NOTES

HOW WIDE SHOULD THE ACTUAL INNOCENCE GATEWAY BE? AN ATTEMPT TO CLARIFY THE MISCARRIAGE OF JUSTICE EXCEPTION FOR FEDERAL HABEAS CORPUS PROCEEDINGS

"The criminal goes free, if he must, but it is the law that sets him free."[1]

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INTRODUCTION

Despite its numerous constitutional and statutory safeguards, the criminal justice system in America is far from perfect. Juries unfortunately convict individuals of crimes they did not commit. Take, for instance, the story of Beverly Monroe. Monroe's freedom was taken away on November 2, 1992, when a jury found her guilty of murdering her long-time boyfriend.[2] On March 5, 1992, Monroe discovered her boyfriend dead with a gun in his hand.[3] The prosecution immediately focused on Monroe, despite the lack of forensic evidence connecting her to the murder and the fact that she had a legitimate alibi.[4] Monroe served nearly seven years of her sentence before a district judge granted her freedom in a federal habeas corpus proceeding, finding that the prosecution had suppressed material, exculpatory evidence.[5] On March 26, 2003, the Fourth Circuit affirmed the grant of habeas relief.[6]

Monroe's case is an exceptional one, and cases such as hers are becoming fewer and farther between, especially with relatively recent technological advances in forensic evidence, such as DNA testing.[7] The possibility for wrongful conviction, however, is nevertheless present in America, and the courts of this country take this risk seriously.[8] Due to this ever-present risk, postconviction

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2. Monroe v. Angelone, 323 F.3d 286, 292 (4th Cir. 2003). Convicted of first-degree murder, Monroe was sentenced to a total of twenty-two years in prison. *Id.*

3. Ralph Blumenthal, *A Virginia Tale of Love and Death, Suspicions and Doubt*, N.Y. TIMES, Feb. 22, 2000, at A12.

4. *Id.*

5. *Monroe*, 323 F.3d at 290-91; Tom Campbell, *Monroe 'Good at Smiling Now'; Enjoying Freedom During Appeal*, RICHMOND TIMES-DISPATCH, Apr. 7, 2002, at B1.

6. *Monroe*, 323 F.3d at 290-91.

7. *See, e.g.*, Death Penalty Information Center, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?scid=6&did=412#inn-yr-rc (last visited Oct. 9, 2008). The number of exonerations in 2003 was at an all-time high at twelve, but in the last four years, the combined total was only twelve exonerations (six in 2004, two in 2005, one in 2006, and three in 2007). *Id.*

8. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting the maxim "that it is better that ninety-nine ... offenders should escape, than that one innocent man should be condemned" (quoting THOMAS STARKIE, EVIDENCE 756 (1824))); Goetz v. Crosson, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring) ("We usually say that it is better that some number of guilty persons go free than that one innocent person be imprisoned, though we might not all agree on the number of wrongful acquittals we are willing to accept to guard

procedures are elaborate and attempt "to ensure not only that a trial was fair, but also that no individual has been wrongly convicted."[9] This Note addresses a very specific procedure for relief on the ladder of postconviction safeguards: the actual innocence gateway, an exception to the doctrine that a procedurally barred petitioner may not petition for federal habeas relief without a showing of cause and prejudice.[10] The *Monroe* court did not base its decision on this exception because of the success of Monroe's *Brady* claim,[11] but a failure to satisfy a procedural requirement below may have likely led Monroe's counsel to attempt to utilize the actual innocence exception before a federal habeas court. Though cases like Monroe's are relatively uncommon, it is nonetheless important for petitioners to understand the processes and procedures along the postconviction pathway as they make their arguments for habeas relief.

Habeas corpus is the primary method for state prisoners to challenge the legality of their convictions in federal court,[12] and various policies, values, and considerations come into play during a federal habeas proceeding.[13] Among these considerations is the underlying notion that "habeas corpus is, at its core, an equitable remedy."[14] But this remedy can also be a powerful tool for individuals convicted of crimes to challenge the decision handed down by a jury of their peers and affirmed by numerous courts on appeal.[15]

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against one wrongful conviction.").

9. Harvey v. Horan, 285 F.3d 298, 299 (4th Cir. 2002).

10. Courts refer to this claim as both the actual innocence gateway and the miscarriage of justice exception. *See, e.g.*, House v. Bell, 547 U.S. 518, 536 (2006); *Schlup*, 513 U.S. at 524 (holding that a "procedurally defaulted petitioner" is required to demonstrate "that a constitutional violation has probably resulted in the conviction of one who is actually innocent" in order to be granted habeas relief).

11. *Monroe*, 323 F.3d at 316-17 (concluding that "it is impossible to say that Beverly Monroe received a fair trial, or that we should be confident she is guilty of first-degree murder"). A prosecutor violates his *Brady* obligation when he fails "to disclose any material favorable to an accused even if it could not have been introduced as independent *evidence* of innocence." *Id.* at 291 n.3. In order to be granted relief under a *Brady* claim, the habeas petitioner must demonstrate that the suppression of evidence affected the trial's outcome. *Id.*

12. CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 1 (2006).

13. *See Schlup*, 513 U.S. at 319-25.

14. *Id.* at 319.

15. FEDERMAN, *supra* note 12, at 18 ("[Habeas corpus] gives the dangerous classes more than a voice; it gives them a weapon to attack a jury's psychological determination of guilt and

After conviction, habeas petitioners do not enjoy a presumption of innocence, as they are no longer merely individuals accused of a crime.[16] To the contrary, having been found guilty beyond a reasonable doubt, the habeas petitioner faces the court with a strong presumption of guilt.[17]

Federal courts allow state prisoners to bypass procedural bars and petition for federal habeas relief when they have claims based on their actual innocence.[18] The Supreme Court articulated the evidentiary standard for claims of actual innocence in habeas petitions in *Schlup v. Delo*.[19] Habeas petitioners must "support [their] allegations of constitutional error with *new* reliable evidence —whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[20] Since the *Schlup* decision, lower courts have wrestled with interpretations of the seemingly simple adjective "new." In fact, these interpretations have produced a split among the circuits on the issue of "whether *Schlup* requires 'newly discovered' evidence or merely 'newly presented' evidence."[21]

This Note posits that the actual innocence standard for presenting new evidence to a habeas court should be further narrowed to exclude "newly presented" evidence. The gateway to the petitioner's constitutional habeas claims should be limited by a prerequisite that the petitioner present "newly discovered" evidence to support a claim of actual innocence. Part I of this Note discusses relevant background information on the writ of habeas corpus, including the specific requirements imposed on habeas petitioners by federal legislation. Part II addresses the current state of the law regarding the actual innocence exception in federal habeas corpus cases. Part III compares the "newly discovered" standard with the "newly presented" standard based on case law and policy concerns surrounding habeas corpus relief. Part IV briefly examines three states'

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dangerousness. It gives the condemned a language to rebut the charges, convictions, misrepresentations in the same terms that were used against them.").

