Ninth Circuit granted.[222]

The state sought, and obtained, certiorari review of the Ninth Circuit's decision.[223] In a 7-2 ruling, with the majority opinion written by Chief Justice Rehnquist,[224] the Supreme Court affirmed the Ninth Circuit, although on a narrow ground. The Court avoided deciding the broad issues in the case by, in essence, elevating an aspect of the procedural history into a ground for decision. As noted, Mr. Martinez-Villareal's "first" petition[225] contained a *Ford* claim which was dis-

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218 Stewart v. Martinez-Villareal, 523 U.S. 637, 640 (1998).

219 Id.

220 See id. at 640-41; Brief for Respondent, supra note 208, at 11-12.

221 The district court noted that while it could not review Mr. Martinez-Villareal's competency to be executed, it could "state that its observations of Petitioner in 1994 called into serious doubt [Martinez-Villareal's] competence." Brief for Respondent, supra note 208, at 12.

222 See supra notes 201-04 and accompanying text.

223 As framed in the petition for certiorari, the issues before the Court in *Stewart v. Martinez-Villareal* were:

> (1) Did Congress intend the limitations of AEDPA on second or successive habeas corpus petitions to apply to all claims and in every court, including competency-for-execution claims and applications for "original" Supreme Court habeas corpus writs? (2) Would applying act to prevent consideration of claim of incompetency for execution, which is raised in second or successive habeas corpus petition, constitute violation of Suspension Clause? (3) By what means can this court review these issues?

Martinez-Villareal v. Stewart, 118 F.3d 628, 630 n.1 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3184 (U.S. Sept. 16, 1997) (No. 97-300). For discussion of the Ninth Circuit's treatment of these issues in the opinion that was the subject of the certiorari petition, see supra note 204 and accompanying text.

224 Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

225 Although there had been prior federal petitions, they were dismissed on grounds of nonexhaustion, see id. at 640, and therefore did not constitute prior filings for purposes of the successive petition rules. See id. at 645. The filing that the Court treated as the "first" petition for counting purposes was the first one that produced an adjudication of the merits. See id. at 643.

missed on grounds of prematurity.[226] Accordingly, the Court reasoned, the subsequent refiling of the *Ford* claim was not a "new" or "successive" petition, but was merely an adjudication of the still-open *Ford* claim from the "first petition."[227] Under this reasoning, the later filing did not trigger AEDPA's successive petition rules, which are reserved for filings that are "second or successive."[228] Invoking a policy rationale for this conclusion, the Court observed that a contrary approach would produce "implications for habeas practice [that] would be far reaching and seemingly perverse"[229] in that "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."[230]

The Supreme Court stated in a footnote that it was leaving open the question of how to treat incompetency-to-be-executed claims that are raised for the first time after a previous petition was adjudicated on the merits rather than dismissed on a technical ground.[231] In the years since the issuance of the Supreme Court's 1998 decision in *Martinez-Villareal*, this open question has been addressed by the Fifth, Sixth, Tenth, and Eleventh Circuits. As already seen, the Fifth and Eleventh Circuits had addressed the issue prior to *Martinez-Villareal*.[232] Although implicitly acknowledging that the issue might be more complex than their earlier decisions indicated, both circuits declared that they would adhere to their earlier precedents because the Supreme Court had not overruled or disapproved these decisions

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226 See id. at 640, 643.

227 As the Court noted,

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Id. at 643.

228 See id. at 645 (finding that "respondent's *Ford* claim was not a 'second or successive' petition under § 2244(b)"). Although this holding was framed in terms of the AEDPA provision, given the procedural context of *Martinez-Villareal*, the Court subsequently applied the same reasoning to a case governed by the pre-AEDPA successive petition doctrine. See Slack v. McDaniel, 529 U.S. 473, 487 (2000).

229 *Martinez-Villareal*, 523 U.S. at 644.

230 Id. at 645. Justices Scalia and Thomas sharply criticized the majority for disregarding the literal language of the statute in favor of a policy rationale. See id. at 646 (Scalia, J., dissenting) ("The Court today flouts the unmistakable language of the statute to avoid what it calls a 'perverse' result. . . . There is nothing 'perverse' about the result that the statute commands, except that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change.").

231 Id. at 645 n.*.

232 See supra notes 202-03 and accompanying text.

specifically.[233] The Tenth Circuit followed the Fifth and Eleventh Circuits in precluding federal habeas corpus review of a *Ford* claim but emphasized that § 2244(b)(2)(B)'s "new facts" gateway was inapplicable to the case not only because of the narrowness of the statutory definition of "innocence" but also because the facts upon which the *Ford* claim were based did not "first [come] to light after the filing of the initial [federal habeas] application."[234] Only the Sixth Circuit and an Indiana district court have followed an approach similar to that of the Ninth Circuit in *Martinez-Villareal*, holding that AEDPA's successive petition rules must be deemed inapplicable to *Ford* claims because these claims are never ripe at the time of an early filing.[235]

The additional impediment to review in the Tenth Circuit case—that all of the facts underlying the *Ford* claim were available at the time of the earlier filing—is unlikely to arise in many cases. The Sixth Circuit found it a simple matter in one case to conclude that the facts bearing on the petitioner's schizophrenia were not fully available at the time of the earlier petition because "this mental disease is progressive and . . . its victims do not improve but only get worse."[236] An Arizona district court reached an equivalent conclusion based on a

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233 See Richardson v. Johnson, 256 F.3d 257, 258-59 (5th Cir.) (per curiam), cert. denied, 533 U.S. 942 (2001) (declining to "read the decision of the Supreme Court in *Stewart v. Martinez-Villareal* as overruling or casting doubt on our decision in *In Re: Davis*" though acknowledging that "*Ford* claims admittedly have an uneasy fit with the AEDPA's limits upon successive writs"); In re Provenzano, 215 F.3d 1233, 1235 (11th Cir.) (per curiam), cert. denied, 530 U.S. 1256 (2000) (noting that Supreme Court in *Martinez-Villareal* "had no occasion to decide whether our [previous] . . . decision is correct").

234 Nguyen v. Gibson, 162 F.3d 600, 601 (10th Cir. 1998). The Tenth Circuit majority opinion failed to address the broad, complex issues set forth in the Ninth Circuit's decision in *Martinez-Villareal*. One member of the three-judge panel issued a dissenting opinion that squarely confronted these issues, specifically referring to the Ninth Circuit's analysis, and ultimately concluding that "the proper course is to construe the term 'second or successive habeas corpus application' . . . as encompassing only those habeas applications that assert claims that were ripe at the time of the petitioner's original habeas application." Id. at 604 (Briscoe, J., dissenting). Such an approach is necessary, Judge Briscoe emphasized, to "ensure that a state prisoner has an *opportunity* for federal court review of all constitutional claims." Id.

235 The Sixth Circuit concluded that the petitioner's habeas corpus application was "not barred by AEDPA's prohibition on second or successive habeas applications because Coe's *Ford* competency claim was not ripe until his execution was imminent and thus was not ripe when his initial habeas application was filed." Coe v. Bell, 209 F.3d 815, 823 (6th Cir.), cert. denied, 529 U.S. 1084 (2000). The district court noted the lack of "specific guidance from the Supreme Court or the Seventh Circuit on this issue." Schornhorst v. Anderson, 77 F. Supp. 2d 944, 948 (S.D. Ind. 1999). Without such guidance, the court was "not persuaded by [the state's] argument that a prisoner's ability to present a *Ford* claim to a district court shortly before a scheduled execution should depend on whether the prisoner had—or could have—included an unripe, unexhausted *Ford* claim in an earlier petition." Id. at 948-49.

236 Scott v. Mitchell, 250 F.3d 1011, 1013 (6th Cir. 2001).

psychologist's affidavit attesting that the requisite factual basis for an incompetency claim did not arise until after the time that the earlier petition was filed.[237] Even in *Ford v. Wainwright* itself, the record before the Court showed a progressive deterioration of the petitioner's mental condition.[238] But, of course, even in cases of this sort, a successive *Ford* claim would still reach an impasse as a result of § 2244(b)(2)(B)'s narrowly configured "innocence" prerequisite.

What, then, is a petitioner to do in the Fifth, Tenth, and Eleventh Circuits (which contain a large number of states that have the death penalty)[239] to avoid a ruling that a *Ford* claim is "successive" and barred by AEDPA's successive petition rules because it qualifies for neither the "new law" gateway nor the "innocence" prerequisite for the "new facts" gateway? Ironically, the conjunction of AEDPA, the Supreme Court's *Martinez-Villareal* decision, and the interpretation of that decision in the Fifth, Tenth, and Eleventh Circuits creates a situation in which the only recourse for a habeas corpus petitioner is to expend his or her own time and that of the federal court judge by needlessly litigating a *Ford* claim at the wrong time. Under the Supreme Court's ruling in *Martinez-Villareal*, a *Ford* claim will be preserved for later review if it is raised in the "first" petition and dismissed on the ground that it is "premature." Under the approach of the Fifth, Tenth, and Eleventh Circuits, a failure to obtain a "prematurity" ruling of this sort will spell doom for the claim at any later stage. Thus, the handwriting is on the wall: Any petitioner who wishes to preserve a potential *Ford* claim should include it in the first petition and seek a finding of prematurity.

This type of needless litigation cannot possibly be what the framers of AEDPA hoped to accomplish. Moreover, it comes at substantial cost. Preservation cannot be accomplished by simply including a barebones *Ford* claim in the first petition as a "placeholder" for later litigation. As explained earlier, the habeas corpus rules permit the state to seek summary judgment if a claim is not adequately supported

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[237] Poland v. Stewart, 41 F. Supp. 2d 1037, 1039 (D. Ariz. 1999) (stating that petitioner could not have brought *Ford* claim any earlier and to bar bringing it now "would essentially foreclose federal district court from *ever* considering such a *Ford* claim").

[238] See Ford v. Wainwright, 477 U.S. 399, 401-02 (1986) ("There is no suggestion that he [Ford] was incompetent at the time of his offense, at trial, or at sentencing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time.").

[239] Over half of the executions in the United States in the post-*Furman* era, 378 out of 732, have taken place in the Fifth and Eleventh Circuits alone. Combined, the states of these circuits, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, hold one-third of all the prisoners currently under sentence of death in the United States. Death Penalty Info. Ctr., Death Row Inmates By State, at http://www.deathpenaltyinfo.org/DRowInfo.html#state (last visited Feb. 19, 2002).

with facts.[240] And, as the behavior of the state's attorneys in *Martinez-Villareal* demonstrates, the state is likely to utilize any such procedural device for dismissing a claim.[241] Moreover, under the AEDPA provision barring successive litigation of a claim that previously has been denied on the merits,[242] a summary judgment ruling in the state's favor probably would preclude later raising of the claim.[243] Thus, it behooves a petitioner's lawyer to investigate and plead the claim sufficiently to avoid a summary judgment ruling, even though the lawyer is doing so merely as a prophylactic measure and any time allotted to this necessarily fruitless endeavor comes at the expense of other claims that also require attention. Of course, it is not just the petitioner's lawyer who will be forced to engage in "make-work." The district court judge will have to devote time and attention to reviewing the claim, especially if the state seeks summary judgment or simply resists a finding of prematurity.

This is only one of many procedural aberrations and systemic irrationalities that AEDPA's successive petition rules have injected into the habeas corpus review process. The next sections consider other types of claims in order to explore these AEDPA-created problems further and to begin an examination of the alternative mechanisms for review touted by the Fifth, Tenth, and Eleventh Circuits—original habeas corpus review in the Supreme Court and certiorari review of a successive state postconviction petition.[244]

2. *Challenges to the Method of Execution: The Case of Robert Lee Tarver*

For some Eighth Amendment "evolving standards of decency" claims, the length of the capital appeals process necessarily means that the strength of the claim may be dramatically different when a death sentence is imposed as compared to when the appeals process is com-

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240 See supra note 139 and accompanying text.

241 See supra notes 219-20 and accompanying text (describing procedural impediments and obstructions that state's attorneys in *Martinez-Villareal* raised at every opportunity).

242 See supra note 161 and accompanying text (explaining that AEDPA wholly forecloses successive raising of claim that previously was denied on merits).

243 As explained infra note 323, there may be circumstances in which the legal or factual landscape at the time of a later filing permits the petitioner to argue that the claim, as framed at that time, is distinct from the one previously adjudicated and therefore is unaffected by AEDPA's prohibition against same-claim successive petitions.

244 As note 203 and accompanying text, supra, explains, the Fifth and Eleventh Circuits cited these alternative mechanisms for review in their pre-*Martinez-Villareal* holdings that the foreclosure of successive federal habeas corpus review of a *Ford* claim does not constitute a suspension of the writ. The Tenth Circuit followed suit in Nguyen v. Gibson, 162 F.3d 600, 601-02 (10th Cir. 1998) (finding that because federal review by Supreme Court is still available, foreclosure of successive petition does not amount to suspension of writ).

plete ten or fifteen years later. During such a time-period, a method of execution may no longer be regarded as humane, decent, or commonly practiced as when the death penalty was reintroduced in the 1970s. Very few states continue to utilize gas chambers, electrocution, hanging, or firing squads.[245] While a constitutional challenge to a method of execution may be raised early in the appeals process, the legal and factual support for the challenge may change dramatically by the end of the process, creating a basis for relief that did not exist in earlier stages of review. For example, a series of botched executions may change the constitutional inquiry factually. Alternatively, several states may change their laws, barring a certain method. Numerous factual and legal developments may emerge after a death sentence has been imposed that create a constitutional challenge to a method of execution.

After declining on several occasions to grant certiorari on the question of Eighth Amendment constraints on the method of execution,[246] the Supreme Court granted certiorari in 1999 in a Florida case, *Bryan v. Moore*, to consider the constitutionality of electrocution.[247] Thereafter, however, the Court dismissed certiorari as improvidently granted after Florida changed its law so as to require use of lethal injection as the execution mechanism unless a prisoner affirmatively elects death by electrocution.[248]

Given the Supreme Court's demonstration of its readiness to take up the issue of the constitutionality of electrocution, it would be reasonable to think that death-sentenced prisoners in another electrocu-

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245 According to the Death Penalty Information Center, five states retain the gas chamber, ten retain electrocution, three retain hanging, and three retain the firing squad as potential methods of execution. Death Penalty Information Center, Methods of Execution, at http://www.deathpenaltyinfo.org/methods.html (last visited Feb. 19, 2002); see also infra note 258 (listing electrocution states).

246 See, e.g., Campbell v. Wood, 511 U.S. 1119, 1119-23 (1994) (Blackmun, J., dissenting from denial of stay of execution and denial of certiorari) (addressing unconstitutionality of hanging as method of execution); Poyner v. Murray, 508 U.S. 931, 931-33 (1993) (Souter, J., respecting denial of certiorari) (discussing viability of challenge to constitutionality of electrocution as method of execution).

247 Bryan v. Moore, 528 U.S. 960 (1999) (mem.). Prior to the Court's grant of certiorari, Florida's electrocution system had made the national news as a result of botched executions and overtly evident pain and suffering by the condemned. Deborah W. Denno, Adieu to Electrocution, 26 Ohio N.U. L. Rev. 665, 667-68, 674 (2000) [hereinafter Denno, Adieu to Electrocution] (describing botched electrocution in Florida); Deborah W. Denno, Getting to Death: Are Executions Constitutional?, 82 Iowa L. Rev. 319, 417-18 (1997) [hereinafter Denno, Getting to Death] (describing electrocution of Jesse Joseph Tafero in 1990).

248 See Bryan v. Moore, 528 U.S. 1133, 1133-34 (2000) (mem.); see also Fla. Stat. Ann. § 922.105 (West 2001).

tion state[249] would have little difficulty obtaining federal judicial review of this claim. The case of Robert Lee Tarver in Alabama illustrates how difficult this task could be.

