HABEAS CORPUS REFORM ACT: TRUE REFORM OR SUSPENSION OF THE GREAT WRIT IN THE UNITED STATES OF AMERICA

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Abstract

The Great Writ is a name often associated with judicial proceedings seeking a writ of habeas corpus in the United States (hereafter, the writ). For those convicted of crimes in the local state courts, the writ was an important safety net against official prejudices and wrongful convictions. The issue of wrongful convictions has moved to the forefront with DNA testing. The writ's application in criminal justice cases changed with the 1996 passage of the Habeas Corpus Reform Act, which curtailed much of the power the writ once held. This reform occurred prior to learning from DNA testing how pervasive wrongful convictions may be. This article analyzes the significant impact this reform has had on the ability of those in state custody to obtain relief through this avenue. The authors suggest that it is important to learn from the unintended consequences of such "reforms" so as not to repeat these mistakes.

I Introduction

THE GREAT Writ is a name often associated with judicial proceedings seeking a writ of habeas corpus. Habeas corpus has historically been one of the most important underpinnings of the criminal justice system, helping to assure the fair and equitable treatment of individuals accused of crimes in the United States. Its application has been a last resort effort for many who were charged with crimes under federal or state laws, but who had not or could not obtain impartial treatment of their cases by the lower courts. For those convicted of crimes in the State courts, the Great Writ was an important safety net against official prejudices. This all changed with the 1996 passage of the Habeas Corpus Reform Act, a law which has systematically dismantled much of the power the Great Writ once held.[1]

II History of Habeas Corpus

The term "habeas corpus" is a Latin term meaning "to bring forth the body". Originally, this writ was an early form of arrest warrant, being used to compel individuals to

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1 While much of the discussion in this article focusses on those convicted in State courts, these same restrictions and limitations also apply to those convicted in federal courts. See, L.W. Yackle "A Primer on the New Habeas Corpus Statute"44 *Buffalo Law Review* 1-46 (1996); see also, *Townsend* v. *Davis*, 254 F.Supp.2d 978, 981 (U.S.D.C., W.D. Tn, 2003)(discussing AEDPA's amendments to federal habeas corpus for federal prisoners), and, *Medberry* v. *Crosby*, 351 F.3d 1049, 1058 (11th Cir, 2003)(AEDPA's limitations on both 2254 and 2255 cases).

come forward to answer charges[2]. Over time though, this writ has evolved into what more than one commentator has described as a fundamental protection for the innocent.[3] By the time the United States was founded, the writ was such an integral part of the justice system that the Constitution did not provide for its issuance, but specifically prohibited its suspension except in times of war or invasion[4].

Despite this distinguished history, the writ's beginnings in American jurisprudence was rather limited. As noted, the authority to issue the writ was not included in the Constitution. It was not until the passage of the Judiciary Act of 1789 that the courts of the United States were given specific authority to issue writs of habeas corpus[5]. That Act limited the court's review to cases involving only those in the custody of the United States.[6] There were also limits to the types of claims which would be considered by the courts. Basically, the courts could review claims that the lower court lacked jurisdiction or the detention was by the executive without proper legal process[7]

This statutory provision was not changed until the Judiciary Act of 1867, which sought to reinstate habeas corpus after its suspension by Congress in 1863 due to the Civil War. Due to concerns over how State authorities would enforce the Restoration Acts passed by Congress[8], this Act extended coverage to all people held in custody, including those being held in the custody of or pursuant to a judgment issued in a State court. In addition, this Act expanded the use of the writ to provide relief to anyone held in violation of the Constitution or laws of the United States.[9] The only notable amendments to the Act of 1867, occurred in 1948[10] and 1966[11]

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2 E. Jenks, "The Story of the Habeas Corpus", 18 *L.Q. REV.* 64, 65 (1902).

3 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 96 (1807).

4 US Constitution, Article I, Section 9, clause 2, which states: "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."

5 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82;

6 *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 448-49 (1806); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17 (1795).

7 *McClesky* v. *Zant*, 499 U.S. 467, 478, 111 S.Ct. 1454,113 L.Ed.2d 517 (1991)

8 C.D. Forsythe, "Historical Origins of Broad Federal Habeas Review Reconsidered", 70 Notre Dame Law Review 1079, 1104 (1995).

9 Act of 1867 (sess. ii, chap. 28, 14 Stat. 385), authorizes courts to grant habeas relief "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States."

10 In 1948, Congress added in the requirement that the petitioner have exhausted their state remedies

11 Pub. L. No. 89-590, 80 Stat. 811 (1966); Pub. L. No. 89-711, 80 Stat. 1105 (1966). Moved the habeas statutes to new provisions—28 U.S.C. §§ 2241, 2244 and 2254—which authorized federal courts to grant writs to state prisoners who were "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241.

While the statutes have remained the same, the use of habeas corpus has been greatly expanded over the years through judicial decision. This occurred mainly as more and more of the Bill of Rights were applied to the State criminal proceedings through the 14th Amendment.