16. *Schlup*, 513 U.S. at 326 n.42; Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002).

17. *See Schlup*, 513 U.S. at 326 n.42.

18. *See, e.g.*, *id.* at 324.

19. *Id.*

20. *Id.* (emphasis added).

21. Wright v. Quarterman, 470 F.3d 581, 591 (5th Cir. 2006).

approaches to dealing with the issue for additional guidance regarding which standard of evidence should govern. Finally, Part V concludes that United States courts should adopt the uniform approach that new evidence in an actual innocence habeas claim must be "newly discovered" evidence.

I. HABEAS CORPUS GENERALLY

A. Historical Context

The Constitution provides that "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."[22] Since ratification of the Constitution, the writ has evolved into the procedure by which courts examine the constitutionality of the petitioner's incarceration.[23] "[T]he writ of habeas corpus [now] extends to anyone 'in custody in violation of the Constitution or laws or treaties of the United States.'"[24] A habeas court does not consider the facts of the petitioner's case or weigh evidence to determine his guilt or innocence.[25] The court's jurisdiction is restricted to constitutional issues surrounding the petitioner's detention, thus the federal judge "need only address whether the custodian has the authority to deprive the petitioner of his constitutionally-protected liberty."[26] In other words, a federal habeas petition, one of the final stages in a petitioner's appeal for relief, is an attack upon the legality of the petitioner's confinement.[27]

22. U.S. CONST. art. I, § 9, cl. 2.

23. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001).

24. J. Brent Alldredge, *Federal Habeas Corpus and Postconviction Claims of Actual Innocence Based on DNA Evidence*, 56 SMU L. REV. 1005, 1008 (2003) (quoting 28 U.S.C. § 2241(c)(3), 2254(a) (200[0])).

25. *See* Herrera v. Collins, 506 U.S. 390, 390-91 (1993).

26. *Id.*

27. FREEDMAN, *supra* note 23, at 1.

B. The Requirements of the AEDPA and the Resulting Effect on Petitions for Federal Habeas Corpus

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) now governs federal habeas corpus proceedings.[28] In addition to requiring habeas petitioners to exhaust their state law remedies,[29] the AEDPA imposed four major changes regarding habeas proceedings, including a one-year time limit for filing habeas petitions.[30] Furthermore, petitioners now have a single opportunity for federal habeas review, except in extraordinary circumstances.[31] Though the constitutional right to counsel does not apply at the habeas level,[32] the AEDPA established an "opt-in" provision to allow states to decide whether to provide a petitioner with counsel in habeas proceedings.[33] Finally, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[34] With these procedural requirements, the AEDPA has greatly inhibited the federal courts' ability to grant relief to state prisoners beyond their first habeas petition.[35] "[T]he AEDPA does not leave a lot of room for state prisoners to

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28. 28 U.S.C. § 2254 (2000). *See generally* FEDERMAN, *supra* note 12, at 157. President Bill Clinton signed this bill into law just one year and five days after the Oklahoma City bombing. *Id.* Even though the primary concern behind the bill's passage was the possibility that terrorists would be set free on technicalities, "rather than on the substance of guilt or innocence," Congress also addressed procedural concerns based on a report by a committee appointed by Chief Justice Rehnquist. *Id.* at 158-59.

29. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.").

30. FEDERMAN, *supra* note 12, at 160.

31. *Id.*

32. Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion) (holding that neither the Eighth Amendment nor the Due Process Clause guarantee an indigent petitioner the right to counsel in postconviction proceedings).

33. FEDERMAN, *supra* note 12, at 160. By opting-in and providing counsel, a state can reduce the amount of time that a prisoner has to file for federal review. *Id.* If the state fails to opt-in, the habeas filing deadline is then doubled from 180 days to 360. *Id.*

34. 28 U.S.C. § 2254(e)(1) (2000).

35. Tyler v. Cain, 533 U.S. 656, 661 (2001). For instance, "[i]f the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." *Id.* (citing 28 U.S.C. § 2244(b)(1) (2000)).

make their case for unlawful confinement."[36] The rigidity of the habeas requirements and possibility that a petitioner may be procedurally barred present a need for clarity in the standards to petition and receive a writ of habeas corpus from federal court.

C. Additional Reasons To Clarify the Standard for Relief Based on a Claim of Actual Innocence

In addition to the rigorous procedural standards required to file a petition for a writ, two other concerns warrant a resolution of the evidentiary standard required for a petitioner to fall within the actual innocence exception. A substantial number of habeas petitions come from inmates on death row, and the Supreme Court in *Schlup* acknowledged that the "quintessential miscarriage of justice is the execution of a person who is entirely innocent."[37] Unfortunately, these capital defendants are often indigent and frequently receive fewer due process protections than the average defendant.[38] Therefore, "the existence of a meaningful [and clear] federal habeas corpus remedy for state prisoners is especially important in death penalty cases."[39] Also troublesome is the fact that the decision whether to grant habeas relief typically rests in the hands of one judge.[40] One scholar aptly captured the essence of this concern:

> In principle ... the writ of habeas corpus allows a solitary federal judge—so many miles removed from the crime scene, and perhaps some ten years after the initial conviction was rendered, after memories have faded and witnesses have either moved away or died—to find a due process violation sufficient enough

36. FEDERMAN, *supra* note 12, at 161.

37. Schlup v. Delo, 513 U.S. 298, 324-35 (1995).

38. *See* FREEDMAN, *supra* note 23, at 147. These defendants are more likely than noncapital defendants to face problems such as "distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion." *Id.*; *see also* ERIC M. FREEDMAN, *Federal Habeas Corpus in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 409, 424-25 (James Acker et al. eds., 1998).