On December 28, 1999, the Alabama Supreme Court scheduled the execution of Robert Lee Tarver in Alabama's electric chair for February 4, 2000.[250] Mr. Tarver, who was convicted in 1984 of capital murder for a killing in the course of a robbery, at this point had completed the direct appeal and state and federal postconviction processes.[251] Mr. Tarver had maintained his innocence throughout all stages of the case. He was convicted at trial on the basis of testimony by his co-defendant, Andrew Lee Richardson, who claimed that Mr. Tarver was the killer; yet, as the Eleventh Circuit observed, "very little evidence made Tarver a better candidate than Richardson to be found the actual killer."[252] The jury returned a sentence of life imprisonment without parole, but the trial judge overrode that verdict and substituted a death sentence.[253] As in the *Martinez-Villareal* case, the postconviction process produced a finding by a trial court that trial counsel was ineffective, but a higher court reversed that ruling.[254]

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249 For a list of the states that use electrocution as a method of execution, see infra note 258.

250 Ex parte Robert Lee Tarver, Jr., 780 So. 2d 807 (Ala. 1999) (setting execution); Tarver v. State, 761 So. 2d 266, 266 (Ala. Crim. App. 2000) (noting actual execution date). The Author undertook representation of Mr. Tarver in January of 2000.

251 In the fall of 1984, Mr. Tarver was charged with the September 15, 1984 robbery-murder of Hugh Kite, the owner of a convenience store in Cottonwood, Alabama. Less than three months after appointment of defense counsel, Mr. Tarver went to trial and subsequently was convicted of capital murder in the Russell County Circuit Court. See Tarver v. State, 500 So. 2d 1232 (Ala. Crim. App.), aff'd, Ex parte Tarver, 500 So. 2d 1256 (Ala. 1986). The Supreme Court denied certiorari in Tarver v. Alabama, 482 U.S. 920 (1987).

252 Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999).

253 Id. at 712; *Tarver v. State*, 500 So. 2d at 1241. Of the states that authorize capital punishment, only four—Alabama, Delaware, Florida, and Indiana—permit a judge to override a jury's life verdict. See Ala. Code § 13A-5-47 (1994); Del. Code Ann. tit. 11, § 4209(d) (2001); Fla. Stat. Ann. § 921.141(2)-(3) (West 2001); Ind. Code Ann. § 35-50-2-9(e) (West 1998). Alabama is the only state that permits elected trial judges to override a jury's capital-sentencing verdict without adherence to any established standards. See Ala. Code § 13A-5-47(e) (1994) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."). Nearly twenty-five percent of Alabama's death row prisoners received verdicts of life imprisonment without parole that were overridden subsequently by trial judges. See Editorial, How to Make Alabama's Death Row Less Crowded, Mobile Press Reg., July 6, 1999; see also Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, 46 Ala. L. Rev. 5 (1994) (providing detailed discussion of Alabama's jury override provisions).

254 In 1987, Mr. Tarver filed a petition for relief in the Alabama state courts alleging that his capital murder conviction and sentence of death were unconstitutionally imposed. The circuit court judge, Judge Wayne Johnson, who was the same judge who originally sentenced Mr. Tarver to death, affirmed petitioner's conviction but reversed his death sentence on the basis of ineffectiveness of counsel. Alabama v. Tarver, No. CC 84-450.01 (Russell County Cir. Ct. Ala. Oct. 20, 1992) (order on remand) (on file with the *New York*

Following the Supreme Court's grant of certiorari on the electrocution issue in *Bryan v. Moore*, Mr. Tarver filed a second state post-conviction petition in an Alabama circuit court in January 2000, challenging the constitutionality of his death sentence and his scheduled execution by electrocution. The petition argued that the certiorari grant in *Bryan v. Moore*[255] required the grant of a stay of execution in Mr. Tarver's case to permit the claim to be heard.[256] The petition presented new evidence supporting a conclusion that execution by electrocution creates a risk of unnecessary pain and suffering.[257] It cited recent legislative enactments banning electrocution in other states[258] and a then-pending proposal to the same effect in the

University Law Review). Mr. Tarver appealed the state circuit court's affirmance of his capital murder conviction and the state appealed the reversal of Mr. Tarver's death sentence. The Alabama Court of Criminal Appeals reversed Judge Johnson's finding that Mr. Tarver's defense counsel was ineffective at trial. See State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App.), cert. quashed as improvidently granted, Ex parte Tarver, No. 1921372, 1993 Ala. LEXIS 1421 (Ala. 1993). The Alabama Court of Criminal Appeals overruled the trial court on this issue, characterizing counsel's actions as consistent with strategic judgments, 629 So. 2d at 20-21, even though the trial court had pointed out, in its rulings, that "'[f]ailure to investigate and failure to put on witnesses,'" as occurred in this case, "'cannot be characterized as trial strategy.'" Id. at 20 (quoting trial court). Mr. Tarver thereafter filed a petition for a writ of habeas corpus in federal district court, which was denied in Tarver v. Jones, No. CV-95-A-1035-N (M.D. Ala. 1998), and the denial of federal habeas corpus relief was affirmed in Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir. 1999).

255 See supra notes 247-48 and accompanying text.

256 See Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure at 5, Tarver v. State, Russell County Cir. Ct., Alabama (No. CC 84-450.60) (brief on file with the *New York University Law Review*).

257 The petition included autopsy reports from recent Alabama executions, demonstrating excessive burning, scorched skin, and other trauma to the bodies of electrocuted prisoners, as well as evidence of botched executions in which electrocution had to be administered repeatedly due to malfunctioning equipment or human error. Id. at 9-18. For a description of the gruesome effects of electrocution, see, e.g., Mike Clary, Flames Erupt in Electric Chair Jolt, L.A. Times, Mar. 26, 1997, at A1. Mr. Tarver's petition cited scientific studies showing that there is no longer any widely held belief that high-voltage electrocution induces unconsciousness or is otherwise painless. See Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, supra note 256, at 9-12, 20-27.

258 In 1949, twenty-six states authorized execution by electrocution. Denno, Getting to Death, supra note 247, at 365. Of the twenty-six, twenty-four have abandoned electrocution completely or as the sole method of execution. Denno, Adieu to Electrocution, supra note 247, at 676. No state has introduced electrocution as a new method of execution since 1949. Denno, Getting to Death, supra note 247, at 365. In recent years, Florida, Georgia, Kentucky, and Tennessee enacted laws rejecting electrocution as the sole method of execution. See Fla. Stat. Ann. § 922.105 (West 2001); Ga. Code Ann. § 17-10-38 (Supp. 2001); Ky. Rev. Stat. Ann. § 431.220(1)(a)-(b) (Michie 1999); Tenn. Code Ann. § 40-23-114 (Supp. 2001). As of January 2002, only two states—Alabama and Nebraska—required execution by electrocution. Death Penalty Info. Ctr., supra note 247. Last year, the Supreme Court of Georgia held that electrocution violated the state constitution's prohibition against cruel and unusual punishment. Dawson v. State, 554 S.E.2d 137, 139 (Ga. 2001).

Alabama legislature.[259] All of these events bore on the interpretation of the "evolving standards of decency" embodied in the Eighth Amendment.[260]

Without a hearing, argument, or even consultation with the parties, the circuit court denied Mr. Tarver's petition on January 27, 2000.[261] On February 2, less than eight hours before the scheduled execution, the state appellate court denied review, declaring that, under Alabama law, all constitutional claims have to be presented within two years of the completion of direct appeal, which, in Mr.

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259 See Mike Cason, House Approves "More Humane" Execution Method, Montgomery Advertiser, Mar. 12, 1998 (discussing bill passed by Alabama's House of Representatives to replace electrocution with lethal injection).

260 Under a principle announced by Chief Justice Warren in Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), the Supreme Court looks to "the evolving standards of decency that mark the progress of a maturing society" to determine the requirements of the Eighth Amendment. As the Court has recognized, "[t]he clearest and most reliable objective evidence of the contemporary values is the legislation enacted by the country's legislatures." Penry v. Lynaugh, 492 U.S. 302, 331 (1989); accord Gregg v. Georgia, 428 U.S. 153, 181 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."). Thus, the Court has held punishments to be violative of the Eighth Amendment based, in part, on evidence of a legislative consensus rejecting the type of punishment at issue. See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 826-30 (1988) (invalidating capital punishment for offender under age sixteen where eighteen state legislatures explicitly rejected practice); Enmund v. Florida, 458 U.S. 782, 788-96 (1982) (holding death penalty unconstitutional for certain type of felony-murder where only eight of thirty-six death penalty jurisdictions allowed capital punishment for such offense); Coker v. Georgia, 433 U.S. 584, 592-96 (1977) (invalidating capital punishment for rape where only one state imposed death for rape of adult and only three imposed it for any rape).

261 Tarver v. Alabama, No. CC 84-450.01, (Russell County Cir. Ct., Ala. Jan. 27, 2000) (order denying postconviction relief), cited in Tarver v. State, 761 So. 2d 266 (Ala. Crim. App. 2000). The circuit court judge made no independent findings or rulings and merely signed orders prepared by the state. Based on the author's experience, this is standard practice in collateral litigation of death penalty cases in Alabama and also other states. See also Equal Justice Initiative of Alabama, supra note 85, at 263 ("In many Rule 32 capital cases, Alabama trial courts sign a proposed order which the Attorney General's office has drafted."). The practice raises fundamental questions about the habeas corpus statutes and common law doctrines that limit the availability of federal habeas corpus review on the theory that the federal courts should give respect to the reasoning of the state judiciary. See, e.g., 28 U.S.C. § 2254(d)(1) (Supp. V 2000) (stating that federal habeas corpus relief is available only if state court's decision was "contrary to" or "unreasonable application of clearly established" Supreme Court law); Coleman v. Thompson, 501 U.S. 722, 730-35 (1991) (finding that comity and federalism principles underlying procedural default doctrine call for determining whether state court decision relies on independent and adequate state procedural ground). When a state court judge does nothing more than "rubber stamp" the prosecution's request and engages in no reasoning whatsoever, it is difficult to comprehend why such an action should be awarded deference by the federal courts. Cf. United States v. Leon, 468 U.S. 897, 914 (1984) (holding that good faith exception to Fourth Amendment exclusionary rule does not apply if magistrate who issued warrant "serve[s] merely as a rubber stamp for the police" (citation omitted)).

Tarver's case, occurred in 1987.[262] The Supreme Court of Alabama denied certiorari review.[263] Hence, Mr. Tarver had no state court process available for a stay of execution.

The traditional federal habeas corpus process also offered no meaningful or available opportunity for obtaining a stay of execution. As already seen in the discussion of incompetency-to-be-executed claims, an execution-related claim like Mr. Tarver's does not qualify for the innocence requirement of § 2244(b)(2)(B).[264] While a ruling by the Supreme Court in *Bryan v. Moore* (or some other case) condemning the use of the electric chair likely would be retroactively applicable to Mr. Tarver's case, no such ruling had been issued by the Court at the time of Tarver's scheduled execution, and therefore successive review was not available under § 2244(b)(2)(A)'s "new law" provision.[265]

At this point, Mr. Tarver pursued the only paths still open for bringing his method-of-execution claim to the federal courts. First, he petitioned the Supreme Court for certiorari review of the Alabama Supreme Court's denial of the second state postconviction petition.[266] But the Alabama Supreme Court ruling had been predicated on procedural grounds: The court had ruled that Mr. Tarver had no state court remedy for his electrocution claim because of a failure to comply with a state statute of limitations. Accordingly, the certiorari petition presented issues concerning the operation and effect of Alabama's procedural rules. Given the Court's preference for broad, important constitutional issues,[267] it was hardly surprising when the Court denied review.[268]

As he was in the process of seeking certiorari review of the state court judgment, Mr. Tarver also pursued the other apparently available alternative: He filed an original application for a writ of habeas

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262 See Tarver v. State, 761 So. 2d 266, 268 (Ala. Crim. App. 2000).

263 See Id.

264 See supra notes 199-201 and accompanying text; see also, e.g., Greenawalt v. Stewart, 105 F.3d 1287, 1288 (9th Cir. 1997) (per curiam) (finding that challenge to lethal injection as method of execution fails to qualify for § 2244(b)(2)(B)'s innocence provision). But see LaGrand v. Stewart, 170 F.3d 1158, 1159-60 (9th Cir. 1999) (applying reasoning of Martinez-Villareal v. Stewart, 118 F.3d 628, 633 (9th Cir. 1997), to exempt method-of-execution claim from AEDPA's successive petition rules on ground that claim was not ripe at time of first petition).

265 This aspect of § 2244(b)(2)(A)'s operation and its implications are discussed infra Part II.C.1.

266 See *Tarver*, 761 So. 2d at 268.

267 See Sup. Ct. R. 10(a); Robert L. Stern et al., Supreme Court Practice §§ 4.11 to .15 (7th ed. 1993) (discussing Supreme Court preference for important constitutional, federal statutory, and federal procedural issues).

268 See Tarver v. Alabama, 528 U.S. 1183 (2000) (mem.).

corpus in the United States Supreme Court. The Court's original habeas corpus jurisdiction, which has existed since the Judiciary Act of 1789,[269] rarely has been exercised in modern times.[270] But the Supreme Court reaffirmed the vitality of the remedy in a 1996 decision, citing its very availability as a reason for concluding that AEDPA's curtailment of Supreme Court certiorari review of a certain type of ruling in a federal habeas corpus proceeding did not constitute a suspension of the writ.[271] Original habeas corpus writs come within the Supreme Court rule for "extraordinary writs," requiring a showing "that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."[272] The claim in Mr. Tarver's case met these criteria because of the difficulties in adjudicating the issue in an initial or successive federal habeas corpus application in the lower federal courts (thus justifying an extraordinary writ to "aid . . . the Court's appellate jurisdiction"), the exceptional circumstance of an imminent execution, and the unavailability of adequate relief in federal (as a result of AEDPA's curtailment of the successive petition remedy) or state court.

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269 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. at 81.

270 See, e.g., In re McDonald, 489 U.S. 180, 184-85 (1989) (per curiam) ("[W]e have not granted the sort of extraordinary writ [habeas corpus petition] . . . sought by petitioner to any litigant . . . for at least a decade."); see also Sup. Ct. R. 20.4(a) (stating that original writs are "rarely granted"). The Court's entire original jurisdiction docket historically has been quite limited. There are several statutory and constitutional bases for litigants to pursue relief through actions that originate at the Court. See U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."); 28 U.S.C. § 1251 (1994) (codifying Supreme Court's "original and exclusive jurisdiction"). The Court, however, has exercised its discretionary authority in this area sparingly and frequently has resisted review even where it has had exclusive jurisdiction. See Mississippi v. Louisiana, 506 U.S. 73, 76 (1992) ("[O]ur original jurisdiction should be exercised only sparingly."); Texas v. New Mexico, 462 U.S. 554, 570 (1983) ("We exercise . . . [original jurisdiction] with an eye to promoting the most effective functioning of this Court within the overall federal system."); California v. Texas, 457 U.S. 164, 168 (1982) ("A determination that this Court has original jurisdiction over a case, of course does not require us to exercise that jurisdiction. We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction."); Stern et al., supra note 267, § 11.3, at 501 ("[T]his power to issue an 'original' writ of habeas corpus . . . is so rarely exercised, and so often misunderstood by untutored practitioners as to be deemed 'an anachronism' in Supreme Court practice.").

271 See Felker v. Turpin, 518 U.S. 651, 658 (1996) ("We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions."); id. at 661-62 (finding that AEDPA "does not repeal our authority to entertain a petition for habeas corpus"). For discussion of the concept of "suspension of the writ," see supra note 202 and accompanying text.

272 Sup. Ct. R. 20.1.

At 10:30 p.m. on February 3, 2000, ninety minutes before his scheduled execution and after Mr. Tarver had been provided his "last meal," the Supreme Court granted the motion for a stay of execution that accompanied the original habeas corpus petition.[273] But the Court's ruling gave rise to a host of questions concerning the nature of original habeas corpus review. Mr. Tarver's electrocution claim came to the Supreme Court with no factual development in any lower court. To review the merits of the claim and to adjudicate the factual issues, the Court would have to consider whether to hold an evidentiary hearing, require briefing, or hold a status conference in front of the full Court. Because of the infrequency of the Court's exercise of its original habeas corpus jurisdiction, no precedent or set of rules existed by which to make these decisions.

On February 22—three weeks after granting Mr. Tarver's stay motion—the Court vacated the order staying the execution and also denied the petition for a writ of habeas corpus.[274] A few weeks later, Mr. Tarver was executed by the State of Alabama.[275]

What accounts for the Court's change of direction in the case? It seems unlikely that the Court's denial of review and dissolution of the

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[273] In re Tarver, 528 U.S. 1146 (2000).