By the mid-to-late 1960s, the writ had reached the apex of its importance, with relief being available to address state convictions in violation of the constitutional rights of the accused as such were, in the words of Justice William Brennan, "so fundamentally defective" that keeping one confined under it is constitutionally intolerable"[12]

III *Sawyer* v. *Whitley* & *Schlup* v. *Delo*

Over the years, it has been claimed that the writ interferes with finality of proceedings, is abused in order to avoid punishment, particularly in death penalty cases, and, when used to review the convictions of those in State custody, amounts to a federal intrusion on the inner workings of State courts.[13] For the most part, these issues were addressed by amendments, such as the 1948 addition of the requirement that a state prisoner exhaust state remedies before seeking federal relief. This gives the States the opportunity to address the claimed violation in the first instance, with exceptions only for fundamental constitutional violations.[14] To address claims of delay and lack of finality, bans against successive or abusive writs were added into the habeas jurisprudence.[15] In *Stone* v. *Powell* [16], the Supreme Court went so far as to prohibit federal courts from reviewing 4th Amendment search and seizure claims if the state provided a full and fair hearing on the claim. This was seen as the beginning of the dismantling of habeas corpus protection.[17] These restrictions continued to increase as more conservative judges were appointed to the Supreme Court.

It was in an effort to further the concept of finality which led the Supreme Court to conclude that a habeas petitioner could not bring a claim in federal court where the claim was not raised within the proper context of the state procedures, unless they could show "cause" for this default and "prejudice" resulting from the error.[18] Absent this showing, federal courts were prohibited from hearing the claims that had been defaulted, or were being raised in a second or successive petition for the first time.[19]

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12 *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 836, 9 L.Ed.2d 837 (1963).

13 L.W. Yackle "A Primer on the New Habeas Corpus Statute"44 *Buffalo Law Review* 1-46 (1996).

14 *Supra* note 12

15 *Supra* note 7.

16 *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)

17 Abner Mikva,"Habeas Corpus And the Oklahoma City Bombing*"* 48 *DEC Fed. Law*. 30 (2001).

18 *Wainwright* v. *Sykes*, 433 U.S. 7297, S.Ct. 2497, 53 L.Ed.2d 594 (1977).

19 *Kuhlmann* v. *Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).

The creation of the procedural default rules were heralded by those who sought to restrict habeas corpus as a good first step in areas of finality and comity.

In keeping with the writ's purpose of protecting the innocent, a judicial exception to these restrictions was created which allowed the courts to hear claims where failing to do so would result in a "miscarriage of justice".[20] While this exception has its roots in the statutory language which existed prior to the 1966 amendments, it became clearly defined by the Supreme Court in 1986 as the "actual innocence" exception.[21] As stated in *Kuhlmann*, this exception originally required that the petitioner demonstrate by new and probative evidence, a colorable claim of factual innocence. That same term, the Supreme Court elaborated further on this exception as a constitutional error has "probably resulted in the conviction of one who is actually innocent."[22] To obtain the benefit of this exception, the prisoner is required to convince the habeas judge that there was a fair probability that the jury would have had a reasonable doubt concerning the guilt of petitioner.[23] This focus on actual innocence, as opposed to legal innocence, was what led the Supreme Court to reject the application of this exception to a claim challenging a sentence rather than the underlying finding of guilt.[24] In *Smith* v. *Murray*, the Supreme Court was asked to apply the miscarriage of justice exception to a claim that psychiatric testimony had been improperly admitted during the sentencing phase of the capital trial. Finding that the testimony was unrelated to innocence, the exception did not apply in that case.[25] Such language would support the idea that, under the right circumstances, one could be factually innocent of a death sentence; i.e., that the facts are such that the individual is not eligible to receive a sentence of death.[26]

This remained the law regarding this exception until 1992, when the case of *Sawyer* v. *Whitley*[27] came before the Supreme Court. After a night of drinking in 1979, Robert Sawyer and Charles Lane brutally murdered Frances Arwood in the Louisiana home Sawyer shared with his girlfriend, Cynthia Shano.[28] During his trial, Sawyer relied on a defense of "toxic psychosis."[29] In support of a sentence of death, the jury found three aggravating circumstances and no circumstances in mitigation.[30] Sawyer's conviction

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20 *Supra* note 19.

21 *Ibid.*

22 *Murray* v. *Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

23 *Kuhlmann*, 477 U.S., at 454, 455, n. 17, 106 S.Ct., at 2627, 2627, n. 17.

24 *Smith* v. *Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

25 *Ibid.*

26 *Supra* note 24.