39. FEDERMAN, *supra* note 12, at 6-7.

40. *Id.*

> to overturn the judgment of numerous state judges and twelve jurors.[41]

The rigid procedural requirements imposed by the AEDPA for habeas petitions, coupled with the fact that prisoners' lives and freedom are potentially left up to the discretion of a single judge, demonstrate the need for precise requirements for actual innocence claims. All efforts should be made to ensure that this standard is as clear as possible. The current circuit split regarding the meaning of "new" evidence reveals that there is room for clarification of the requirements for petitioners' habeas claims based on the miscarriage of justice exception.[42]

II. THE STATE OF THE LAW ON THE ACTUAL INNOCENCE EXCEPTION TODAY

Generally, procedural bars preclude federal review of a habeas claim that state courts would consider defaulted unless the petitioner can show cause and prejudice.[43] The petitioner must give a reason for failing to challenge the alleged constitutional violation and demonstrate actual prejudice as a result.[44]

A. The Gateway: An Exception to Showing Cause and Prejudice

Actual innocence claims are an exception to the requirement of showing cause and prejudice.[45] Notably, actual innocence is not the same as legal innocence.[46] Legal innocence occurs when the prosecution fails to introduce sufficient proof at trial to demonstrate the defendant's guilt beyond a reasonable doubt, whereas actual innocence simply means that the defendant did not actually commit

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41. *Id.*

42. *See infra* Part II.C.

43. Murray v. Carrier, 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004); *see also* Mark M. Oh, Note, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo*'s Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341 (1998).

44. Francis v. Henderson, 425 U.S. 536, 542 (1976).

45. *Hubbard*, 378 F.3d at 338.

46. Calderon v. Thompson, 523 U.S. 538, 559 (1998) (noting that the miscarriage of justice exception deals with petitioners claiming actual, rather than legal, innocence).

the alleged crime.[47] Courts reason that the actual innocence exception strikes a necessary balance between the "societal interest in finality, comity, and conservation of scarce judicial resources with the individual interest in justice."[48] Courts examine petitions based on claims of actual innocence if a "miscarriage of justice" would occur absent review.[49]

This particular exception is not a constitutional one, but rather a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[50] For example, a petitioner with an underlying claim for relief based on ineffective assistance of counsel at trial who fails to meet a deadline or is procedurally barred for another reason generally will not be able to argue his underlying claim to a federal habeas court. If he meets the requirements of the actual innocence exception, however, the gate will open for him to argue the ineffective assistance claim. This was precisely the situation in *Schlup* in which the Supreme Court, having concluded that Schlup met the requirements for an actual innocence claim, remanded his case to allow him to argue his underlying constitutional claims.[51]

B. The Schlup *Decision*

The *Schlup* Court held that a procedurally defaulted habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" in order to proceed on a claim of actual innocence.[52] In order for this claim to be credible, the petitioner must present new, reliable evidence to support his contention of innocence.[53] Relying on the *Schlup*

47. Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 122 (2005).

48. Tania Nelson, House v. Bell*: A Second Chance for Procedurally Barred Claims*, 8 LOY. J. PUB. INT. L. 225, 225 (2007).

49. *Hubbard*, 378 F.3d at 338; Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002) ("To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime ... by presenting new evidence of innocence.").

50. Herrera v. Collins, 506 U.S. 390, 404 (1993) (holding that a claim of actual innocence, without an underlying constitutional claim, will not independently warrant federal habeas relief).

51. Schlup v. Delo, 513 U.S. 298, 332 (1995).

52. *Id.* at 321.

53. *Id.* at 324.

decision, several circuit court decisions have discussed the standard to be applied when faced with habeas claims of actual innocence based on "new" evidence.[54]

C. The Resulting Split Among the Circuits

In *Wright v. Quarterman*, the Fifth Circuit identified the split among the courts of appeals as to whether the *Schlup* standard "requires 'newly discovered' evidence or merely 'newly presented' evidence."[55] The Eighth Circuit's position is that the new evidence claimed by the petitioner must not have been available at trial and "could not have been discovered earlier through the exercise of due diligence."[56] The petitioner in *Osborne v. Purkett*, convicted of rape, claimed that he should be allowed to bypass the procedural bar to argue his constitutional claim before the court.[57] To support his claim, he presented the court with an affidavit containing testimony that another individual had a sexual relationship with the victim, a fact that provided a potentially exculpatory explanation for the conclusion of the forensic examination—that she had engaged in sexual intercourse before her death.[58] The court concluded that the affidavit did not constitute new evidence because the evidence existed at the time of the trial and could easily have been discovered through due diligence.[59] Although the petitioner's new evidence likely would have met the "newly presented" evidence standard, the court refused to consider his evidence based on its interpretation that the standard should be narrow and include only newly discovered evidence.[60]

The Third Circuit subscribes to the same interpretation of *Schlup*. In *Hubbard v. Pinchak*, the petitioner, convicted in state court of

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54. *See infra* Part II.C.

55. 470 F.3d 581, 591 (5th Cir. 2006) (declining to address the circuit split because the petitioner had not demonstrated that reasonable jurors would find the merits of his *Brady* claims debatable).

56. *Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) (citing Amrine v. Bowersox, 238 F.3d 1023, 1029 (8th Cir. 2001)).

57. *Id.* at 916.

58. *Id.* The prosecution presented evidence of the victim's Sexual Abuse Forensic Examination, which was consistent with the victim having had sexual intercourse. *Id.* at 914.

59. *Id.* at 920.

60. *Id.*

felony murder and robbery, appealed the district court's denial of habeas relief to the Third Circuit.[61] The petitioner based his actual innocence claim on his own sworn testimony, which had not been presented to the jury.[62] The court did not accept his argument, concluding that a "defendant's own late-proffered testimony is not 'new' because it was available at trial."[63] According to the Third Circuit, a petitioner's decision to withhold the testimony from the jury does not give him the ability to present it to a habeas court under the actual innocence exception.[64]

In contrast, in *Gomez v. Jaimet*, the Seventh Circuit concluded that *Schlup* only required the petitioner to present new evidence that was reliable and had not been presented during trial in order to make an actual innocence claim.[65] The petitioner filed a writ of habeas corpus in federal court after the Illinois Appellate Court affirmed his murder conviction.[66] The petitioner in *Gomez* supported his claim with statements from his codefendants and his own testimony.[67] Disregarding the state's argument that the evidence was not new because it was not "newly discovered," the court stated that "if a petitioner comes forth with evidence that was genuinely not presented to the trier of fact then no bar exists to the habeas court evaluating whether the evidence is strong enough to establish petitioner's actual innocence."[68] The court's holding effectively adopted the "newly presented" standard of evidence for claims of actual innocence.