[274] Id. at 1152.

[275] The execution was preceded by additional litigation. After the Supreme Court granted a stay of execution, the former assistant district attorney who prosecuted Mr. Tarver contacted defense counsel and revealed that black prospective jurors intentionally had been excluded from jury service on the basis of race. See Tarver v. State, 769 So. 2d 338, 340 (Ala. Crim. App. 2000). Mr. Tarver, who is black, previously had argued in his initial habeas corpus petition that the prosecutor used peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). See Tarver v. Hopper, 169 F.3d 710, 712-13 (11th Cir. 1999). The state prosecutor used thirteen out of sixteen peremptory strikes (eighty-one percent) to exclude almost all of the qualified black venire members from jury service at Mr. Tarver's trial. Thirteen of the fourteen qualified black jurors (ninety-three percent) selected for jury service were excluded by the state prosecutor on the basis of race. See Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, supra note 256, at 3. Despite the fact that Russell County is almost forty percent African American, Mr. Tarver was tried by a jury with eleven whites and only one black juror. Id. When provided an opportunity to dispute the claim of racial discrimination in jury selection, the circuit court found that "the State was unable to rebut the prima facie case of a *Batson* violation." Alabama v. Tarver, No. CC 84-450.01 (Russell County Cir. Ct. Ala. Oct. 20, 1992) (order on remand) (on file with the *New York University Law Review*). However, Mr. Tarver's trial counsel failed to object contemporaneously when the state excluded black venire members with peremptory strikes during jury selection. Id. Because the claim does not establish factual innocence, it is not subject to review under the new successive petition guidelines. When presented with the claim in a successive state petition on the eve of execution, the Alabama Court of Criminal Appeals denied the petition on procedural grounds and denied a stay of execution, after which the Alabama Supreme Court denied certiorari review and a stay. See State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App.), cert. quashed as improvidently granted, Ex parte Tarver, No. 1921372, 1993 Ala. LEXIS 1421 (Ala. 1993).

stay of execution were prompted by a shift of views about the merits of the issue, given that no factual development or briefing took place in the interim. In all likelihood, the Court's denial of review was influenced, at least in part, by the increasingly clear picture of the administrative problems that would attend original habeas corpus review of the case. Four members of the Court wanted to set the cause for oral argument.[276] The complex management of what was sure to be a long, time-consuming adversarial process—which would cast the Court in the unfamiliar role of original fact-finder—surely caused some members of the Court to rethink the feasibility of the original habeas corpus remedy in a case like Mr. Tarver's. Although arguably the Court could have remanded the case to a lower court for fact-finding,[277] such an action would have required it to blaze a new trail in the procedural terrain. Section III.B.1 will return to this subject and look further at the original habeas corpus remedy as an alternative to successive litigation. Before addressing this issue at greater length, however, it is useful to examine another type of problem created by AEDPA's successive petition rules.

C. The Preclusive Effects of § 2244(b)(2)(A)'s "New Law" Provision

1. The Provision's Generally Preclusive Effects

As explained earlier,[278] § 2244(b)(2)(A)'s "new law" provision changes the common law standard for successive petitions by incorporating a particularly stringent version of the *Teague* doctrine of nonretroactivity. Under § 2244(b)(2)(A), a petitioner cannot file a successive petition on the basis of "new law," i.e., "a new rule of constitutional law . . . that was previously unavailable," unless the new rule has been "made retroactive to cases on collateral review by the Supreme Court."[279] The Supreme Court held in 2001 in *Tyler v. Cain*[280] that a rule is eligible for the "new law" gateway only if the

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276 In re Tarver, 528 U.S. 1152 (2000).

277 For discussion of such a procedure, see infra Part III.B.1.

278 See supra note 173 and accompanying text.

279 28 U.S.C. § 2244(b)(2)(A) (Supp. V 2000).

280 533 U.S. 656, 662 (2001) (holding that "the [retroactivity] requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review"). The circuit courts had been divided on the question of whether this standard follows prior law in permitting a circuit or district court to deem a new rule to be "retroactive" on the basis of analogous Supreme Court decisions. The Third and Ninth Circuits have interpreted the provision in accordance with pre-AEDPA law. See Flowers v. Walter, 239 F.3d 1096, 1104 (9th Cir. 2001) (per curiam) (concluding that § 2244(b)(2)(A) "codifies *Teague*"); West v. Vaughn, 204 F.3d 53, 61-62 (3d Cir. 2000) (holding that AEDPA did not alter *Teague*'s retroactivity analysis). The First, Fourth, Fifth, Seventh, Eighth, Tenth, and

Court itself has declared that rule to be retroactive to cases on collateral review.

In a dissenting opinion in *Tyler*, Justice Breyer pointed out the "procedural complexity" that the majority's interpretation of the provision injects:

> After today's opinion, the only way in which this Court can make a rule . . . retroactive is to repeat its . . . reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not "held," that a new rule is retroactive.[281]

In non-capital cases, a successive petitioner will not be able to benefit from a newly announced rule—and will have to wait in prison, serving a prison sentence whose constitutionality has been thrown into question by the new rule—until the Supreme Court happens to grant review in a case that produces the requisite ruling of retroactivity. In

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Eleventh Circuits construe the provision in the narrower manner eventually adopted by the Supreme Court in Tyler v. Cain, 533 U.S. 656 (2001). See Browning v. United States, 241 F.3d 1262, 1264 (10th Cir. 2001) (en banc) (holding that rule applies retroactively "only if the Court actually applies the rule retroactively, or makes some explicit statement regarding retroactivity"); Rodgers v. United States, 229 F.3d 704 (8th Cir. 2000) (per curiam) (same); Talbott v. Indiana, 226 F.3d 866, 868 (7th Cir. 2000) (same); Hernandez v. United States, 226 F.3d 839, 841 (7th Cir. 2000) (same); Brown v. Lensing, 171 F.3d 1031, 1032 (5th Cir. 1999) (same); In re Smith, 142 F.3d 832, 835 (5th Cir. 1998) (same); Rodriguez v. Superintendent, Bay State Corr. Ctr., 139 F.3d 270, 274 (1st Cir. 1998) (same); In re Vial, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc) (same); In re Hill, 113 F.3d 181, 184 (11th Cir. 1997) (per curiam) (same).

281 533 U.S. at 677 (Breyer, J., dissenting). Justice Breyer further remarked upon another problem: the possible foreclosure of successive federal habeas corpus review as a result of the interaction of the successive review petitions with AEDPA's statute of limitations. "Even this complex route will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has 'made' a new rule retroactive, not from the time it initially recognized that new right." Id. "Otherwise, the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness." Id. But the risk to which Justice Breyer adverted will arise only if the statute of limitations' "new law" provision—which permits the filing of a petition one year after "the date on which the constitutional right asserted was initially recognized by the Supreme Court," § 2244(d)(1)(C)—is interpreted in the same manner as the successive petition provision the Court construed in *Tyler v. Cain*. The provisions are somewhat differently worded, and the linguistic distinctions may call for construing the statute of limitations in a manner that avoids the problem identified by Justice Breyer. See Hertz & Liebman, supra note 26, § 5.2b, at 263 n.61 (discussing problems raised by Court's decision in *Tyler v. Cain*).

capital cases, the effect is even more insidious: A capital prisoner whose stay of execution depends upon filing a successive petition[282] will be unable to do so, and may well be executed, because the Supreme Court has not yet issued a decision announcing the retroactivity of a newly announced rule that renders the prisoner's conviction or sentence unconstitutional.

2. *The Additional Impact on Execution-Related Claims*

Justice Breyer's explanation of the procedural consequences of the Supreme Court's *Tyler* ruling[283] presupposes that a claim *can* be litigated in a first habeas corpus petition and thereby produce a Supreme Court ruling of "retroactivity," which in turn would open the otherwise closed "new law" gateway under § 2244(b)(2)(A). But as already seen in the earlier discussion of *Ford* claims of incompetency to be executed,[284] certain types of claims cannot be adjudicated until the successive petition stage. In the incompetency context, there already is a clearly established constitutional rule that can be applied in habeas corpus cases—the *Ford* decision itself. But let us now consider the effects of the *Tyler* decision on an execution-related claim that does not have a similar pedigree.

In 1995, in a case entitled *Lackey v. Texas*, Justice Stevens issued an opinion respecting the denial of certiorari to express the view that the claim raised in the petition—"whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment"—appears to have merit and is worthy of further inquiry in the lower courts and, perhaps, certiorari review by the Supreme Court.[285] Justice Stevens pointed out that the claim, "[t]hough novel, . . . is not without foundation," for it rests upon principles established in the Supreme Court's Eighth Amendment jurisprudence[286] and also the decisions of British jurists.[287] Justice Breyer, who joined Justice Stevens's

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282 For discussion of the standards governing the issuance of a stay of execution in connection with a successive federal habeas corpus petition, see Hertz & Liebman, supra note 26, § 13.2d.

283 See supra notes 281 and accompanying text.

284 See id.

285 Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (statement of Stevens, J., respecting denial of certiorari).

286 Id.

287 See id. at 1047 (citing Pratt v. Attorney Gen. of Jam., 2 App. Cas. 1, 33 (P.C. 1994) (appeal taken from Jam.) (recognizing that prisoners should not be faulted for delays resulting from use of appellate procedures)).

statement, expressed agreement "that the issue is an important undecided one."[288]

In the years since Justice Stevens issued his opinion, the claim of inordinate delay of execution, commonly known as a "*Lackey* claim,"[289] has been the subject of several lower court opinions[290] and extensive commentary in legal scholarship.[291] Justice Breyer has developed further the legal foundations of the claim in opinions dissenting from the denial of certiorari.[292] Justice Thomas has gone on the record rejecting the claim.[293]

The very nature of a *Lackey* claim makes it one that ordinarily will be raised late in the postconviction process.[294] Usually the claim

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288 Id.

289 See, e.g., Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998) (referring to claim based on length of confinement as "*Lackey* claim"); id. at 1370-78 (Fletcher, J., dissenting) (same).

290 Compare Knight v. Florida, 528 U.S. 990, 992-93 (1999) (Thomas, J., concurring in denial of certiorari) (citing lower court case law on *Lackey* claim and stating that "[t]hese courts have resoundingly rejected the claim as meritless"), with id. at 998 (Breyer, J., dissenting from denial of certiorari) (citing lower court case law and disagreeing with Justice Thomas).

291 For discussions in the academic literature of *Lackey* claims, see Dwight Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?, 29 Seton Hall L. Rev. 147 (1998); Dwight Aarons, Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases, 89 J. Crim. L. & Criminology 1 (1998); Michael P. Connolly, Note, Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment, 23 New Eng. J. on Crim. & Civ. Confinement 101 (1997); Dan Crocker, Note, Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?, 1 J. Gender Race & Just. 555 (1998); Jessica Feldman, Comment, A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional, 40 Santa Clara L. Rev. 187 (1999); Kathleen M. Flynn, Note, The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment, 54 Wash. & Lee L. Rev. 291 (1997); Ryan S. Hedges, Note, Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence, 74 S. Cal. L. Rev. 577 (2001).

292 See *Knight*, 528 U.S. at 993-99 (Breyer, J., dissenting from denial of certiorari) (pointing to international law as well as lower federal court decisions in support of recognition of *Lackey* claims); Elledge v. Florida, 525 U.S. 944, 944-46 (1998) (Breyer, J., dissenting from denial of certiorari) (arguing that executions carried out after extensive delay may be especially "cruel" and "unusual" punishment and suggesting that delay of twenty-three years presents such concerns).

293 See *Knight*, 528 U.S. at 990-93 (Thomas, J., concurring in denial of certiorari) (finding justifications for recognition of *Lackey* claims to be without merit).

294 There may be the rare case in which a capital prisoner could litigate a *Lackey* claim in a first habeas corpus petition, e.g., a case in which a reversal of a prior conviction or sentence leads to a resentencing to death and subsequent postconviction review after the capital prisoner had already spent years on death row. For instance, in *Elledge*, the petitioner spent more than twenty-three years in prison. See *Elledge*, 525 U.S. at 944-45 (Breyer, J., dissenting from denial of certiorari). According to Justice Breyer, Elledge "experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part." Id. at 945. In fact, eighteen of the twenty-three years were

will arise after a capital prisoner already has litigated a federal habeas corpus petition and received an adjudication of that petition on the merits. Accordingly, in the vast majority of cases in which such a claim might be raised, the vehicle for obtaining federal habeas corpus review of the claim would be a successive petition.

Prior to AEDPA, such a claim self-evidently would qualify for the "new facts" gateway for the filing of a successive petition. This conclusion once again flows naturally from the very nature of the claim. Because the requisite factual basis for the claim is a showing that the prisoner has spent a prolonged time on death row, the facts supporting the claim ordinarily would emerge only after the adjudication of the first habeas corpus petition. But, as already seen, AEDPA changes the "new facts" standard by engrafting onto it a requirement of a showing of "innocence." Even assuming that this prerequisite can be satisfied by a showing of "innocence of the death penalty,"[295] it seems unlikely that a court would construe the provision as encompassing a *Lackey* claim, which relates solely to the constitutionality of the carrying out of an execution.[296]

Thus, a petitioner who seeks to raise a *Lackey* claim under the post-AEDPA regime must look to § 2244(b)(2)(A)'s "new law" provision. At first glance, this provision appears more promising. It seems a simple enough matter to show that the claim is novel. That proposition already has been accepted by both Justice Stevens's opinion supporting the claim[297] and Justice Thomas's opinion rejecting the claim.[298] But now we confront the procedural Catch-22 created by § 2244(b)(2)(A). In order to obtain authorization for filing a successive petition with a *Lackey* claim, the prisoner must show not only that the principle has already been adopted as a "rule" but also that the Supreme Court itself has already declared that rule to be retroactive to cases on collateral review.[299] As Justice Breyer explained, these preconditions ordinarily require that the claim come before the Supreme Court on a first habeas corpus petition, so that the claim can

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spent litigating three successful appeals; a fourth and final appeal "accounts for the remaining five years—which appeal, though ultimately unsuccessful, left the Florida Supreme Court divided 4-2." Id. In fact, the state conceded that "[a]ll delays were a result of [petitioner's] 'successful litigation' in the appellate courts of Florida and the federal system." Id.

295 See supra notes 184-89 and accompanying text.

296 See, e.g., LaGrand v. Stewart, 170 F.3d 1158, 1160 (9th Cir. 1999) (excluding *Lackey* claim from innocence exception to successive petition bar).

297 See Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (statement of Stevens, J., respecting denial of certiorari) ("Though novel, petitioner's claim is not without foundation.").

298 *Knight*, 528 U.S. at 991 (Thomas, J., concurring in denial of certiorari) (characterizing *Lackey* claim as "novel").

299 See supra note 173 and accompanying text.

thereby receive the necessary imprimatur from the Court. But the very nature of the claim almost always will prevent it from being presented in a first petition. Thus, we are at an impasse. And the cost is the greatest imaginable—the state's taking the lives of individuals whose execution may very well be unconstitutional.

3. *The Additional Impact on Claims That Are the Subject of Supreme Court Reconsideration: The Case of Glenn Holladay*

Until now, this Article has focused on claims that are only litigable at the time of a successive petition because, for example, they must be adjudicated at or near the time of execution or must be litigated late in the postconviction process. This Section examines a nonapparent preclusive effect that § 2244(b)(2)(A)'s "new law" provision may have on claims that technically could be litigated at the time of a first petition but almost invariably would not be or would fail due to then-existing Supreme Court precedent. The focus of this discussion will be a claim that the Eighth Amendment prohibits the execution of an individual who is mentally retarded.

As the Supreme Court observed in 1989 in *Penry v. Lynaugh*, "mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."[300] People with mental retardation "have a reduced ability to cope with and function in the everyday world."[301] In *Penry*, the Court held that the Eighth and Fourteenth Amendments require that the sentencing authority in a capital case be allowed to consider and give effect to a capital defendant's mental retardation.[302] The Court refrained, however, from holding that the Eighth Amendment "precludes the execution of any mentally retarded person . . . convicted of a capital offense simply by virtue of his or her mental retardation alone."[303] The Court concluded that insufficient objective evidence existed of a national consensus against execution of the mentally retarded that would justify a conclusion that "standards of decency" called for an Eighth Amendment rule exempting mentally retarded individuals from the death penalty.[304] Only one state, Georgia, had banned execution of a re-

300 492 U.S. 302, 337 (1989).

301 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

302 *Penry*, 492 U.S. at 328; see also Penry v. Johnson, 121 S. Ct. 1910, 1920-24 (2001) (explaining ruling in earlier *Penry* decision).

303 *Penry*, 492 U.S. at 340.

304 For an explanation of the "evolving standards of decency" analysis the Court employs in construing the Eighth Amendment, see supra note 260.

tarded person found guilty of a capital offense.[305] "[W]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,'" the Court found "there is insufficient evidence of such a consensus today."[306]

Since *Penry*, evidence of a national consensus on the execution of the mentally retarded has emerged: Eighteen states and the federal government have enacted legislation banning the execution of the mentally retarded.[307] Most jurisdictions in the United States now prohibit the execution of people with mental retardation.[308] Legislators and policymakers in jurisdictions with the death penalty are passing laws to prohibit the execution of the mentally retarded and are expressing support for the idea that mentally retarded persons should no longer be put to death.[309] These developments bring this country into closer accord with other nations of the world, which overwhelmingly prohibit the execution of mentally retarded persons.[310]

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305 See *Penry*, 492 U.S. at 334; see also Ga. Code Ann. § 17-7-131(j) (Harrison 1990).

306 See *Penry*, 492 U.S. at 340.

307 21 U.S.C. § 848(1) (1994); Ariz. Rev. Stat. Ann. § 13-703(B) (West 2001); Ark. Code Ann. § 5-4-618(b) (Michie 1997); Colo. Rev. Stat. § 16-9-403 (2001); Conn. Gen. Stat. Ann. § 53a-46a(h)(2) (West 2001); Fla. Stat. Ann. § 921.137 (West Supp. 2002); Ga. Code Ann. § 17-7-131(j) (1997); Ind. Code Ann. § 35-50-2-9(a) (West 1998); Kan. Stat. Ann. § 21-4623(d) (1995); Ky. Rev. Stat. Ann. § 532.140(1) (Michie 1999); Md. Code Ann., art. 27 § 412(g) (1996); Mo. Ann. Stat. § 565.030.4(1) (West Supp. 2002); Neb. Rev. Stat. § 28-105.01(2) (Supp. 2000); N.M. Stat. Ann. § 31-20A-2.1(B) (Michie Supp. 2000); N.Y. Crim. Proc. Law § 400.27(12)(c) (McKinney Supp. 2001-2002); N.C. Gen. Stat. § 15A-2005(c) and (e) (Supp. 2001); S.D. Codified Laws § 23A-27A-26.1 (Michie Supp. 2001); Tenn. Code Ann. § 39-13-203(b) (1997); Wash. Rev. Code Ann. § 10.95.030(2) (West Supp. 2002). In addition, the Supreme Court of Tennessee recently declared that executing the mentally retarded violates the Eighth Amendment of the United States Constitution as well as the Tennessee Constitution, and it applied its decision to cases pending on collateral review. See Van Tran v. State, 66 S.W.3d 790, 809-11 (Tenn. 2001).

308 Including jurisdictions that do not authorize capital punishment, the execution of a mentally retarded person is impermissible in Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, the District of Columbia, and the federal system of the United States.

309 This trend is illustrated by President George W. Bush's announcement on June 11, 2001, that "'We should never execute anybody who is mentally retarded.'" Raymond Bonner, President Says the Retarded Should Never Be Executed, N.Y. Times, June 12, 2001, at A28.

310 The United States is virtually alone among the nations of the world in its toleration of the execution of the mentally retarded. See Brief for Petitioner at 43 n.46, Atkins v. Virginia, 534 S.E.2d 312 (Va. 2000), cert. granted, 533 U.S. 976 (2001) (No. 00-8452) (identifying United States, Japan, and Kyrgyzstan as sole countries that reportedly permit execution of mentally retarded persons and explaining that questions have arisen regarding permissibility of practice in Kyrgyzstan). Compare Harold Hongju Koh, A Dismal Record

In what was apparently a response to these developments, the Supreme Court granted a stay of execution for a mentally retarded North Carolina prisoner named Ernest McCarver on March 1, 2001[311] and then, on March 26, granted certiorari in the case[312] on the following question: "Does significant objective evidence demonstrate that national standards have evolved such that executing [a] mentally retarded man would violate [the] Eighth Amendment prohibition against cruel and unusual punishment?"[313] The *McCarver* case reached the Supreme Court on a petition for certiorari from the North Carolina Supreme Court's denial of a successive state postconviction petition.[314] On March 6, 2001, the Court granted a stay of execution in another case in which a mentally retarded person was scheduled for execution.[315] These events provide the backdrop for our examination of the case of Glenn Holladay.

Mr. Holladay, who was convicted of murder and sentenced to death in Alabama in 1987,[316] is mentally retarded. As a child, he was tested by mental health experts on three separate occasions, which resulted in I.Q. scores of forty-nine, fifty-six, and fifty-four.[317] Mr. Holladay can neither read nor write, did not complete school beyond

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on Executing the Retarded, N.Y. Times, June 14, 2001, at A33 (expressing view that only nation other than United States that regularly sentences mentally retarded persons to death is Kyrgyzstan), with Baktybek Abdrisaev, Penalties in Kyrgystan, N.Y. Times, June 30, 2001, at A14 (Letter to the Editor from Kyrgyz Ambassador to United States) (denying that death penalty is permitted for mentally retarded persons in Kyrgyzstan).

311 McCarver v. North Carolina, 531 U.S. 1205 (2001) (mem.).

312 McCarver v. North Carolina, 532 U.S. 941, 941 (mem.), granting cert. to State v. McCarver, 548 S.E.2d 522 (N.C. 2001).

313 State v. McCarver, 548 S.E.2d 522 (N.C.), cert. granted sub nom. McCarver v. North Carolina, 532 U.S. 941(2001).

314 See Brief for Petitioner, at 5-7, McCarver v. North Carolina, 533 U.S. 975 (2001) (mem.) (No. 00-8727), dismissing cert. granted by 532 U.S. 941 (2001) (mem.). The state postconviction trial judge exercised discretionary review and granted the applications for a stay of execution and postconviction relief. See id. at 7. Later on that same day, the North Carolina Supreme Court reversed the judge's ruling and dissolved the stay of execution. Id.

On September 25, 2001, the Supreme Court dismissed the certiorari petition in *McCarver* as improvidently granted, in light of North Carolina's newly enacted statutory prohibition against executing the mentally retarded. McCarver v. North Carolina, 533 U.S. 975 (2001) (mem.), dismissing cert. granted by 532 U.S. 941 (2001) (mem.). On the same day, the Court granted certiorari in Atkins v. Virginia, 533 U.S. 976 (2001) (mem.), which presents essentially the same question of whether executing the mentally retarded violates the Eighth Amendment.

315 See Richardson v. Luebbers, 532 U.S. 915 (2001) (mem.).

316 On June 26, 1987, Mr. Holladay was convicted of killing his ex-wife, Rebecca Holladay, her boyfriend, David Robinson, and Larry Thomas, Jr. Holladay v. State, 549 So. 2d 122, 124-25 (Ala. Crim. App. 1988). The basis for the capital charge in the case was the killing of two or more persons pursuant to one scheme or course of conduct. Id. at 124.

317 Record at 2032-33, 2035, 2039, State v. Holladay (No. CC-86-1057-DWS) (Etowah County Cir. Ct., Alabama) (record on file with the *New York University Law Review*).

the sixth grade, and has a life history that includes extensive documentation of mental retardation by state agencies, schools, and physicians.[318] At his trial, the sentencing judge concluded that Mr. Holladay is mentally retarded,[319] but nonetheless sentenced him to death. Mr. Holladay unsuccessfully sought reversal of the conviction and death sentence on direct appeal, in state postconviction proceedings, and in federal habeas corpus proceedings.[320] His petition for relief from the Supreme Court following federal habeas corpus review was denied on November 27, 2000.[321]

On May 17, 2001, in response to the State of Alabama's request for an execution, the Alabama Supreme Court scheduled Mr. Holladay's execution for June 22, 2001.[322] For Mr. Holladay, the fundamental challenge was to stay alive long enough to benefit from a potentially favorable ruling in *McCarver*. If the Supreme Court declared the execution of the mentally retarded unconstitutional in six to twelve months and made its decision retroactive, Mr. Holladay could be saved. If he were executed before a favorable *McCarver* ruling, he would be the victim of both bad timing and a procedural obstacle course that did not afford him adequate opportunities for review.

In order to seek relief through federal habeas corpus review, Mr. Holladay would have had to file a successive petition. Although the Eighth Amendment claim presently under discussion, unlike those previously considered, *would* be cognizable in a first petition, Mr. Holladay's case had long since progressed past the stage of the first

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318 Id. at 2021-69.

319 State v. Holladay, No. CC-86-1057-DWS (Etowah County Cir. Ct., Alabama July 27, 1987) (judgment of the court) (on file with the *New York University Law Review*).

320 On direct review, the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Mr. Holladay's conviction and sentence of death. See Holladay v. State, 549 So. 2d 122, 133 (Ala. Crim. App. 1988), aff'd sub nom. Ex parte Holladay, 549 So. 2d 135 (Ala. 1989). The Supreme Court denied certiorari. Holladay v. Alabama, 493 U.S. 1012 (1989). Mr. Holladay then filed a Petition for Relief from Conviction under Rule 20 of Alabama Rules of Criminal Procedure on September 10, 1990. Ala. R. Crim. P. 20. See Holladay v. State, 629 So. 2d 673, 676 (Ala. Crim. App. 1992) (providing procedural history), cert. denied, Ex parte Holladay, No. 1921232, 1993 Ala. LEXIS 1318 (Ala. 1993). The trial court denied this postconviction petition, and the Alabama Court of Criminal Appeals affirmed the denial of relief on December 30, 1992, after which the Alabama Supreme Court denied certiorari on October 15, 1993. 629 So. 2d at 673, 688. The Supreme Court likewise denied certiorari. Holladay v. Alabama, 510 U.S. 1171 (1994). Mr. Holladay thereafter filed a Petition for Writ of Habeas Corpus in the Northern District of Alabama, which was denied, see Holladay v. Jones, No. CV95-PT-2929-M (N.D. Ala. Oct. 21, 1998), cited in Holladay v. Haley, 209 F.3d 1243 (11th Cir. 2000) and the Eleventh Circuit affirmed the denial of relief on April 19, 2000. Holladay v. Haley, 209 F.3d 1243, 1256 (11th Cir. 2000).

321 Holladay v. Haley, 531 U.S. 1017 (2000).

322 Ex parte Holladay, No. 88-258 (Ala. S. Ct. May 17, 2001) (order fixing execution date) (on file with the *New York University Law Review*).

federal habeas corpus petition.[323] And, for reasons similar to those considered earlier with regard to *Lackey* claims,[324] the option of a successive federal habeas corpus petition essentially was foreclosed by AEDPA's reworking of the law. Notwithstanding the powerful indicia of the Court's inclination to revisit the *Penry* decision and announce an Eighth Amendment prohibition on execution of mentally retarded persons, the Court had not yet announced such a rule, let alone declared it to be retroactive to cases on collateral review. Accordingly, § 2244(b)(2)(A)'s "new law" gateway was unavailable. Section 2244(b)(2)(B)'s "new facts" gateway, although not foreclosed quite so definitively, was unlikely to be of use. Even if a federal district court judge were to construe the innocence provision broadly to encompass innocence of the death penalty[325] and apply it to a showing that Mr. Holladay's mental retardation should have exempted him from receiving a sentence of death, it seems highly improbable that a judge would find that any new facts now proffered as additional support for the claim "could not have been discovered previously through the exercise of due diligence."[326]

Mr. Holladay thus pursued successive postconviction relief in the state courts. He filed a petition for stay of execution and relief from unconstitutional punishment in the Alabama Supreme Court, arguing that the Supreme Court's grant of certiorari in *McCarver* furnished a compelling reason for the state court to reconsider its earlier ruling that Mr. Holladay's mental retardation did not preclude his execution.[327] On June 20, 2001, the Alabama Supreme Court denied the

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323 The claim was not included in the first federal habeas corpus petition. If it had been, the claim surely would have been denied on the basis of Penry v. Lynaugh, 492 U.S. 302 (1989). It is worth noting that a denial on the merits at that time would not have caused later litigation of the claim to run afoul of AEDPA's categorical prohibition of "same-claim successive petitions." See supra note 161 and accompanying text (explaining AEDPA's treatment of same-claim successive petitions). The Eighth Amendment claim on which the Court granted certiorari in *McCarver v. North Carolina*—that "national standards have evolved [since the Court's decision in *Penry*] such that executing [a] mentally retarded man would violate [the] Eighth Amendment," State v. McCarver, 548 S.E.2d 522 (N.C.), cert. granted sub nom. McCarver v. North Carolina, 532 U.S. 941(2001)—is, in essence, a different claim from the one the Court considered and rejected in *Penry*, namely whether a national consensus existed in 1989 for prohibiting the execution of mentally retarded persons. As this illustrates, new facts or new law can so alter the fundamental nature of a claim that AEDPA's bar against same-claim successive petitions is inapplicable.

324 See supra Part II.C.2.

325 See supra notes 184-89 and accompanying text.

326 28 U.S.C. § 2244(b)(2)(B)(i) (Supp. V 2000).

327 Petition for Stay of Execution and Relief from Unconstitutional Punishment, Holladay v. State, No. 88-258 (Ala. S. Ct. June 20, 2001) (order denying stay of execution) (on file with the *New York University Law Review*).

petition and the request for a stay of execution.[328] Mr. Holladay then sought a stay of execution from the Supreme Court of the United States, which the Court granted several hours before the scheduled execution.[329] The case is still pending before the Court.

Although Mr. Holladay managed to avert execution, at least for now, the option of successive state postconviction review and a subsequent petition for certiorari is hardly an adequate substitute for federal habeas corpus review. For one thing, some states do not permit successive state postconviction review[330] or severely limit its availability.[331] Moreover, even in those states in which the remedy is available, it usually will not suffice as a guarantor against constitutional violations. This is the inescapable lesson of the statistical data showing that federal habeas corpus review results in reversals of the conviction or sentence in forty percent of the cases that passed through the state courts without relief.[332] Given the very small number of cases in which the Supreme Court grants certiorari,[333] the Court cannot serve as the judicial backstop for all of the cases in which the state courts turned a blind eye to constitutional violations.

The scenario considered here is certain to arise again with regard to other claims that could change the fate of death row prisoners who have already initiated or completed state and federal collateral proceedings. For example, the very same factors that led the Court to grant certiorari in *McCarver*—the emergence of a new national consensus as exemplified by legislative actions—could result in the Court's revisiting its previous ruling that the Eighth Amendment permits the execution of minors who are sixteen or seventeen years of age at the time of the crime.[334] There is reason to anticipate that the

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328 Holladay v. State, No. 88-258 (Ala. S. Ct. June 20, 2001) (order denying stay of execution) (on file with the *New York University Law Review*).

329 See Holladay v. Alabama, 533 U.S. 925 (2001) (mem.).

330 See Donald E. Wilkes, Jr., State Postconviction Remedies and Relief § 3-2, at 194 (2001) (surveying all state postconviction statutes and explaining that some states, including Arkansas, Maryland, and Missouri, "limit to one the total number of applications for relief that a convicted person may file").

331 See id. § 3-2, at 191-95 (discussing large number of states with stringent statutes of limitations for postconviction petitions).

332 See supra note 89 (describing findings of federal habeas corpus study).

333 See, e.g., Stern et al., supra note 267, § 1.16, at 36 (noting that Court "hears oral argument and resolves the merits in only a very small proportion of the cases submitted to it").