Similarly, the Ninth Circuit construed the *Schlup* standard for evidence as merely "newly presented" evidence.[69] After being indicted for murder, Griffin obtained psychiatric records to support an insanity defense.[70] Defense counsel, however, ignored information

61. 378 F.3d 333, 336-37 (3d Cir. 2004).
62. *Id.* at 340.
63. *Id.*
64. *Id.*
65. 350 F.3d 673, 679 (7th Cir. 2003).
66. *Id.* at 677.
67. *Id.* at 679.
68. *Id.* at 680. Despite this favorable ruling, the court ultimately held that the petitioner failed to meet the stringent standard. The court was not convinced "that it [was] more likely than not that no reasonable juror would have convicted him in light of the statements of his co-defendants and his own testimony." *Id.*
69. Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003).
70. *Id.* at 959.

indicating that the defendant suffered from Non-Psychotic Organic Brain Syndrome and chose not to use insanity as a defense, contrary to the petitioner's wishes.[71] Arguing that it was not entered voluntarily and intelligently, the petitioner appealed his guilty plea, but failed to present the medical records to the postconviction court.[72] When the state courts denied relief, the defendant petitioned for federal habeas corpus relief.[73] The habeas court faced the question of whether hospital and prison medical records satisfied the "new reliable evidence" standard from *Schlup*.[74] Although the records at issue had been available during the plea negotiations, they had not been offered into evidence during those negotiations.[75] The court decided to interpret *Schlup*'s language broadly to include any evidence not introduced at trial.[76] Even though the court considered the medical records to be "new" evidence, the petitioner was not successful because he was unable to demonstrate that no reasonable juror would have convicted him if the evidence had been presented at trial.[77]

D. The Supreme Court's Failure To Clarify

The most recent case involving a petitioner's claim of actual innocence in the Supreme Court was in 2006.[78] In *House v. Bell*, a jury in state court convicted the petitioner of murder and sentenced him to death.[79] Petitioner House filed a writ of habeas corpus in federal court to pursue constitutional claims that were procedurally barred under state law.[80] The Supreme Court did not have the opportunity to address the circuit split regarding the interpretation of *Schlup*'s "new evidence" language, because the State stipulated

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71. *Id.*

72. *Id.*

73. *Id.* A guilty plea is essentially the equivalent of a conviction for purposes of making a claim based on actual innocence. *See* Bousley v. United States, 523 U.S. 614, 623 (1998).

74. *Griffin*, 350 F.3d at 961.

75. *Id.*

76. *Id.* at 962. The court relied on two of its prior decisions when making this determination. *Id.*

77. *Id.* at 965.

78. *See* House v. Bell, 547 U.S. 518 (2006).

79. *Id.*

80. *Id.*

that the petitioner was presenting new reliable evidence in the habeas proceeding.[81]

The Court reiterated that the *Schlup* standard, rather than the more stringent standard for federal habeas review contained in the AEDPA, applied to petitions seeking relief based on a claim of actual innocence.[82] The Court concluded that its review of the petitioner's case would be based on a consideration of "'all the evidence,' old and new, incriminating and exculpatory."[83] In addition, the Court said that a habeas court can review evidence regardless of whether it would be admissible at trial, but did not suggest whether "newly discovered" or "newly presented" was the appropriate evidentiary standard for a claim of actual innocence.[84] Therefore, the circuit split remains unresolved.

III. THE "NEWLY DISCOVERED" VERSUS "NEWLY PRESENTED" STANDARDS

Without controlling precedent from the Supreme Court regarding whether the *Schlup* standard requires "newly discovered" or simply "newly presented" evidence, lower courts are free to choose between the two methods for determining what constitutes "new" evidence in habeas claims based on the actual innocence exception. Requiring only "newly presented" evidence gives a habeas petitioner more latitude when submitting evidence to the court. In contrast, the "newly discovered" standard has the additional requirement of unavailability at the time of trial.[85] A comparison of the two standards by considering the precedent in this area, as well as the many policy concerns surrounding the writ of habeas corpus, indicates that the appropriate standard for evidence is the stricter "newly discovered" standard.

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81. *Id.* at 2077.

82. *Id.* at 2078; *see also* Nelson, *supra* note 48, at 236-37. The standard found in the AEDPA applies to successive petitions based on claims that were not fully developed in the lower courts, rather than procedurally barred claims based on actual innocence and supported with new evidence. *House*, 547 U.S. at 539.

83. *House*, 547 U.S. at 538 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

84. *Id.*

85. *See generally* Hubbard v. Pinchak, 378 F.3d 333 (3d Cir. 2004); Gomez v. Jaimet, 350 F.3d 673 (7th Cir. 2003).

A. Suggestions from Prior Decisions

The case law surrounding the actual innocence exception for procedurally barred habeas petitioners provides several hints as to which standard of evidence the *Schlup* Court intended to implement.

1. Justice O'Connor's Concurring Opinion in Schlup

In *Schlup*, Justice O'Connor filed a concurring opinion concluding that the majority's holding required "newly discovered" evidence rather than only "newly presented."[86] The 5-4 decision made O'Connor's vote a critical one.[87] O'Connor began her opinion by saying that she intended to explain what she believed the Court's holding meant.[88] According to her, the Court held that a habeas petitioner must present "newly discovered evidence of innocence" in order to meet the actual innocence exception requirements.[89] Her clarification of the standard requires petitioners to present evidence that had not been previously available to the defendant.[90]

O'Connor's concurrence is significant for two reasons. First, concurring opinions, especially in cases with a divided court, offer commentary on the majority decisions, and may potentially provide assistance to lower courts attempting to follow the decision.[91] Throughout her tenure on the Court, O'Connor wrote a number of concurring, as well as dissenting, opinions which eventually became

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86. Schlup v. Delo, 513 U.S. 298, 332-33 (1995) (O'Connor, J., concurring).

87. Griffin v. Johnson, 350 F.3d 956, 962 (9th Cir. 2003).

88. *Schlup*, 513 U.S. at 332.

89. *Id.* at 332-33.

90. *See id.*

91. *See* NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 55 (1996); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 783 (1990); Igor Kirman, Note, *Standing Apart To Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 (1995). *But see* County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) (arguing that a concurring opinion does not "take precedence over an opinion joined in its entirety by five Members of the Court" and that the majority went too far in referring to a concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), as the Court's opinion).

the majority position of the Court.[92] Furthermore, other Supreme Court cases have been decided by one justice when the Court was split.[93] In that respect, O'Connor's opinion in *Schlup* may be seen as "both an agent of stare decisis and an agent of change."[94] Lower courts should give her opinion a great deal of weight when interpreting the *Schlup* standard.

Second, Justice O'Connor was frequently an influential "swing" vote on the Court.[95] This position arguably gave her the ability "to exercise considerable power" over the Court's rulings.[96] Her influence over her colleagues on close cases, such as *Schlup*, lends support to the conclusion that her concurring opinion in that case should be viewed as the law with respect to new evidence for a habeas petition in federal court. If nothing else, her opinion may be seen as guidance for lower courts—guidance that the Seventh and Ninth Circuits failed to observe.