334 In Thompson v. Oklahoma, 487 U.S. 815, 838 (1988), a plurality (consisting of Justices Brennan, Marshall, Stevens, and Blackmun), joined by Justice O'Connor in a concurring opinion, concluded that criminal defendants who were under the age of sixteen at the time of the crime cannot be executed pursuant to a statute that sets no minimum age for eligibility for the death penalty. Thereafter, a different plurality (consisting of Chief Justice Rehnquist and Justices White, Scalia, and Kennedy), again joined by Justice

Court in the coming years will wrestle with difficult questions of international law in the capital punishment context, which could result in new bases for contesting a capital conviction or sentence, or barring an execution.[335] Indeed, the Supreme Court's grant of certiorari on any capital punishment issue could create a situation in which there are indicia that an impending execution is unconstitutional (because of the invalidity of the conviction or sentence or of the execution itself), but § 2244(b)(2)(A) likely will prevent some prisoners who have completed or nearly completed the review process from gaining access to federal habeas corpus review before his or her execution.[336]

O'Connor in a concurring opinion, concluded that there was no current national consensus that individuals who were sixteen or seventeen years old at the time of the crime should be constitutionally exempt from the death penalty. Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

In 1999, in a case in which the certiorari petition argued that international law and treaties bar the execution of a defendant who was sixteen at the time of the crime, the Court took the issue seriously enough to request a brief from the Solicitor General on "the views of the United States" on international law questions presented by the case. See Domingues v. Nevada, 526 U.S. 1156, 1156 (1999). Nonetheless, the Supreme Court thereafter denied certiorari. See Domingues v. Nevada, 528 U.S. 963 (1999). For a discussion of developments in American law since *Stanford* and of international law and covenants on executions of minors, see Victor L. Streib, Emerging Issues in Juvenile Death Penalty Law, 26 Ohio N.U. L. Rev. 725 (2000); see also Victor L. Streib, Death Penalty for Juveniles (1987); Victor L. Streib, American Death Penalty for Juveniles: An International Embarrassment, 5 Georgetown J. on Fighting Poverty 219 (1998).

335 See Fed. Republic of Germany v. United States, 526 U.S. 111, 112 (1999) (per curiam) (declining to consider Federal Republic of Germany's application for temporary restraining order or injunction against execution of German citizen as violative of Vienna Convention); id. at 114 (Breyer, J., dissenting) (stating that issues in case warrant "fuller briefing"); see also Breard v. Greene, 523 U.S. 371 (1998) (per curiam) (relying on procedural default and nonretroactivity doctrines to avoid reaching merits of challenge to capital conviction based on claimed violation of Vienna Convention); id. at 380 (Breyer, J., dissenting) ("In my view, several of the issues raised here are of sufficient difficulty to warrant less speedy consideration."); see also generally Kenneth C. Randall, Federal Courts and the International Human Rights Paradigm 149-62, 211-12 (1990) (analyzing increasing recognition of American federal judiciary as international authority on adjudicating human rights and terrorism cases); John Quigley, Execution of Foreign Nationals in the United States: Pressure from Foreign Governments Against the Death Penalty, 4 ILSA J. Int'l & Comp. L. 589 (1998) (describing international pressure against use of capital punishment in United States).

336 For example, on January 11, 2002, the Court granted certiorari in Ring v. Arizona, 122 S. Ct. 865 (2002). The question in *Ring* revisits an issue previously decided by the Court in 1990: In Walton v. Arizona, 497 U.S. 639, 647-49 (1990), the Court held that a capital-sentencing statute that gave the judge sole discretion to make fact findings necessary to impose a sentence of death did not violate a capital defendant's right to a jury trial in violation of the Sixth Amendment. In 2000, the Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that "remov[ing] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the Sixth Amendment right to a jury trial. Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)). Although the Arizona Supreme Court affirmed Ring's capital murder conviction and death sentence, it concluded that *Apprendi* has over-

D. *Is This What Congress Intended?*

A review of the congressional debates over AEDPA strongly suggests that Congress did not intend to foreclose successive federal habeas corpus review in the ways just demonstrated. Rather, members of Congress who voted for the legislation seemingly had a quite different conception of the successive petition mechanism they were adopting.

As the earlier quotations from the congressional debates indicate, a dominant metaphor in the debates over the initial Powell Commission bills and AEDPA was that of "successive bites at the apple."[337] When Chief Justice Rehnquist spoke publicly about the Powell Commission proposals, he invoked that metaphor, saying:

> Reasonable people have questioned whether a criminal defendant ought to have as broad a "second bite at the apple" in the Federal courts as he presently does, but that is a question of policy for Congress to decide.[338]

A "Statement of Administration Policy" from the Clinton White House on the proposed legislation used the same metaphor, saying that "offenders [should] have only 'one bite at the apple.'"[339] Senator Hatch argued in favor of restrictions on successive petitions by saying that federal habeas corpus petitioners must be prevented from the abusive practice of taking "a 10th bite of the apple, even a 20th bite of

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ruled *Walton*, which is the question now before the United States Supreme Court. State v. Ring, 25 P.3d 1139, 1150-52, 1156 (Ariz. 2001). The Court's decision in *Ring* has the potential to invalidate death sentences in as many as nine states that rely on some form of judge sentencing. Any death-sentenced prisoner facing an imminent execution in Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska will have a legitimate basis for arguing that the execution should be stayed. However, until the Court announces what may be a new rule in *Ring*, it is unclear that successive federal habeas petitions will be available to inmates with execution dates in early 2002. In the meantime, the Court has granted several stays of execution pending its decision in *Ring* where state courts have provided merits review on state successive petitions. See Brown v. Alabama, 122 S. Ct. 1462, No. 01-9454 (01A745), 2002 WL 507327 (U.S. Apr. 4, 2002) (mem.) (granting stay of execution pending disposition of petition for writ of certiorari after state court successive petition for postconviction relief was denied by Alabama Supreme Court); Bottoson v. Florida, 122 S. Ct. 981 (2002) (mem.) (granting stay of execution pending disposition of petition for writ of certiorari after state court successive petition for postconviction relief was denied by Florida Supreme Court on merits); King v. Florida, 122 S. Ct. 932 (2002) (mem.) (same).

337 See supra note 132 and accompanying text.

338 Excerpts from Rehnquist Speech Urging Curb on Death Penalty Appeals, supra note 116, at A18; see also Coleman v. Balkcom, 451 U.S. 949, 957-58 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that giving capital prisoners "so many bites at the apple," has resulted in "mockery of our criminal justice system").

339 142 Cong. Rec. 7769 (1996) (statement of Sen. Moynihan) (placing excerpt from "Statement of Administration Policy" into Congressional Record).

the apple."[340] Other proponents of the restrictions similarly invoked that metaphor,[341] as did even those members of Congress who were troubled by aspects of the bill and sought to ameliorate some of its provisions.[342]

What emerges from a review of the debates over the successive petition restrictions is a clear sense that members of Congress viewed the successive petition rules as a mechanism that would allow prisoners to have one full, fair chance to present their meritorious constitutional claims to the federal courts while simultaneously preventing manipulation of the system through relitigation of previously presented claims or strategic withholding of claims for later presentation. The statutory provisions that Congress adopted reflect this set of goals. The provisions generally track the basic contours of pre-AEDPA practice by authorizing the filing of a successive petition to raise a claim that was unavailable at the time of the earlier petition because the legal or factual basis did not exist or was not reasonably knowable at that time. These provisions easily can be equated with the metaphor of "one bite at the apple." If a claim cannot be raised at the time of the first petition because of legal or factual unavailability, the concept of "one bite" requires that the prisoner be permitted to raise that claim once it becomes available.

Thus, both the language of the provisions and the underlying legislative history strongly suggest that Congress intended to ensure that petitioners would have at least one full, fair opportunity to raise each meritorious claim at each of the levels of federal court habeas corpus review. But, as this Article demonstrates, AEDPA's successive petition rules can operate to foreclose federal habeas corpus review of claims that could not have been litigated at the time of the first habeas corpus petition. It seems likely that, in the rush to create a statute

340 137 Cong. Rec. 16,538 (1991) (statement of Sen. Hatch).

341 See, e.g., 141 Cong. Rec. 15,095 (1995) (statement of Sen. Dole) ("By imposing filing deadlines on all death row inmates, and by limiting condemned killers convicted in State or Federal court to one Federal habeas petition—one bite of the apple—these landmark reforms will go a long, long way to streamline the lengthy appeals process . . . ."); 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein) ("[T]his bill provides habeas petitioners with one bite of the apple. It assures that no one convicted of a capital crime will be barred from seeking habeas relief in Federal court. In my view, it appropriately limits second and subsequent habeas appeals to narrow and appropriate circumstances.").

342 142 Cong. Rec. 7784 (1996) (statement of Sen. Kennedy) ("The proposal to limit inmates to one bite at the apple is sound in principle."); 141 Cong. Rec. 15,056 (1995) (statement of Sen. Cohen) ("Mr. President, I think it is important that those accused of serious capital crimes have one complete bite at the apple. I believe the Biden amendment will make sure that one bite is complete and not incomplete."); id. at 15,048 (1995) (statement of Sen. Biden) ("The vast majority of us . . . want to and have been trying for years to change the old system to limit the time in which a petition can be filed and to limit the number of petitions that can be filed. So essentially you get one bite out of the apple.").

before the one-year anniversary of the Oklahoma City bombing, not even the drafters of the provisions—let alone the other members of Congress who voted for the legislation—understood that the rules would function in this manner.

Moreover, those who voted for the legislation surely did not anticipate or intend the severe ripple effects that the preclusive successive petition rules have had on the rest of the state and federal systems of postconviction review of criminal convictions and sentences. AEDPA's removal of a successive federal habeas corpus remedy in certain situations has required that prisoners in these cases resort to alternative mechanisms to seek federal court relief. Thus, as in the case of Robert Lee Tarver, prisoners are invoking the original habeas corpus remedy; and, as in the case of Glenn Holladay, prisoners are filing successive state postconviction petitions in order to seek certiorari review of the state courts' rulings in the Supreme Court. As a result, what was previously a nine-stage process of judicial review of criminal convictions and sentences[343] has now been expanded by another round of state postconviction review (with a petition of certiorari from the ruling of the state courts) and a round of original habeas corpus. Whatever Congress may or may not have intended in enacting AEDPA, it is quite clear that Congress did not intend to expand and complicate the preexisting system of postconviction review.[344]

III

POTENTIAL REMEDIES FOR THE DYSFUNCTIONAL ASPECTS OF AEDPA'S SUCCESSIVE PETITION PROVISIONS

A number of means exist to remedy the unintended consequences of AEDPA's successive petition provisions. Part III.A proposes two possibilities for revising AEDPA itself–legislative reform and judicial interpretation of the existing statute. Part III.B suggests three mechanisms for increasing judicial review of claims typically raised in successive petitions–use of the Supreme Court's original habeas jurisdiction, increased Supreme Court review of state postcon-

343 See supra note 85 and accompanying text.

344 See Williams v. Taylor, 529 U.S. 420, 436 (2000) (recognizing "AEDPA's purpose to further the principles of comity, *finality*, and federalism" (emphasis added)); see also H.R. Conf. Rep. No. 104-518, at 111 (1996) (stating that Act is designed "to address the acute problems of *unnecessary delay* and abuse in capital cases" (emphasis added)). It is readily apparent that a system that forces capital prisoners to pursue additional, extraordinary remedies because of the removal of long-standing access to successive federal habeas corpus review promotes neither the interest of "finality" nor the avoidance of "unnecessary delay."

viction proceedings, and creative use of motions under Rule 60(b) of the Federal Rules of Civil Procedure.

A. *Revising AEDPA*

1. *Legislative Reform*

The most direct way to cure the problems with AEDPA's successive petition provisions would be to seek a congressional amendment of the statute. If a majority in Congress were willing to ameliorate the detrimental and dysfunctional aspects of the statute (and securing such a Congressional majority is, of course, the big hitch), it would be a simple enough matter to devise statutory amendments to remedy the existing problems. The term "successive" could be statutorily defined to both: codify the Supreme Court's ruling in *Stewart v. Martinez-Villareal*[345] that a habeas corpus application is not "successive" if the prior application was dismissed on procedural grounds and did not produce an adjudication on the merits;[346] and exempt the situations described in this Article from the scope of the successive petition rules. Under such an amendment, a filing of a claim would be deemed nonsuccessive, notwithstanding the adjudication of a prior petition on the merits, if the claim was unreviewable at the time of the earlier petition either because it was not ripe at that point or because then-controlling Supreme Court precedent rejected that very claim. In addition, the statutory definition of "innocence" could be broadened to clarify that it encompasses sentencing-related claims that bear on a petitioner's "innocence of the death penalty."[347] The definition could be extended to claims that render an execution inherently inhumane and unconstitutional. Thinking even more broadly, the "innocence" provision could be disaggregated from § 2244(b)(2)(B)'s "new facts" gateway, so that innocence (ideally, defined broadly) would function as a freestanding gateway, just as it did under the pre-AEDPA standard for successive petitions.[348]

As Congress's behavior in the wake of the Oklahoma City bombing and on numerous other occasions illustrates, most legislators see their political interests furthered by a "law and order" stance. Accordingly, some probably would oppose the contemplated amendments as a way of enhancing their "crime-control" credentials while more reasonable politicians might fear that even voting in favor of the

345 523 U.S. 637 (1998).

346 See supra notes 227-29 and accompanying text.

347 See supra notes 184-89 and accompanying text.

348 See supra notes 175-83 and accompanying text.

amendments could create fodder for attacks by future rivals.[349] It is hardly coincidental that expansions of the rights of criminal defendants and prisoners in the past century have tended to come from the courts, not from Congress and the state legislatures.

As discussed earlier,[350] there has been a significant shift in attitudes about capital punishment, as even those unswayed by moral or religious scruples about the death penalty have been forced to acknowledge the imperfections of the system as it is currently administered. The effects of this new public consciousness are evident in the apparent support among members of Congress for an "Innocence Protection Act" to improve capital-defense representation and guarantee defense access to DNA evidence.[351] Reformers might be able to initiate a carefully targeted lobbying approach that emphasizes a legislative repair of the successive petition provisions to ensure that federal courts have a meaningful opportunity to police the uses of the death penalty and thereby prevent wrongful executions. That message could be coupled with an argument that AEDPA has produced an irrational and dysfunctional system that badly needs repair in order to function effectively.[352] However, it is uncertain whether concerns about inno-

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[349] For a few (of the many possible) examples of political candidates who attacked incumbents by accusing them (often without any basis) of being "soft on crime," see The Real War on Crime, supra note 102, at 79-81.

[350] See supra notes 146-53 and accompanying text.

[351] For a discussion of the proposed Innocence Protection Act, S. 486, 107th Cong. (2001), and H.R. 912, 107th Cong. (2001), and the considerable bipartisan support that the legislation has engendered among members of Congress, see Section on Individual Rights and Responsibilities, Am. Bar Ass'n, Toward Greater Awareness: The American Bar Association Call for a Moratorium on Executions Gains Ground 12-13 (2001), available at http://www.abanet.org/irr/finalreport.doc.

[352] A lobbying campaign of this sort, whether pursued at the present time or in the future, should build on the lessons one can glean from congressional debates of the bills that culminated in the AEDPA. As earlier sections of this Article have suggested, AEDPA's proponents skillfully used myth, see supra notes 131-33 and accompanying text, prototypical scenarios, see supra notes 131-32 and accompanying text, and metaphor, see supra note 132 and accompanying text. As cognitive psychology and narrative theory teach, devices such as these are highly effective at driving home a message at the cognitive level and thereby shaping the listener's perceptions. For a discussion of narrative theory, see Amsterdam & Bruner, supra note 137, at 40-43, 111, 189-92, 317 n.68. At the very least, proponents of AEDPA reform need to be prepared to defend against the use of such tactics. It would be better still if the reformers would take advantage of the same tool chest of rhetorical devices to convey counternarratives about the actual workings of the current habeas corpus process and the need for revamping the system. Cases such as those described earlier in this Article can be used to refute the myths of systemic abuse by prisoners and their lawyers and to demonstrate that the proffered scenarios of abuse omit key facts that shed a strikingly different light on the events. *Martinez-Villareal*, where the failures to raise the claims at an early stage were directly attributable to incompetent lawyering, is a good example. See supra notes 209-12 and accompanying text. Such stories would further show that systemic reform is needed to guarantee that habeas corpus petitioners have at least one "bite at the apple" when it comes to certain types of claims.

cence are sufficient to prompt review of more complex issues like AEDPA's successive petition provisions.

The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001[353] also have created obstacles to modifying the 1996 Anti-Terrorism Bill.[354] These developments suggest that the timing could not be worse for a legislative campaign to undo some of the flawed measures adopted as part of AEDPA. The same members of Congress who exploited the Oklahoma City tragedy[355] are likely to invoke the recent incidents of domestic terrorism as reasons for maintaining—or even expanding—the measures of the "Antiterrorism Act" of 1996. Accordingly, it appears that, at least for the immediate future, the courts offer the best hope for AEDPA reform.

2. *Judicial Construction of AEDPA's Successive Petition Rules*

Upon first consideration, it would seem that the current Supreme Court, dominated by a conservative majority that has historically favored the contraction of the federal habeas corpus remedy, is also an unlikely source of aid to those who would seek to reform the current problems in AEDPA's successive petition rules. However, the Court has shown a willingness to construe some AEDPA provisions narrowly so as to preserve the vitality of the writ.[356] In *Stewart v. Martinez-Villareal*,[357] a majority of the Court departed from a literal reading of the language of the successive petition provisions, over the strenuous objections of Justices Scalia and Thomas, in order to construe the law in a manner that would guard against the "far reaching and seemingly perverse"[358] consequence of "bar[ring] the prisoner from ever obtaining federal habeas review" of a claim.[359] In a subsequent decision that applied and extended *Martinez-Villareal*, the Court—again over the vehement objections of Justice Scalia—construed AEDPA in accordance with "earlier habeas corpus principles" so as to preserve the "vital role" that the "writ of habeas corpus

353 For a detailed account of the destruction of the World Trade Center and the attack on the Pentagon on September 11, 2001, see U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror, N.Y. Times, Sept. 12, 2001, at A1.

354 See Robin Toner, Some Foresee A Sea Change in Attitudes on Freedoms, N.Y. Times, Sept. 15, 2001, at A16 (reporting that lawmakers "[a]cross the political spectrum . . . are arguing that the United States has entered a new and more dangerous era that demands heightened security measures, including . . . greater surveillance powers for federal agents").

355 See supra notes 2-16 and accompanying text.

356 See supra note 16 and accompanying text.

357 523 U.S. 637 (1998).

358 Id. at 644.

359 Id. at 645. For discussion of this aspect of the majority decision and the dissenting opinions of Justices Scalia and Thomas, see supra notes 223-30 and accompanying text.

plays . . . in protecting constitutional rights."[360] And in a case involving a different provision of AEDPA, a majority of the Court construed the provision to preserve Supreme Court review of a lower court's denial of a certificate of appealability (the prerequisite for a petitioner's securing appellate review of a denial of habeas corpus relief),[361] even though, as Justice Scalia pointed out, a strict construction of the "plain language" of the provision would have led to the opposite result.[362] Although there has not always been a majority willing to travel this path,[363] the Court's track record in construing AEDPA provides some reason to believe that a majority of the Court is amenable to the use of its powers of statutory interpretation to cure some of the systemic problems caused by the law.

As already seen, the Court in *Martinez-Villareal* explicitly reserved the question of whether the successive petition rules should apply to the successive filing of an execution-related claim that was not ripe at the time of the earlier, adjudicated petition.[364] The same rationale that produced the *Martinez-Villareal* holding—the need to guard against AEDPA's creation of "far reaching and seemingly perverse" consequences[365]—should lead the Court to exempt previously unripe claims from the scope of the successive petition rules. The "perverse" consequence at issue in *Martinez-Villareal* was "bar[ring] the prisoner from ever obtaining federal habeas review" of a claim.[366] In the ripeness context considered in this Article, a prisoner admittedly can preserve access to federal habeas corpus review for an execution-related claim, but only by needlessly raising the claim at the

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360 Slack v. McDaniel, 529 U.S. 473, 483 (2000). The *Slack* decision applied the Court's earlier *Martinez-Villareal* ruling to a pre-AEDPA fact pattern and then extended that ruling, with regard to both AEDPA and pre-AEDPA cases, by holding that a federal petition can include claims not included in an earlier petition that was dismissed because of the continuing availability of state remedies. Id. at 487-88. Justice Scalia responded by saying, "I believe that the Court produces here, as it produced in a different respect in *Stewart v. Martinez-Villareal*, a distortion of the natural meaning of the term 'second or successive.'" Id. at 490-91 (Scalia, J., dissenting).

361 See Hohn v. United States, 524 U.S. 236, 249-50, 253 (1998).

362 Id. at 254 (Scalia, J., dissenting).

363 For example, in Duncan v. Walker, 533 U.S. 167, 192-93 (2001), Justice Breyer, in dissent, criticized the majority's restrictive interpretation of AEDPA's statute of limitations and pointed out that the majority's approach is inconsistent with *Martinez-Villareal* and *Slack v. McDaniel*, where "we have assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly."

364 See *Martinez-Villareal*, 523 U.S. at 645 n.* (reserving question of whether *Ford* claim of incompetency to be executed, raised for first time in successive petition, "would be a 'second or successive habeas corpus application' within the meaning of AEDPA").

365 Id. at 644.

366 Id. at 645.

time of the first petition even though the claim is not ripe and must be dismissed on grounds of prematurity.[367] Surely, it is the height of perversity to require a prisoner to present a claim needlessly, at substantial cost to the prisoner and the courts, for the express purpose of seeking a ruling from the court that the claim is being presented at the wrong time.[368]

The interpretive remedy for the current problem is not quite as simple and straightforward as the one adopted by the Court in *Martinez-Villareal*. Mr. Martinez-Villareal's presentation of the unripe claim in his earlier petition allowed the Court to declare that the subsequent refiling of the claim after it became ripe was still part of the earlier petition.[369] To remedy AEDPA's dysfunctional effects on unripe claims that were *not* presented in an earlier petition, the Court will have to proceed down the path traveled by the Ninth Circuit in its decision in *Martinez-Villareal*[370]—the analysis the Court avoided by affirming the Ninth Circuit on a narrower ground of decision. That is, the Court will need to construe the successive petition provision as exempting claims that were not reviewable at the time of the earlier petition because they were not yet ripe.[371] Such a construction comports with legislative intent, as the legislative history shows that Congress intended petitioners to have at least one full, fair bite at the apple with regard to successive federal habeas corpus review of consti-

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367 See supra notes 227-29 and accompanying text.

368 Admittedly, the Supreme Court on occasion has been willing to tolerate—and even has insisted upon—procedural complexity and needless jumping through hoops in the federal habeas corpus context. A notable example of this trend is the Supreme Court's decision in O'Sullivan v. Boerckel, 526 U.S. 838 (1999), in which the Court held (contrary to what had been the prevailing view in the circuits) that exhaustion of state remedies requires pursuit of discretionary state appeals, see id. at 845, 848, even though, as Justice Breyer stated in dissent, this rule needlessly "add[s] to the burdens of already overburdened state courts and delay[s] further a criminal process that is often criticized for too much delay." Id. at 863 (Breyer, J., dissenting). But *O'Sullivan* and cases like it typically are grounded on a rule of federal-state "comity" that calls for federal respect for state processes. See id. at 844-45. As the Court itself has recognized, this concern does not apply to the successive petitions context, where the doctrines are designed to further the federal courts' own interest in avoiding relitigation. See McCleskey v. Zant, 499 U.S. 467, 493 (1991) ("[S]uch respect is not implicated when a petitioner defaults a claim by failing to raise it in the first round of federal habeas review.").

369 See supra notes 227-29 and accompanying text.

370 For discussion of the Ninth Circuit's approach, see supra note 204 and accompanying text.

371 As explained earlier, the Ninth Circuit's ruling in *Martinez-Villareal* was framed in terms of the incompetency-to-be-executed claim, as that was the claim before the court in that case. But, as shown in earlier sections of this Article, the same analysis necessarily applies to other claims that are not ripe at the time of the first petition. See supra notes 227-29 and accompanying text.

tutional claims.[372] Additionally, or alternatively, the Court could reach this result through the same analytic device the Ninth Circuit employed. In accordance with the rule of construction calling for interpretation of statutes in a manner that avoids potential constitutional problems, the Court could construe AEDPA's successive petition rule to exempt previously unripe claims so that the statute does not have the operative effect of "suspending the writ" with regard to these claims.[373] Indeed, a majority of the Court recently employed a similar approach to construe provisions of AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996[374] in a manner that preserved the availability of federal habeas corpus review of orders of deportation,[375] so as to avert a potential violation of the Suspension Clause.[376]

An interpretive remedy for the defects in the "new law" provision, exemplified by the *Holladay* case,[377] presents an even knottier puzzle. Given that the statute's very purpose is to funnel "new law" cases into a narrow successive petition gateway, it hardly seems reasonable to construe the statute in a manner that exempts cases on the ground that the Supreme Court's indication of a change of direction is about to create "new law." On the other hand, Congress's very creation of a "new law" gateway unquestionably demonstrates that Congress did not foresee—and, had it foreseen, ostensibly would have

372 See supra Part II.D.

373 See supra notes 227-29 and accompanying text. Of course, as we have already seen, a petitioner can preserve the unripe claim for review by raising it at the earlier time and angling for a ruling of prematurity. In this sense, it could be said that the petitioner is not wholly foreclosed from review and that the statute accordingly does not run afoul of the Suspension Clause. But, for the reasons discussed earlier, such a procedural contortion should not be deemed a real remedy entitled to any weight in a Suspension Clause analysis of the availability of federal habeas corpus review.

374 Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.).

375 The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 replaces the customary term "deportation" with the term "removal." Calcano-Martinez v. INS, 533 U.S. 348, 350 n.1 (2001).

376 INS v. St. Cyr, 533 U.S. 289, 299-300 (2001), construed AEDPA and IIRIRA to preserve habeas corpus jurisdiction under 28 U.S.C. § 2241 because "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions" under the Suspension Clause. Where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." Id. (quoting Crowell v. Benson, 285 U.S 22, 62 (1932)). For discussion of AEDPA and IIRIRA's severe impact on immigration policy and the plight of imprisoned detainees, see Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 Harv. L. Rev. 1936 (2000); Gerald Neuman, The Assault on Habeas Corpus in Immigration Law, A.B.A. Sec. Individual Rts. & Responsibilities, Winter 2001, at 17.

377 See supra Part II.C.3.

guarded against—the possibility that a capital prisoner with an impending "new law" claim would be executed merely because the petitioner's execution date arrives before the Supreme Court has had the opportunity to announce the new rule and apply it retroactively to cases like the prisoner's.

The key, then, to effectuating the actual legislative intent of vouchsafing the successive presentation of "new law" claims is to permit prisoners in a narrowly drawn category of cases to gain access to federal court so as to forestall their executions until the Supreme Court has had a chance to rule on the new claim in the pending case. One means for doing so would be the one proposed for unripe claims—to exempt the situation from the successive petition rules and thereby permit the filing of the claim as a "first" application. A more doctrinally satisfying answer might be for the Court to use its interpolative powers to create a mechanism that directly addresses the specific plight of those who face execution on the verge of the announcement of a rule that would prohibit their execution. A mechanism of this sort existed prior to AEDPA—the "miscarriage of justice" rule—which permitted recourse to a successive federal habeas corpus petition when "a fundamental miscarriage of justice would result from a failure to entertain the claim."[378] In its broadest formulation, this rule permitted access to successive federal habeas corpus review whenever a prisoner's life was at stake;[379] under the narrower interpretation adopted by the Rehnquist Supreme Court, the "miscarriage" rule was limited to cases of "actual innocence" of the crime or "innocence of the death penalty."[380] Even under the narrower framing, a prisoner in a case like Mr. Holladay's would qualify because the claim at issue, an Eighth Amendment claim that mental retardation renders an individual categorically ineligible for the death penalty, surely comes within the definition of "innocence of the death penalty."[381]

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[378] McCleskey v. Zant, 499 U.S. 467, 495 (1991); accord Schlup v. Delo, 513 U.S. 298, 320-21 (1995) (explaining miscarriage-of-justice exception).

[379] See Hertz & Liebman, supra note 46, § 28.4f, at 1344 n.92 and accompanying text (citing pre-AEDPA, pre-*McCleskey* lower federal court case law).

[380] See supra notes 122-23 and accompanying text (explaining doctrinal sleight of hand by which *McCleskey* majority transformed plurality view of "ends of justice" principle into holding).

[381] In *Penry v. Lynaugh*, the Court noted that if it "held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry, . . . such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." 492 U.S. 302, 330 (1989). That is, such a decision would be "a new rule placing a certain class of individuals beyond the State's power to punish by death." Id.

The remedy proposed here necessarily triggers a follow-up question: Would the creation of such a mechanism, unmoored in the language of the statute, be faithful to the Court's role in construing and applying the legislation that Congress drafted? It could be said that the Court already has answered this question implicitly in the affirmative by creating this very same mechanism under the preexisting statute, which also offered no linguistic foundation for the Court's action.[382] In doing so, the Court followed a long-standing tradition of treating the habeas corpus remedy as governed less by statutory developments than by "a complex and evolving body of equitable principles informed and controlled by historical usage . . . and judicial decisions."[383] The Court's ruling in *Martinez-Villareal*, construing AEDPA in a manner apparently at odds with the statutory language so as to avert a "perverse" result,[384] can be viewed as part of this same tradition. The lower courts, apparently taking their cue from the Supreme Court's treatment of AEDPA, have indicated their willingness to consider the creation of a "miscarriage of justice" exception to its statute of limitations even though the statutory language contains no provision to such effect.[385] Thus, the proposal advanced here is con-

382 In *McCleskey*, 499 U.S. at 495, the Court explained that the "miscarriage of justice" standard is based on the "ends of justice" language, which existed in the 1948 habeas corpus statute but was eliminated by Congress in its 1966 revision of the statute.

383 Id. at 489; accord *Schlup*, 513 U.S. at 319 n.35 ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence."); Jones v. Cunningham, 371 U.S. 236, 243 (1963) ("[Habeas] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.").

384 See supra notes 223-29 and accompanying text.

385 A growing number of district courts apply a "miscarriage of justice" exception to the statute of limitations. See, e.g., Nickerson v. Roe, No. C98-04909, 2000 WL 33381022, at *2 (N.D. Cal. Dec. 11, 2000) (concluding that "case presents extraordinary circumstances warranting petitioner's release" including allegations of "suppression and destruction of evidence and perjury by the state's investigators"); United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099-1102 (C.D. Cal. 1998) (holding that miscarriage-of-justice gateway provides avenue of review for constitutional claims otherwise time-barred by AEDPA), aff'd, 209 F.3d 1095 (9th Cir. 2000); Alexander v. Keane, 991 F. Supp. 329, 334-39 (S.D.N.Y. 1998) (discussing possible "actual innocence" exception but finding it inapplicable to present case). Although no circuit court has yet done so, some appellate courts have indicated that they are inclined to give serious consideration to an actual innocence exception to the statute of limitations. See, e.g., Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1218-19 (11th Cir. 2000) (suggesting willingness to consider "actual innocence" exception where petitioner has made satisfactory initial showing); Lucidore v. N.Y. State Div. of Parole, 209 F.3d 107, 114 (2d Cir.) (declining, on merits of case, to decide whether Suspension Clause requires actual innocence exception), cert. denied, 531 U.S. 873 (2000); Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. 2000) (per curiam) (declining to decide "whether proof of factual innocence would toll the limitations period" given petitioner's inability to show factual innocence).

sistent with the jurisprudential principles followed by the Supreme Court and the lower federal courts in construing the habeas corpus statutes.

Of course, the existence of jurisprudential and policy rationales for adopting such statutory constructions does not guarantee that the Court will choose to adopt any of these solutions. Accordingly, prudence dictates a consideration of alternative remedies for the problems identified.

B. Improvement of Alternative Mechanisms for Obtaining Federal Review

1. Original Habeas Corpus Proceedings

It was once recognized that original habeas corpus review is "not only within the authority of the Supreme Court, but it is its duty" when jurisdiction to adjudicate an imprisoned person's constitutional claim is otherwise unavailable.[386] The Supreme Court, however, rarely has exercised its original habeas corpus jurisdiction in modern times.[387] In fact, it has been over seventy-five years since a petitioner has been successful in obtaining release on a habeas petition filed directly with the Court.[388] Until AEDPA's enactment, there was little need for the Court to make active use of its original habeas corpus jurisdiction because the traditional habeas corpus process generally afforded adequate opportunities for federal review.