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92. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (embracing O'Connor's formulation of the "undue burden test"). O'Connor first suggested the "undue burden test" in a dissenting opinion in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting), and later employed the test in her concurring opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490, 522 (1989) (O'Connor, J., concurring); *see also Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring) (urging the Court to adopt a new test with respect to Establishment Clause cases). Her proposed "endorsement test" has been cited with approval by the Court in subsequent First Amendment cases. *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985). For further discussion on the influence of O'Connor's opinions in the areas of religion, reproductive rights and burdens, and racial communities and communities of interest, see MAVEETY, *supra* note 91, at 75-87, 91-104, 107-21.

93. Most notably, in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court's ruling turned on the decision of Justice Powell, even though no other justice agreed with his analysis regarding affirmative action in state medical school admissions.

94. Ray, *supra* note 91, at 783 (noting that concurring opinions "may propose future avenues for development of the law laid down by the majority").

95. *See* MAVEETY, *supra* note 91, at 28; Diane Lowenthal & Barbara Palmer, *Justice Sandra Day O'Connor: The World's Most Powerful Jurist?*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 211, 238 (2004); Carl R. Schenker, Jr., *'Reading' Justice Sandra Day O'Connor*, 31 CATH. U. L. REV. 487, 490 (1982). One commentator noted, "In her 22 years on the nation's highest court, Justice O'Connor has firmly established herself as the single most important voice on a nine-member tribunal that decides some of America's most difficult and politically contentious issues ...." Warren Richey, *As O'Connor Votes, So Tilts the Supreme Court*, CHRISTIAN SCI. MONITOR, June 30, 2003, *available at* http://www.csmonitor.com/2003/0630/p01s02-usju.html.

96. Lowenthal & Palmer, *supra* note 95, at 238 ("She may not [have been] at the exact ideological center of the Court, but she [was] close enough to play a key role, particularly on cases with fragile coalitions, and the bottom line is that most of the time, most of the other Justices agree[d] with her.").

2. Recognition of the Importance of O'Connor's Concurrence in Griffin v. Johnson

Ironically, the court in *Griffin* noted O'Connor's concurring opinion in *Schlup*, the fact that she cast a crucial vote in the decision, and that she clearly employed the term "newly discovered," rather than "newly presented."[97] The *Griffin* court went further to say that "[Justice O'Connor's] opinion could constitute *Schlup*'s holding."[98] The court recognized that in cases where the Supreme Court is fragmented and did not base its decision on a single rationale, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."[99] Following that reasoning, O'Connor's adoption of the "newly discovered" evidence standard is controlling. Her inclusion of the "newly discovered" requirement is a narrower holding than interpretations of the majority opinion that only call for "newly presented" evidence. Contrary to the recommendation of the magistrate judge and the guidance provided by O'Connor's concurring opinion, however, the *Griffin* court chose to adopt the "newly presented" standard for evidence based on its own case law.[100] In doing so, the court glossed over the distinction and provided little support for its reasoning.[101] Despite its persuasiveness, O'Connor's opinion and her adoption of the "newly discovered" standard have not been cited in any other Supreme Court case since *Schlup*.

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97. Griffin v. Johnson, 350 F.3d 956, 962 (9th Cir. 2003) (citing Schlup v. Delo, 513 U.S. 298, 332 (1995)).

98. *Id.*

99. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)); *see also* Marks v. United States, 430 U.S. 188, 193 (1977); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 810-14 (2005).

100. *Griffin*, 350 F.3d at 962. The court relied on its 2002 decision that held that "physical evidence excluded at trial could satisfy *Schlup*'s gateway requirement notwithstanding the fact that it was not 'newly discovered.'" *Id.*; *see also* Sistrunk v. Armenakis, 292 F.3d 669 (9th Cir. 2002).

101. *See Griffin*, 350 F.3d at 962.

3. Implications of the Courts' Emphasis on the Strictness of the Standard

When discussing the requirements to fall within the actual innocence exception, courts repeatedly refer to the strictness of the standard. The majority in *House v. Bell* characterized the *Schlup* standard as "demanding" and concluded that it "permits review only in the 'extraordinary' case."[102] Other courts have emphasized that the majority of petitioners who make actual innocence claims are not victorious.[103] The *Schlup* Court also said that new reliable evidence is "obviously unavailable in the vast majority of cases."[104] The difficulty in making a successful claim of actual innocence based on new evidence suggests that the Supreme Court meant "newly discovered" evidence. "Newly presented" evidence is a much easier standard for a petitioner to meet than "newly discovered" evidence. Although both standards require that evidence be reliable, the latter requires that the evidence was unavailable to the defendant at the time of trial.[105] There are a number of reasons that evidence might not be presented at trial, as opposed to the limited category of evidence that had been surpressed or not discovered at the time.[106] For instance, a defendant's own testimony, if not presented at trial, would meet the "newly presented" standard regardless of the reason for withholding the testimony. The numerous references by courts to the rigorousness of the *Schlup* standard therefore insinuate that the Court was referring to a standard that requires the new evidence proferred by a habeas petitioner to be "newly discovered."

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102. 547 U.S. 518, 538 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); *see also* Calderon v. Thompson, 523 U.S. 538, 540 (1998).

103. *Calderon*, 523 U.S. at 559 ("[I]n virtually every case, the allegation of actual innocence has been summarily rejected."); Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003) (noting that this exception applies only in the "'extremely rare' and 'extraordinary case' where the petitioner is actually innocent of the crime for which he is imprisoned" (quoting *Schlup*, 513 U.S. at 327)); Sellers v. Ward, 135 F.3d 1333, 1338-39 (10th Cir. 1998) (noting the "very high barriers" of the *Schlup* standard); Nelson, *supra* note 48, at 229-30 (explaining why claims of actual innocence are rarely successful).

104. *Schlup*, 513 U.S. at 324.

105. *See supra* note 59 and accompanying text.

106. See *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003), for an example of a case in which the prosecution suppressed the evidence.

4. The Specific Wording Used by the Court in Schlup

Finally, the specific words that the *Schlup* Court used to define the standard suggest that new evidence must be "newly discovered." The Court stated that actual innocence claims must be supported by *"new* reliable evidence ... that was *not presented at trial*."[107] The Court's use of both "new" and "not presented at trial" would be redundant if the Court intended the standard to be merely "newly presented." The Court simply could have said "evidence that was not presented at trial" if it had intended for "newly presented" to be the standard. The Court goes on to approve Judge Friendly's description of the standard:

> The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.[108]

This language indicates that the Court intended "newly discovered" to be the standard. Notably, Judge Friendly's examples do not include any that would fall under the category of "newly presented" evidence and refer only to evidence that has been "newly discovered." By definition, the examples mentioned, which included both evidence that had been wrongly excluded and evidence that became available after the trial, are types of evidence that were not available for the defendant to use during trial. The Court's endorsement of Judge Friendly's characterization of evidence implies that it intended "newly discovered" evidence to be the measure of evidence to be considered by a habeas court in an actual innocence claim.

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107. *Schlup,* 513 U.S. at 324 (emphasis added).

108. *Id.* at 328 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)).

B. Policy Concerns

Though the language used in *Schlup*, particularly in Justice O'Connor's concurring opinion, suggests that the Court intended to use the "newly discovered" standard, the lack of explicit grounds in the case law requires a consideration of the numerous policy concerns surrounding both standards.

Recently, the volume of habeas petitions in federal courthouses has increased greatly because of petitioners filing a large number of frivolous petitions for habeas relief.[109] After the implementation of the AEDPA, the number of habeas corpus petitions filed by state prisoners increased significantly.[110] This increase in petitions "has delayed the administration of justice, prevented the finalization of verdicts, frustrated federal-state relations, and undermined public confidence in the criminal justice process."[111]

While habeas petitions clearly drain society's resources, four other considerations further affect the determination of the type of evidence that a petitioner must present to a habeas court in order to make a successful actual innocence claim. These issues include the continuous advancement of technology and its use in the courtroom, the requirement of defense counsel to use due diligence, the general concern for finality and comity in criminal cases, and the basic interest in individual justice.

1. Technology in the Courtroom

Technology, and DNA testing in particular, is an extremely beneficial law enforcement tool, as well as a useful device in criminal cases.[112] Scientists continue to make state-of-the-art

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109. *See* Oh, *supra* note 43, at 2342.

110. JOHN SCALIA, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00.txt. From 1995 to 2000, there were 50 percent more habeas corpus petitions filed by state prison inmates. *Id.* During 2000, 58,257 petitions were filed in U.S. district courts. *Id.*

111. Oh, *supra* note 43, at 2342.

112. Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005); Matthew J. Mueller, Comment, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U. L. REV. 227, 250 (2006).

advances to improve the testing methods used for evidence in the courtroom.[113] DNA testing provides both the government and the defendant with an accurate method of identifying the origin of forensic evidence.[114] Today, defendants have greater access to DNA testing of physical evidence than ever before, providing them with the ability to utilize technology to prove their innocence.[115] As technology advanced, the legal system necessarily addressed the admissibility of scientific technologies and methodologies into evidence.[116] In 2004, Congress passed the Justice for All Act addressing postconviction DNA testing and preservation of biological evidence.[117] As an incentive for states to consider claims of actual innocence, the law provides that in order for a state to receive federal funding for DNA testing technologies and research, it must provide for postconviction DNA testing in various situations.[118] In addition, many state legislatures have proposed or enacted legislation similar to the Justice for All Act.[119]

With technology advances and greater access to DNA testing and other technological discovery tools, the chance that evidence will be unavailable at the trial level decreases. Because defendants have a greater opportunity to obtain exculpatory evidence through DNA testing or other forms of technology, before or during the trial, the *Schlup* standard should be restricted to only "newly discovered" evidence. Technological advances significantly diminish any need for a "newly presented" standard of evidence. If evidence that would support a claim of actual innocence has truly been missed and has resulted in the conviction of an innocent person, the evidence will surely qualify under the "newly discovered" standard should the case make it to this level in the postconviction process. Furthermore, if the overlooked evidence is forensic evidence, then postconviction DNA testing will likely be conducted based on either

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113. Mueller, *supra* note 112, at 250.

114. Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence,* 38 CAL. W. L. REV. 389, 391 & nn.1-2 (2002).

115. *See* Kenneth Williams, *Why It Is So Difficult To Prove Innocence in Capital Cases*, 42 TULSA L. REV. 241, 243 (2006).

116. Goldberg & Siegel, *supra* note 114, at 391-92.

117. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18, 28 & 42 U.S.C.).

118. 18 U.S.C. § 3600 (2006); 42 U.S.C. § 14136 (2000).

119. Mueller, *supra* note 112, at 256; *see, e.g.*, CAL. PENAL CODE § 1417.9 (West 2008).

a state or federal postconviction DNA testing statute.[120] If exculpatory evidence, whether forensic or otherwise, is available or should be available at the time of trial, the defense should be required to present the exculpatory evidence at trial, rather than waiting to use it during a federal habeas proceeding.

2. Counsel's Obligation To Use Due Diligence

If the petitioner in a habeas proceeding were required only to support his claim with "newly presented" evidence, then there would be less of an incentive to discover evidence at the trial level. Under the broader standard, a defendant could be assured that as long as the evidence was reliable, he could use it to support his actual innocence claim to the habeas court, thereby bypassing the state appellate processes. A "newly discovered" standard would prevent the defense from "sandbagging" or withholding constitutional claims in state proceedings in order to have them heard first in federal court.[121] A more restrictive standard makes certain that the defendant presents all of his evidence to the trial court, which is the most appropriate stage for factfinding.

There is a strong argument that a trial court is in a better position to examine evidence than a judge on habeas review.[122] Chief Justice Roberts recently noted in *House* that the trial court has the ability to "observe[] the witnesses' demeanor, examine[] physical evidence, and [make] findings" regarding the reliability of the petitioner's evidence.[123] As time goes by, witnesses may become unavailable, memories fade, and the risk of perjury increases.[124] Therefore, the best time for a court to review the testimony and

120. *See supra* notes 116-19 and accompanying text.

121. Murray v. Carrier, 477 U.S. 478, 491-92 (1986) ("Nor do we agree that the possibility of 'sandbagging' vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful.").

122. House v. Bell, 547 U.S. 518, 557 (2006) (Roberts, C.J., concurring in part and dissenting in part); *see also* Alldredge, *supra* note 24, at 1010; Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2340 (2007).

123. *House*, 547 U.S. at 557 (Roberts, C.J., concurring in part and dissenting in part). Chief Justice Roberts did not believe that new evidence should be taken at face value, but that a trial court should have the opportunity to examine its reliability. Nelson, *supra* note 48, at 240.

124. Alldredge, *supra* note 24, at 1010; *see also* Pettys, *supra* note 122, at 2340.

facts of a case is when the evidence is fresh.[125] Because the trial court is the proper place for review of the evidence, courts should adopt a standard that provides the greatest incentive for a defendant to present all available evidence at the trial level. The "newly discovered" standard would provide this incentive because it would exclude any evidence that was available and known to the defendant or his counsel at the time of trial. Defendants choosing not to present evidence during trial would run the risk of waiving their right to present the evidence in the habeas proceeding, and this danger precludes them from keeping important evidence from the trial court.