AEDPA has radically changed this situation. The statute's curtailment of successive federal habeas corpus remedies necessitates that some condemned prisoners now seek federal review in the Supreme Court by means of original habeas corpus petitions.[389] As a result, it is apparent that the Court needs to clarify procedures for original habeas corpus review. In particular, the Supreme Court should clarify the circumstances in which it will grant original habeas review and the mechanisms it can use to engage in fact-finding.

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386 Ex parte Yarbrough, 110 U.S. 651, 653 (1884); accord Ex parte Grossman, 267 U.S. 87, 122 (1925) (granting original writ of habeas to petitioner whose presidential pardon was challenged by federal district court).

387 See supra note 270 and accompanying text.

388 See Ex parte Grossman, 267 U.S. at 122 (granting original habeas corpus relief to petitioner); Ex parte Hudgings, 249 U.S. 378, 379, 385 (1919) (same); In re Heff, 197 U.S. 488, 490, 509 (1905) (same).

389 See supra notes 267-74 and accompanying text (discussing Robert Lee Tarver's petition for original habeas corpus).

a. Broadening the Grounds on Which Review Should be Granted

It has been apparent for some time that AEDPA's enactment and its ripple effects on the Supreme Court's original habeas corpus docket require at least some retooling of the standards for granting an original habeas corpus petition.[390] When the Court held in 1996 that the availability of such review avoided any Suspension Clause problems in AEDPA's removal of Supreme Court jurisdiction to review circuit court rulings denying leave to file successive petitions,[391] Justices Stevens, Souter, and Breyer expressed their understanding that the Court still could review gatekeeping rulings through interlocutory appeals.[392] Although interlocutory appeal may well be efficient, it is simply beyond the petitioner's authority to effectuate such review without the consent of the court of appeals.[393] Accordingly, some additional procedural mechanism is needed to enable prisoners to seek the Court's intervention to correct gatekeeping jurisprudence, as, for example, when intercircuit conflicts emerge in the circuits' exercise of their gatekeeping functions. Original habeas corpus review would provide the requisite mechanism, but only if the Court broadens the parameters of such review.

The earlier discussions of the cases of Robert Lee Tarver[394] and Glenn Holladay[395] suggest that another way in which the standards should be broadened is specifically to authorize original habeas corpus review when a case already pending before the Court retroactively alters the constitutionality of an imminent execution in another case. In the exercise of its certiorari jurisdiction, the Court's grant of review on a particular issue commonly results in the Court's "holding" certiorari petitions of similarly situated prisoners pending the resolution of the first case.[396] An amendment of the standards for original habeas

390 For a description of those standards, see supra note 270 and accompanying text.

391 Felker v. Turpin, 518 U.S. 651, 660-65 (1996). For an explanation of the "gatekeeping" role of circuit courts under AEDPA's successive petition procedures, see supra notes 165-69 and accompanying text.

392 See *Felker*, 518 U.S. at 666 (Stevens, J., concurring) ("[B]y entering an appropriate interlocutory order, a court of appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application.").

393 See Sup. Ct. R. 19 ("A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case.").

394 See supra Part II.B.2.

395 See supra Part II.C.3.

396 See Stern et al., supra note 267, § 5.9, at 243-44 (stating that occasionally "a petition for certiorari may be held, without the Court taking any action, until . . . a decision is reached by the Court in a pending case raising identical or similar issues").

corpus to affirm the propriety of a similar "hold" for these cases would avert the miscarriage of justice that would occur if a prisoner is executed simply because no state court will stay the execution on the basis of an impending new rule and the federal courts have been stripped of their power to do so by AEDPA.

b. Mechanisms for Supreme Court Fact-Finding

When original habeas corpus issues come to the Court in essentially the same posture as a petition for a writ of certiorari—with an adequate factual record and no need for additional fact-finding—the Court is well-situated to resolve an important legal question.[397] However, in a case such as Mr. Tarver's,[398] where there has not been adequate factual development in the lower courts, a factual inquiry must take place. The Court is not well-positioned to receive unreviewed facts, conduct evidentiary hearings, or otherwise manage complex litigation, discovery, and the legal requirements of a fair adjudication.

In original cases involving suits brought by one state against another under 28 U.S.C. § 1251(a)—which comprise the bulk of the Court's original docket requiring factual development—the Court typically appoints a Special Master to take evidence on factual issues.[399] Although the Court's rules do not expressly authorize such a procedure, it customarily confers to a Special Master the authority to "summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for."[400]

In the original habeas corpus context, the Court could employ the same approach, appointing a Special Master to take evidence where necessary. While such a device is possible, it is not the most desirable means of addressing the fact-finding issue. First, Special Masters are used most often when resort to district court fact-finding is problematic—a concern not presented in habeas cases.[401] In addition, in origi-

397 Cf. *Felker*, 518 U.S. at 664-65 (1996) (outlining standards used by Court to review original habeas petitions).

398 For discussion of the case of Robert Lee Tarver, see supra Part II.B.2.

399 See Stern et al., supra note 267, § 10.12, at 487-90 (describing Special Master's scope of authority and general fact-finding procedures).

400 Illinois v. Missouri, 384 U.S. 924, 924 (1966) (mem.); Nebraska v. Iowa, 379 U.S. 996, 996 (1965) (mem.) (same).

401 A factor that militates in favor of the Court's use of a Special Master in suits by one state against another does not apply to the original habeas corpus context. When one state is suing another, remand to a district court in either state would be problematic, and therefore fact-finding conducted under the auspices of the Court itself is preferable. Although it could be said that there are also intercourt tensions when a federal district court engages in fact-finding on a question concerning the constitutionality of a state's procedures, these tensions are no different—and no greater—than those that customarily arise in any federal habeas corpus proceeding. To the extent that these tensions require systemic accommoda-

nal jurisdiction cases other than habeas corpus, the losing party typically bears responsibility for paying costs of using a Special Master for fact-finding.[402] For obvious reasons, indigent death row prisoners will not be able to defray the costs of litigation if they fail on the merits. Alternatively, and preferably, the Court could remand the factual questions to the federal district court.[403] An examination of the nature of original habeas corpus review and its distinctions from interstate suits suggests that remand to district court is the more appropriate and efficient procedure.

The Court historically has expressed a preference for original habeas corpus litigation to be conducted at the district court level. Section 2241 of the Judicial Code authorizes the "Supreme Court, any justice thereof, and any circuit judge . . . [to] decline to entertain an application for a writ of habeas corpus and . . . [to] transfer the application for hearing and determination to the district court having jurisdiction to entertain it."[404] Although AEDPA arguably may prohibit the Court from assigning all jurisdictional authority to the district court, there is nothing in the law or the Court's rules that would preclude continued use of the district court for factual development and evidentiary review.

Remand to the district court would advance the interest of efficiency, as the district court already has some familiarity with the case and the parties. The district court judge will have adjudicated the initial federal habeas corpus petition and in all likelihood will be able to address the factual issues without the additional case review that would be required of a Special Master.

Moreover, the district court is situated ideally to play a continuing role in the case in the event that further fact-finding is needed. The Supreme Court clearly has expressed its resistance to an adjudica-

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tions, the Supreme Court has already instituted the necessary measures by developing an array of habeas corpus doctrines designed to further the interest of comity in federal-state relations. See supra notes 122-27 and accompanying text.

402 See, e.g., Nebraska v. Wyoming, 506 U.S. 996, 996 (1992) (mem.) (awarding and apportioning costs among United States, Nebraska, and Wyoming); see also, e.g., Arizona v. California, 357 U.S. 902 (1958) (same as to costs among Arizona, California, Nevada, New Mexico, Vermont, and United States); Texas v. New Mexico, 354 U.S. 918 (1957) (same as to costs among Texas, New Mexico, and Middle Rio Grande Conservancy District).

403 Under 28 U.S.C. § 2241(a), "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (Supp. V 2000). The fact that the actual language of § 2241 confers authority on district courts to adjudicate habeas corpus claims further supports the propriety of involving them in the management of the Court's original habeas work.

404 28 U.S.C. § 2241(b) (1994); see also Fed. R. App. P. 22(a) (requiring that original habeas applications be made in district, not circuit, courts).

tion process that would involve the Court itself in ongoing oversight of a case.[405] At least some execution-related claims are likely to require further fact-finding even after the Supreme Court issues its ruling in the case. For example, a declaration that a death row prisoner is incompetent to be executed may not preclude the state from asserting later that the prisoner has regained competency and can be executed.[406] If the district court handles the initial fact-finding procedures on remand from the Supreme Court, the same court will be able to step back into the case at a later time, aided by an existing familiarity with the issues and the facts.

Even in original habeas corpus cases before the Court on purely legal questions, remand to a district court may become necessary at some point in the process. For example, assuming that the Supreme Court holds that the Eighth Amendment prohibits execution of mentally retarded persons,[407] there often will be a question of whether a capital prisoner actually is retarded, and the lower courts may not have taken adequate evidence on this issue. If a case is before the Court on an original habeas corpus petition, there would be no lower court to which to remand the case as there would be in cases before the Court on certiorari review. Here again it would promote the interest of efficiency if the district court serves as fact-finder for purposes of the original habeas corpus proceeding and thereby gains extensive familiarity with the factual issues and the record.

There is an understandable reluctance on the part of the Court to facilitate original habeas litigation as a routine matter. These cases are complex, emotional, and extremely demanding.[408] However, there are significant issues that need to be adjudicated and may now be precluded from review in traditional habeas corpus litigation. The creation of established review procedures and a willingness to remand important questions requiring factual development might allow the

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405 See, e.g., Vermont v. New York, 417 U.S. 270, 277 (1974) (per curiam) (explaining that continued Court supervision over decrees apportioning water between states would "materially change the function of the Court" because Court "would be acting in an arbitral rather than a judicial manner").

406 The Court has held that states may even forcibly medicate prisoners who present a threat to themselves or others. See Washington v. Harper, 494 U.S. 210, 227 (1990) (holding that forcible medication of mentally ill prisoner does not violate Due Process Clause where prisoner presents danger to self or others and treatment is in prisoner's "medical interest"). Some state courts have concluded that forcible medication is permissible even where the consequence is to make a condemned prisoner competent for execution. See, e.g., Singleton v. Norris, 992 S.W.2d 768, 769 (Ark. 1999) (holding that "involuntary administration of medication" prior to execution is permissible where it is for prisoner's "own good and for the security of the institution in which he is incarcerated").

407 See supra note 314 and accompanying text.

408 See supra note 98 (discussing complexity of capital litigation).

Court to address issues that merit review and that would otherwise be rejected as too demanding for the Court's docket.

2. *Successive State Postconviction Petitions and Subsequent Certiorari Review*

The Supreme Court rarely has granted a petition for certiorari to review the denial of relief in state collateral or postconviction processes.[409] As some of the Justices have acknowledged, the Court's decisionmaking about certiorari review at this stage is shaped by the assumption that a state postconviction case will return to the Court on a certiorari petition at the conclusion of federal habeas corpus proceedings, with the record and legal issues refined by the lower federal courts.[410] But that assumption is no longer a safe one, especially for execution-related claims, because of AEDPA's abridgement of federal successive habeas corpus review.

There are already some indications of systemic change. The previously discussed case of *McCarver v. North Carolina*,[411] in which the Supreme Court granted review of the question of whether the Eighth Amendment prohibits execution of mentally retarded persons, reached the Court via a petition for certiorari from the state courts'

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409 See, e.g., Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of stay of execution) ("Because the scope of the State's obligation to provide collateral review is shrouded in so much uncertainty, . . . th[e] Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims.").

410 See Durden v. California, 531 U.S. 1184, 1184 (2001) (Souter, J., joined by Breyer, J., dissenting from denial of certiorari) (explaining why dissenting Justices were no longer willing to defer certiorari review of California's "three-strikes law" until issue emerges from federal habeas corpus proceedings with appellate court ruling on issue). The likelihood of a certiorari grant in a state postconviction case has decreased even further as a result of the new habeas law. AEDPA's statute of limitations does not toll expressly the time for filing a federal habeas corpus petition while a prisoner seeks Supreme Court certiorari review of a state postconviction ruling, see 28 U.S.C. § 2244(d)(2) (Supp. V 2000), and some circuit courts have held that the statute of limitations is not tolled under these circumstances. See, e.g., Stokes v. Dist. Attorney of Phila., 247 F.3d 539, 543 (3d Cir. 2001); Snow v. Ault, 238 F.3d 1033, 1035-36 (8th Cir.) (concluding that § 2244(d)(2) does not toll statute of limitations for time "during which certiorari could have been sought"), cert. denied, 532 U.S. 998 (2001). Thus, prisoners often will have to forgo seeking certiorari review at the conclusion of state postconviction proceedings so as not to erode the time for filing a federal habeas corpus petition. Indeed, unless a prisoner initiates a state postconviction proceeding immediately after direct appeal, thereby tolling the twelve-month statute of limitations early, see § 2244(d)(2), there will likely be insufficient time to seek certiorari review of the state courts' postconviction ruling and still meet the deadline for filing a habeas petition. The situation is even more difficult in so-called "opt-in states," see infra notes 414-16, because AEDPA's opt-in provisions establish an even shorter limitations period of six months. See § 2263(a).

411 McCarver v. North Carolina, 532 U.S. 941 (2001) (mem.), cert. dismissed as improvidently granted by, 533 U.S. 975 (2001) (mem.).

denial of a successive postconviction petition.[412] As a result of AEDPA's restrictions, issues increasingly will come to the Court in this posture. Some cases, however, will fall between the cracks because not every state permits successive review and even those that do frequently erect procedural barriers to review on the merits.[413]

Two reforms could improve the reliability of this mechanism for review. First, states could broaden review procedures and more rigorously evaluate claims presented in successive state collateral petitions. Much of the current shape of habeas corpus law reflects the Supreme Court's and Congress's *belief* that the state courts are adjudicating constitutional issues in capital cases fairly. This assumption is evident in judicially and legislatively established requirements of increased deference to state court rulings, restricted opportunities for evidentiary development in federal court, and reinforced measures for exhaustion. There is little actual evidence, however, to suggest that the states seriously are concerned with improving the reliability of state court review in capital cases. Indeed, even though AEDPA permits states to curtail federal habeas corpus review in capital cases by improving the availability of adequately funded, competent counsel for indigent capital defendants in state postconviction proceedings,[414] no state has managed to qualify yet[415] and few states have even sought to qualify.[416] Given the states' lack of responsiveness even where their

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412 See supra note 314 and accompanying text.

413 See supra notes 330-31 and accompanying text.

414 See §§ 2261-2266. These are the so-called "opt-in" provisions, which provide expedited, particularly restrictive habeas corpus review in capital cases in those states that have "opted in" by satisfying the statutory prerequisites. For discussion of these provisions, see Hertz & Liebman, supra note 26, § 3.3.

415 See, e.g., Baker v. Corcoran, 220 F.3d 276, 286-87 (4th Cir. 2000) (finding that Maryland has not satisfied opt-in prerequisites), cert. denied, 531 U.S. 1193 (2001); Stouffer v. Reynolds, 168 F.3d 1155, 1160 n.2 (10th Cir. 1999) ("Oklahoma is not a qualifying state for purposes of the special provisions of the AEDPA applicable to capital cases."). Several states have conceded that they do not qualify. See, e.g., Death Row Prisoners of Pa. v. Ridge, 106 F.3d 35, 36 (3d Cir. 1997) (mooting case after "Commonwealth . . . declared that Pennsylvania does not meet the requirements . . . and that it has not met them previously"); Burris v. Parke, 95 F.3d 465, 468 (7th Cir. 1996) (en banc) (stating that "Indiana concedes" that it has not "satisfied certain [opt-in] conditions for the processing of capital cases within the state court system"). Other states have made that concession implicitly. See, e.g., Breard v. Pruett, 134 F.3d 615, 618 (4th Cir.) (noting that district court found that Virginia did not qualify for opt-in status and that state did not appeal ruling), cert. denied sub nom. Breard v. Greene, 523 U.S. 371 (1998). But see Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2001) (finding that Arizona qualifies for opt-in status), reh'g en banc denied, 283 F.3d 992, No. 01-99000, 2002 WL 431715 (9th Cir. Mar. 20, 2002).