3. The Interest in Finality and Comity

In an earlier case, Justice Powell recognized that there are "limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment."[126] The Court in *Schlup* cited this opinion and specifically tied the miscarriage of justice exception to the petitioner's actual innocence in order to accommodate the balance of the societal interests of finality and comity with the interest of justice in these "extraordinary" situations.[127] Justice Harlan even concluded that both the individual defendant and society have an interest in the finality of a criminal case.[128] He claimed that the finality of a conviction will provide for a shift in focus from "whether a conviction was free from error" to "whether the prisoner can be restored to a useful place in the community."[129] Harlan's opinion also noted the importance of finality in developing rules governing habeas proceedings.[130]

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125. *See* Pettys, *supra* note 122, at 2340 ("[F]acts are optimally determined when the evidence is freshest ....").

126. Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986).

127. Schlup v. Delo, 513 U.S. 298, 322 (1995) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

128. Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

129. *Id.*

130. *Id.* at 25 ("It is with this interest in mind, as well as the desire to avoid confinements contrary to fundamental justice, that courts and legislatures have developed rules governing the availability of collateral relief.").

In addition to the Supreme Court, Congress has also expressed the value of finality in criminal cases,[131] and both bodies have developed tough procedural rules, making it more difficult for petitioners to file successful federal habeas claims.[132] Certainly, the passage of the AEDPA, with its rigid procedural requirements, reveals the significance that Congress places on finality in the criminal justice system.[133] If courts choose to adopt the "newly presented" standard for actual innocence claims, then the habeas petitions may be endless. The importance of finality would be severely undermined. The justice system should have a mechanism in place to prevent petitioners from filing an unlimited number of unsubstantiated or abusive petitions.[134] State prisoners have nothing to lose, making it more likely that they will file numerous habeas petitions, regardless of the merits of their claims.[135] Successive claims, particularly meritless ones, impose great costs on judicial resources.[136] Considering the paramount importance that the Court places on finality and conserving resources, it likely did not intend for petitioners to have endless opportunities to make claims of actual innocence. "Without finality, the criminal law is deprived of much of its deterrent effect" because individuals with endless opportunities to appeal their convictions are not as likely to fear the resulting criminal sentence.[137]

The judicial system would not be reliable or effective if a criminal defendant had the ability to challenge incessantly his incarcera-

131. Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 891-92 (1998) (noting that "Congress has chosen to limit the habeas remedy to cases where the state court decision is clearly wrong, resolving doubtful cases in favor of the finality of the judgment").

132. Pettys, *supra* note 122, at 2361.

133. *See generally* 28 U.S.C. § 2254 (2000).

134. The Court in *Schlup* distinguished between successive petitions and abusive ones. Schlup v. Delo, 513 U.S. 298, 318 (1995). Successive petitions raise "'grounds identical to those raised and rejected on the merits on a prior petition.'" *Id.* at 318 n.34 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (plurality opinion)). Abusive petitions are "where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that 'disentitle[s] him to the relief he seeks.'" *Id.* at 318-19 (quoting Sanders v. United States, 373 U.S. 1, 17-19 (1963)).

135. Oh, *supra* note 43, at 2343; *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) (noting that state prisoners "have everything to gain and nothing to lose").

136. *See* Alldredge, *supra* note 24, at 1010.

137. Teague v. Lane, 489 U.S. 288, 309 (1989).

tion.[138] Procedural rules are a vital and necessary method for "ensuring that criminal litigation proceeds steadily toward closure."[139] A "newly discovered" standard allows courts to achieve finality, while also ensuring that those petitioners who are actually innocent receive a genuine opportunity for habeas relief.

Comity and federalism go hand in hand with the interest of finality in criminal cases.[140] States are entitled to finality because it gives them the ability to enforce their laws.[141] When state prisoners petition federal courts for a writ of habeas corpus, questions of comity inevitably arise. The right to file a habeas petition repeatedly presents conflicts between federal and state courts, more so than any other right guaranteed by the American legal system.[142] This right has been called an anomaly because of the ability of federal judges to invalidate the decisions of a state court without giving them preclusive effect.[143] Adopting a narrower standard for the evidence that petitioners can use to support their actual innocence claims may alleviate some of the tension that habeas petitions create. Employing the "newly discovered" standard for evidence limits federal courts' ability to review state court decisions because it prohibits petitioners from filing federal habeas petitions based on the actual innocence exception with nothing more than "newly presented" evidence supporting their claim.

4. The Ever-Present Interest in Justice

Finality and federalism are important considerations when determining the standard for evidence on a claim of actual innocence, but the Supreme Court also has recognized the importance of preventing the execution or long-term incarceration of an innocent individual.[144] The "newly presented" standard for evidence provides slightly more insurance that a truly innocent individual will not be

138. *Id.*

139. Pettys, *supra* note 122, at 2363.

140. Calderon v. Thompson, 523 U.S. 538, 555 (1998) ("Finality serves as well to preserve the federal balance.").

141. *Id.* at 556.

142. Eric Seinsheimer, Dretke v. Haley *and the Still Unknown Limits of the Actual Innocence Exception*, 95 J. CRIM. L. & CRIMINOLOGY 905, 907 (2005).

143. *Id.*

144. *See* Schlup v. Delo, 513 U.S. 298, 324-25 (1995).

executed or incarcerated. Under the "newly presented" standard, petitioners would have more opportunities to make claims of actual innocence.[145] In that case, the "newly presented" standard might be more apt at protecting individuals who are actually innocent of the crime for which they have been convicted. Based on a broader interpretation of the new evidence requirement, a "newly presented" standard would plausibly allow more claims to pass through "the *Schlup* gateway."[146]

Though the "newly presented" standard for evidence is the broader interpretation of *Schlup*'s holding, the slight advantage that it gives state prisoners does not outweigh the costs of a wider gateway. First of all, the majority of petitioners who are actually innocent will meet the cause and prejudice standard to bypass the procedural bars.[147] The fear of convicting innocent individuals is further reduced by the presumption that the state court verdict is ordinarily correct.[148] This proposition stems from the constitutional rights guaranteed to a defendant during trial, as well as the fact that a jury of peers determines the defendant's guilt.[149] The requirement that a petitioner must first exhaust his state remedies ensures that his case will proceed through the trial, the direct appeal, and state postconviction review before reaching the federal habeas court.[150] Criminal defendants, therefore, have many safeguards to ensure that they are not wrongly convicted.[151] In addition, habeas corpus relief is not the final opportunity for incarcerated prisoners and individuals on death row.[152] After the Supreme Court denied habeas relief to the petitioner in *Herrera*, for example, Justice Scalia noted that the petitioner could still file for executive clemency under Texas law.[153] Scalia further stated, "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system."[154] With executive clemency available as a final

145. *See supra* notes 102-05 and accompanying text.
146. Griffin v. Johnson, 350 F.3d 956, 961 (9th Cir. 2003).
147. Dretke v. Haley, 541 U.S. 386, 394 (2004).
148. *See* Alldredge, *supra* note 24, at 1010.
149. *Id.*
150. *Id.* at 1009.
151. *Id.* at 1007.
152. Berg, *supra* note 47, at 145.
153. Herrera v. Collins, 506 U.S. 390, 415 (1993) (Scalia, J., concurring).
154. *Id.*

safeguard for petitioners, courts need not adopt a standard for new evidence that would allow potentially endless habeas corpus petitions.