416 Of the thirty-eight states that have the death penalty, only thirteen have even attempted to "opt in." Marianne L. Bell, Note, The Option Not Taken: A Progressive Report on Chapter 154 of The Anti-Terrorism And Effective Death Penalty Act, 9 Cornell J.L. & Pub. Pol'y 607, 625 (2000). It seems likely that states are forgoing the benefits of the opt-in provisions because AEDPA already provides expeditious and restrictive habeas

oft-stated interest in "finality" could be advanced through improved provision of counsel, it is hard to imagine that states willingly would improve state successive review procedures in a manner that ultimately would facilitate *greater* review for condemned prisoners. If, however, the states were given an adequate motivation to improve their successive review procedures,[417] the state postconviction process (with subsequent certiorari review) could provide a viable avenue for federal review for at least some of the cases now foreclosed by AEDPA's successive petition provisions.

Absent such systemic change in the state postconviction processes and some reform of AEDPA, the onus is once again on the Supreme Court to serve as backstop. The Court will need to devote greater scrutiny to—and increase the frequency of its grants of—petitions for certiorari from denials of state postconviction relief at the time of the first state postconviction petition as well as subsequent petitions. Particular attention should be devoted to the types of claims that can no longer be litigated in federal habeas corpus proceedings as a result of AEDPA's successive petition provisions.

3. *Rule 60(b) Motions*

Although the federal habeas corpus process is used primarily by prisoners to secure judicial review of criminal convictions and sentences,[418] the remedy is deemed to be "civil"[419] and its processes

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corpus review in capital cases and thus they have little incentive to pay for appointment of postconviction counsel in order to acquire the additional restrictions offered by the opt-in provisions. 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, 665 (1999) ("[T]he interests of the States in death penalty finality are more than adequately accommodated without their having to respond affirmatively to the opt-in provisions by providing counsel to indigent capital prisoners.").

417 Those members of Congress seeking to enact new federal legislation known as the "Innocence Protection Act," see S. 486, 107th Cong. (2001), and H.R. 912, 107th Cong. (2001), to reform the nation's capital punishment system obviously have learned from the experience with AEDPA that a powerful incentive is needed in order to induce states to improve their postconviction procedures. The proposed legislation would ensure state cooperation by withholding federal funds under specified circumstances. For a general description of the Innocence Protection Act, see Section on Individual Rights and Responsibilities, supra note 351, at 12-13.

418 This is not, by any means, the only use of the federal habeas corpus process. It is also used in a variety of traditional civil settings. See, e.g., Duncan v. Walker, 533 U.S. 167, 176 (2001) ("[F]ederal habeas corpus review may be available to challenge the legality of a state court order of civil commitment or a state court order of civil contempt."); see also supra note 376 (discussing Supreme Court's habeas corpus review of validity of immigration removal order).

419 See, e.g., Keeney v. Tamayo-Reyes, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) ("[O]ver the writ's long history, . . . one thing has remained constant: Habeas corpus is . . . an original civil action in a federal court.").

are largely subject to the Federal Rules of Civil Procedure.[420] Accordingly, it has long been accepted that federal habeas corpus petitioners can file "Motions for Relief from Judgment" pursuant to Civil Rule 60(b),[421] which permits the filing of such motions under a variety of circumstances, including, e.g., the discovery of new evidence.[422] Rule 60(b)(6), which provides for the filing of such a motion for "any other reason justifying relief from the operation of the judgment,"[423] has been recognized to grant the federal courts broad authority to relieve a litigant of a final judgment "whenever such action is appropriate to accomplish justice."[424] Commentators describe the rule, which the Supreme Court has interpreted expansively in accordance with the underlying purpose of bringing about just results,[425] as a

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420 See, e.g., 28 U.S.C. § 2254 R. 11 (1994) (enacted by Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976)) (Rules Governing § 2254 Cases in United States District Courts) (stating that civil rules apply in habeas corpus proceedings "to the extent they [Rules] are not inconsistent with . . . [habeas] rules"); Calderon v. Ashmus, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (recognizing that Federal Rules of Civil Procedure apply to habeas petitions).

421 See, e.g., Browder v. Dir., Ill. Dep't of Corr., 434 U.S. 257, 262 n.6, 263 n.8 (1978) (discussing applicability of Rule 60(b) in habeas proceedings but finding it irrelevant in present case where inmate disavowed reliance on it). Rule 60(b) motions must be filed "within a reasonable time" and certain of the grounds for such a motion—including the newly discovered evidence provision—are subject to a concrete time limitation of "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b)(6).

422 Fed. R. Civ. P. 60(b)(2) (providing for filing upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"). Rule 59(b) states that new-trial motions shall be filed "no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(b).

423 Fed. R. Civ. P. 60(b)(6). Invocation of this provision requires a showing of "extraordinary circumstances." See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 393-94 (1993) ("To justify relief . . . party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay."). The lower federal courts recognize that a change in the law can constitute such an extraordinary circumstance, but the Supreme Court has cautioned that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." Agostini v. Felton, 521 U.S. 203, 239 (1997) (dicta).

424 Klapprott v. United States, 335 U.S. 601, 615 (1949).

425 See, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988) (stating that Rule 60(b) grants federal courts "broad authority to relieve a party from a final judgment" to achieve just terms); *Klapprott*, 335 U.S. at 614-15; see also Jackson v. People's Republic of China, 794 F.2d 1490, 1496 (11th Cir. 1986) ("[Rule 60(b)(6)] must be liberally construed to achieve substantial justice."). In *Klapprott*, the Supreme Court granted a prisoner 60(b)(6) relief from a denaturalization order entered four-and-a-half years earlier, because his circumstances at that time had deprived him of the opportunity to be heard. See *Klapprott*, 335 U.S. at 607, 615. When the default judgment issued, the petitioner was incarcerated, weakened by illness, unable to afford an attorney, and preoccupied with other legal problems. Id. at 613-14. Moreover, the petitioner raised a meritorious challenge to denaturalization. The complaint strongly indicated that the Government had proceeded on inadequate facts. Id. at 615. The Court relieved the petitioner of the adverse final judgment and afforded him a hearing on denaturalization "in accord with

"grand reservoir of equitable power to do justice in a particular case."[426]

Rule 60(b)'s relevance to the successive petitions context is readily apparent. If a federal habeas corpus petitioner has been denied relief in a first petition, he or she conceivably could invoke Rule 60(b) to seek "relief from [the prior] judgment" on the grounds of "newly discovered evidence" or another "reason justifying relief."[427] Indeed, the fit is so natural and logical that federal judges inclined to curtail the availability of federal habeas corpus relief have rushed to seal off this avenue of relief. A number of federal courts have declared, without much explanation of their reasoning, that a Rule 60(b) motion filed by a federal habeas corpus petitioner after denial of a prior petition will be deemed to be a "successive petition," subject to the usual restrictions on successive petitions.[428] Recently, however, the Second Circuit has recognized what is plainly evident from a fair reading of the rule—that there is no justification for treating a Rule 60(b) motion as a successive petition, subject to the restrictions on such filings.[429]

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elemental concepts of justice." Id. In reaching its decision, the Court emphasized that all the petitioner sought was "a chance to try the denaturalization proceedings on its merits." Id. at 609.

In *Liljeberg*, the Court similarly interpreted Rule 60(b)(6) flexibly and relieved a party from an unfair and improper judgment. In this case, a federal district judge inadvertently had created the appearance of impropriety by ruling on matters in which he had a personal stake. *Liljeberg*, 486 U.S. at 865-67. In essence, the Court vacated the judgment merely to redress the appearance of impropriety. Id. at 867-70. The opposing parties had not demonstrated "special hardship" by reason of reliance on the order, id. at 869, and thus the Court found "a greater risk of unfairness in upholding the judgment . . . than there is in allowing . . . a fresh look at the issues." Id. at 868.

426 12 James Wm. Moore, Moore's Federal Practice § 60.48[1], at 60-166 to 60-167 (3d ed. 2001) (citation omitted); see also *Jackson*, 794 F.2d at 1494 (stating that "[t]he rule is equitable in origin, and the court may take action appropriate to accomplish justice").

427 See, e.g., Daniel v. Thigpen, 742 F. Supp. 1535, 1565 (M.D. Ala. 1990) (granting habeas relief to death row prisoner on Rule 60(b) motion on basis of ineffective assistance of counsel).

428 See Felker v. Turpin, 101 F.3d 657, 660-61 (11th Cir.) (rejecting petitioner's argument that Rule 60(b) petition not be treated as successive petition without providing explanation of decision), cert. denied, 519 U.S. 989 (1996); Clark v. Lewis, 1 F.3d 814, 825-26 (9th Cir. 1993) (same); cf. Rodriguez v. Mitchell, 252 F.3d 191, 200 (2d Cir. 2001) (listing such decisions by other circuits and observing that "[t]hese courts . . . have offered little explanation in support of their reasoning" which "depend[s] largely on conclusory statements and citations to one another").

429 "A motion under Rule 60(b) and a petition for habeas have different objectives." *Rodriguez*, 252 F.3d at 198. As the Court of Appeals for the Second Circuit explained,

> The habeas motion under 28 U.S.C. § 2254 seeks to invalidate the state court's judgment of conviction. As to the motion under Rule 60(b), while it is undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction, it does not seek that relief. It seeks only to vacate the federal court judgment dismissing the habeas petition. The grant of such a motion would not have the effect of invalidating the state conviction. It would

If other circuits follow the Second Circuit's lead, Rule 60(b) offers a means for significantly reducing the systemic problems caused by AEDPA's successive petition rules. With regard to claims that cannot be adjudicated at the time of the initial petition because they are not yet ripe, Rule 60(b) seems well-suited to extending the solution that the Court fashioned for a subset of such claims in *Stewart v. Martinez-Villareal*[430]—those that were previously presented in a petition and dismissed on grounds of prematurity.[431] If new facts emerge or new legal developments take place after the filing of a first petition, Rule 60(b) would permit the prisoner to raise a claim based on them, without running afoul of the restrictive successive petition provisions of AEDPA, even if the claim had not been present in the original petition. Not only would this ensure that the prisoner has access to federal review, it also would promote efficiency. Under this approach, the claim would be heard by a district court judge who is already familiar with the case and capable of adjudicating the factual issues, thereby avoiding the problems that ensue if a prisoner's only recourse is original habeas corpus review. Moreover, this approach would spare the prisoner—and the courts—the needless expenditure of time and effort entailed in prophylactic raising of claims at a time when they are not yet ripe in order to preserve them by securing a ruling of "prematurity."[432]

Rule 60(b) also offers a solution for situations in which the Court's grant of certiorari in another case signals the likely announcement of a retroactively applicable new rule, but the prisoner—whose case raises precisely the same issue as the one on which the Court has granted certiorari—has no procedural vehicle for securing a stay of execution to await the issuance of the Court's ruling.[433] Upon the filing of a Rule 60(b) motion, the district court could grant a stay of execution. The district court's ruling would be appealable by either party[434] and would thus provide both sides with a path to the circuit court and eventually the Supreme Court if there is any question about

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> merely reinstate the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction.

Id.

430 523 U.S. 637 (1998).

431 For a discussion of the Court's holding in *Martinez-Villareal*, see supra notes 223-29 and accompanying text.

432 For an explanation of the nature of this elaborate procedure and the reasons why petitioners are often driven to use it, see supra Part II.B.1.

433 For further explanation of this dilemma, see supra notes 264-65, 323-26 and accompanying text.

434 Rule 60(b)(6) is available to all parties. The nature of habeas corpus proceedings has led both to grants and denials of Rule 60(b) relief. See Ritter v. Smith, 811 F.2d 1398, 1404 (11th Cir. 1987) (affirming district court's grant of Rule 60(b) relief to State, thereby rein-

the propriety of a stay or subsequent review. There would be no need for resolving the procedural conundrums posed by original habeas corpus review of cases that require additional fact-finding.[435] The Court would nonetheless retain its authority to deny review or stays of execution when no legitimate basis for such review exists.

CONCLUSION

This Article has focused on only a single facet of the drastic changes that the Anti-Terrorism and Effective Death Penalty Act effected in federal habeas corpus procedure and practice. AEDPA and federal habeas corpus review are themselves only a part, albeit an important one, of the larger problems that plague the capital punishment system in the United States. Fear and the politics of death have produced lethal barriers to the enforcement of constitutional protections for many condemned prisoners in America. Incident-driven lawmaking, fueled by an unseemly enthusiasm for executions, has undermined the already questionable reliability of capital punishment. The component parts are corrosive—a culture that demonstrates its anger over violence and death with more violence and death; excessive proceduralism with inverted incentives that overproduce death;[436] and an alchemy of race, class, and politics generating death verdicts against the disfavored and disadvantaged in wealth-dependent systems of criminal justice that are less and less scrutinized.

In the last twenty-five years, nearly 750 prisoners in America have been hanged, shot, electrocuted, asphyxiated, or lethally injected by state governments[437] after courts have legitimated these executions

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stituting inmate's death sentence); Hall v. Alabama, 700 F.2d 1333, 1338 (11th Cir. 1983) (denying 60(b)(6) relief to prisoner who escaped pending state appeal).

435 See supra Part III.B.1 and accompanying text. The Rule 60(b) procedure also eliminates some of the procedural complexities caused by the interaction of AEDPA's statute of limitations with the successive petition provisions' retroactivity rule. As explained supra note 281, Justice Breyer pointed out in his dissenting opinion in Tyler v. Cain, 533 U.S. 656, 677 (2001), that the majority's interpretation of the retroactivity provision created a potential new problem with regard to the construction and application of the statute of limitations. The Rule 60(b) procedure avoids any such problem because the prisoner is reopening an already existing action, which was initially filed in accordance with the statute of limitations. Cf. Fed. R. Civ. P. 15(c) (stating that amended pleading "relates back" to date of timely filing of original pleading).

436 See James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2032 (2000) (describing skewed incentives that encourage trial actors to "overproduce death sentences"); 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, 316 (addressing "excessive proceduralism in post-conviction proceedings" and suggesting "ways to redesign" federal habeas review in capital cases).

437 See NAACP Legal Def. and Educ. Fund, Inc., Death Row U.S.A., Fall 2001, at 4.

by avoiding important constitutional problems and vexing legal issues. An array of procedural barriers to habeas corpus review has been crafted carefully, while basic questions of fairness and justice go unexamined. Although it would be comforting to believe that habeas corpus and other court processes guard against unjust executions, the sad reality is that the review procedures in capital cases are unmoored by any enduring commitment to heightened scrutiny or careful deliberation.

This Article's analysis of AEDPA's successive petition rules provides but a single example of these systemic realities, which in turn represents only one facet of a problematic structure with multiple components. The Article also shows the origins of some of these problems, including the readiness of some judges and legislators to uncritically accept myths about villainous prisoners aided by equally sinister attorneys who hold hostage the American mandate for executions. The story of the restrictions on successive habeas corpus petitions in habeas corpus is a microcosm of a larger dynamic that often creates poorly constructed procedural devices to remedy ill-defined structural problems in an atmosphere of anger, fear, and uninformed rulemaking.

In 1994, Justice Blackmun said that he would "no longer . . . tinker with the machinery of death" because twenty years of struggling "to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty" had forced him to conclude that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[438] Although it is tempting to follow his lead and simply refuse to "tinker with the machinery of death," there are nearly 4000 condemned men, women, and children[439] whose fate depends on whether constitutional protections reliably can be enforced in death penalty cases. Already Congress is grappling with the need to reform critical problems in the capital punishment system—many of which AEDPA has exacerbated—by considering passage of the Innocence Protection Act.[440] There are a number of additional areas where legislative and judicial reforms are necessary to guard against miscarriages of justice. This Article has proposed certain legislative and judicial solutions to correct the specific problems that have been the focus of discussion here—the preclusive effects of AEDPA's successive petition rules.

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438 Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

439 See NAACP Legal Def. and Educ. Fund, Inc., Death Row U.S.A., Fall 2001, at 1.

440 See supra note 351 and accompanying text.

It would be easy to view reform of the capital punishment system as needlessly exhausting procedural gymnastics that cannot be justified to protect the hated and reviled prisoners on America's death rows. However, in truth, it is really for the millions in whose name executions are carried out that we should struggle against a hopeless acceptance of the flawed procedures that ultimately blur the line between rational justice and irrational vengeance. Perhaps in this way, we can begin a process that rejects the myths and narratives we use to sustain fear and the politics of death.