IV. INSIGHT FROM STATE LAW

Each state allows convicted prisoners some form of relief based on "newly discovered" evidence.[155] Many state legislatures have also enacted, or at least debated the enactment of, laws addressing the possibility of postconviction claims of actual innocence.[156] A number of these states' laws suggests that "newly discovered" evidence is a better standard than the broader approach of "newly presented" evidence.[157] For example, when considering these postconviction laws, both Virginia and Florida legislatures inserted the phrase "newly discovered" into their respective legislation.[158] Virginia's law suggests that it would not widen the actual innocence exception to include "newly presented" evidence.[159] In 2002, Virginia put to a referendum the question of whether the state supreme court could consider actual innocence claims without the requirement that the claim first be filed in a lower court.[160] The amendment stated that this review would concern only those cases in which an individual convicted of a felony is able to prove actual innocence through *newly discovered* evidence or DNA evidence.[161]

Florida has also shown its approval of the "newly discovered" standard by proposing a bill that would remove any time limit on petitions based on actual innocence if the new evidence "could not have been previously discovered by the exercise of due diligence."[162] Additionally, California allows petitioners to make claims based on

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155. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 659 (2005). *See generally* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:1-1:9 (2007).

156. Mueller, *supra* note 112, at 256.

157. *Id.* at 259 nn.207 & 209.

158. *Id.* at 259 & n.209.

159. VA. CODE ANN. § 19.2-327.1 (West 2007).

160. Mueller, *supra* note 112, at 259.

161. *Id.*

162. *Id.* at 259 n.209.

newly discovered evidence,[163] but courts in California limit the postconviction claims to challenges based on "newly discovered" evidence that would significantly alter the prosecution's case.[164] The movement of states to adopt laws that allow for habeas relief on an actual innocence claim with the introduction of *newly discovered* evidence lends support to that standard's superiority over the "newly presented" standard.

Despite the fact that these three states provide but a small sample of the manner in which states deal with actual innocence claims, the plain language of the proposed laws and the treatment of claims based on actual innocence bolster the argument that courts should use the "newly discovered" standard for federal habeas petitions based on the actual innocence exception to procedurally barred claims.

V. THE SOLUTION: UNIFORM ADOPTION OF THE "NEWLY DISCOVERED" STANDARD

The Supreme Court cautioned that lower courts should exercise restraint when dealing with exceptions to the procedural default doctrine by expanding the exceptions only when necessary.[165] In dealing with federal habeas corpus jurisdiction, courts should not allow habeas claims based on the actual innocence exception to include petitions that are only supported with "newly presented" evidence. In other words, the actual innocence gateway should not be expanded to include "newly presented" evidence. Instead, habeas petitioners should be required to present "newly discovered" evidence that was not available or could not have been discovered through due diligence at the time of the trial.

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163. Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1453 & n.81 (2007) (citing CAL. PENAL CODE § 1473(a) (West 2006)).

164. *See, e.g.*, *In re* Clark, 855 P.2d 729, 739 (Cal. 1993). The requirements in California seem to be narrower than the federal requirements because "the courts have signaled that newly discovered evidence will not warrant habeas relief unless it thoroughly undermines the entire structure of the prosecution's case, and such evidence undermines the prosecution's case only if it is conclusive and 'points unerringly to innocence.'" Medwed, *supra* note 163, at 1454 (quoting *In re* Weber, 523 P.2d 229, 243 (Cal. 1974)).

165. *See* Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (citing Dretke v. Haley, 541 U.S. 386, 388 (2004)).

Though the case law in this area does not explicitly embrace the "newly discovered" standard, the language employed by Justice O'Connor in *Schlup* strongly suggests that the Court not only intended the narrower approach, but that lower courts should be prohibited from allowing actual innocence claims based only on "newly presented" evidence. Rather than glossing over the distinction between the two standards, as the Ninth Circuit in *Griffin v. Johnson* did, federal courts should require petitioners to present "newly discovered" evidence. With lives and freedom at stake, there should be no room for confusion regarding the requirements to petition a federal court for a writ of habeas corpus.

Moreover, an evaluation of the many policy concerns surrounding the writ indicates a crucial need for a uniform adoption of a "newly discovered" standard of evidence among the circuits. In particular, the narrower standard is the best way to achieve the critical balance of the "societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[166] Courts continually struggle with maintaining a balance among these concerns, but the imposition of a "newly discovered" standard will undoubtedly help them to do so.

By the time a petitioner reaches the habeas stage of his postconviction proceedings, he has been convicted of a crime by a jury of his peers. Accordingly, the petitioner is no longer entitled to the presumption of innocence.[167] The higher up the postconviction process, the greater the number of chances the petitioner has had to demonstrate his innocence. The more chances afforded a petitioner to appeal his sentence, the smaller the risk that he has been wrongly convicted. In the rare cases like Beverly Monroe's,[168] the judicial system is likely to detect a wrongful conviction before the need to petition a federal court for review because of the numerous constitutional and statutory safeguards available in criminal cases. Moreover, executive clemency, the ultimate safeguard, will always be a possibility for the truly innocent prisoner.

Conversely, the deeper into the postconviction process, the greater the need for finality, comity, and conservation of judicial

166. Schlup v. Delo, 513 U.S. 298, 324 (1995).
167. *Id.* at 326; Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002).
168. *See supra* notes 2-6 and accompanying text.

resources. As these needs increase, the risk that justice will not be served decreases. At some point, in order to achieve a balance between these concerns, the gateway for endless appeals and petitions must close. For claims of actual innocence, that point can be clarified by an adoption of the "newly discovered" standard of evidence. This adoption leaves the gateway open wide enough to maintain the key balance of all the various interests involved, including the ability for an actually innocent petitioner to pass through the gate in order to argue his constitutional claim.

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