27 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

and sentence were subsequently upheld by the Louisiana Supreme Court.[31] Following denial of his first habeas corpus petition, Sawyer filed a second petition raising additional grounds for relief.[32] After the district court found this filing to constitute a successive petition and an abuse of the writ, Sawyer argued that his claims should nonetheless be reviewed under the miscarriage of justice exception.[33] On appeal, the Fifth Circuit was asked to address the question of "what it means to be actually innocent of the death penalty" in order for the court to reach the merits of a successive or abusive claim.[34] After reviewing *Kuhlmann*, *Murray*, *Smith*, and other related precedents, the appellate court determined that Sawyer needed to demonstrate that, under all available evidence, a fair probability existed that the jury would not have found the facts needed to support either of the aggravating circumstances on which his death sentence rested.[35] Finding that none of the evidence Sawyer asserted sufficiently challenged the factual basis for the charges against him nor the aggravating circumstances found by the jury, The Fifth Circuit rejected Sawyer's claims. The United States Supreme Court granted certiorari to review the appropriateness of the standard adopted by the Fifth Circuit to consider Sawyers successive and abusive claims.[36]

The Supreme Court began its analysis with the observation that in the typical noncapital case, a determination of what is meant by "actual innocence" is easily determined.[37] Such cannot be said for this concept as it applies to the imposition of a sentence of death, where the underlying guilt is not challenged. Given these difficulties, the Supreme Court was seeking to create a standard similar to the *Murray* standard which could be followed and applied by the lower courts in the limited time frames often presented in successive petitions by capital defendants.[38] For its part, an amicus brief filed by the Solicitor General argued in favor of a strict standard that would have limited the inquiry solely to evidence which undermined the elements of the crime itself. The Supreme Court felt that this was too strict a standard and did not give meaning to the idea of being innocent of a death sentence. To the extent that it called for a weighing of aggravating and mitigating circumstances, the Supreme Court also rejected the

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31 *Supra* note, 27.

32 *Ibid.*

33 *Sawyer* v. *Whitley*, 945 F.2d 812, 817 (5th Circuit, 1991).

34 *Ibid.*

35 *Id.* at 822. One aggravating circumstance, that Sawyer had a prior murder conviction, was overturned in the initial appeals process. This left only the aggravating circumstances of murder in commission of aggravated arson and in an especially heinous or cruel manner.

36 *Id. at* 505

37 *Id. at* 340-341.

38 *Ibid.* Noting that many successive petitions are brought just before a scheduled execution, giving the courts very little time in which to decide the case

standard urged by the petitioner. Instead, the Supreme Court held that the inquiry should focus solely on whether the evidence established the presence of conduct or aggravating factors which made the petitioner eligible for the death sentence. Thus, they defined this sensible approach as being whether the petitioner had "shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty."[39] Under this newly crafted standard, the Supreme Court found that petitioner's evidence was insufficient to establish that he was innocent of a death sentence because it did not challenge the factual findings making him eligible to receive a sentence of death. In doing so, the Supreme Court affirmed the lower court ruling.

While they denied the petitioner relief in that case, the overall decision in *Sawyer* was predictable. Despite the increase in conservative justices on the Supreme Court, there was still a reluctance to completely eliminate federal habeas corpus as an avenue for relief. So, it was not surprising when the Supreme Court created an avenue for capital defendants to challenge their sentence. However, no one expected the lower courts to begin applying this standard to claims of actual innocence of the crime itself. Yet this is what occurred.

The *Sawyer* decision was handed down at the end of January 1992. Within two weeks, the case of Robert McCoy would be submitted to the 8th Circuit Court of Appeals.[40] McCoy had been convicted of rape in an Arkansas court.[41] Following affirmance of his conviction and the denial of postconviction relief by the State courts, McCoy filed for habeas corpus in the federal district court.[42] That petition was also denied, without an evidentiary hearing. Finding that there were unresolved factual issues on McCoy's claim that counsel provided ineffective assistance by not introducing evidence concerning a key that had been given to McCoy by the victim, the 8th Circuit remanded the case back to the district court for a hearing.[43] At that hearing, McCoy also introduced evidence that the window which was the point of entry under that State's theory of the case had not been damaged.[44] The district court found this claim had been procedurally defaulted when McCoy failed to raise it earlier before the State courts. Thus, under normal circumstances, the federal courts would be prevented from addressing the merits of this claim.[45] However, it was further found that this evidence,

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39 *Id.* at 348.

40 *Mc Coy* v. *Lockhart*, 969 F. 2d 649 (8th Cir. 1992).

41 *Id.* at 650.

42 *Supra* note 40.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

combined with that of the key was sufficient to meet the probably innocent standard set forth in *Murray* v. *Carrier* and therefore, failure to address these claims would amount to a miscarriage of justice.[46] The appeal from this decision went before the 8th Circuit shortly after the Supreme Court's decision in *Sawyer* v. *Whitley*.

After first acknowledging the ruling of the lower court, the 8th Circuit went on to observe that the Supreme Court, in *Sawyer*, had announced a new standard to apply in considering the miscarriage of justice exception to procedural default rules. In the opinion of the 8th Circuit, even though the Supreme Court was considering a claim that Sawyer was innocent of his death sentence, the standard would apply equally to claims of innocence of the underlying crime. The Court's rationale for this extension was two-fold; 1) the courts in general had always applied the same standard to both types of claims, and 2) in deciding *Sawyer*, the Supreme Court had applied the new standard to both Sawyer's *claims regarding sentence* and his challenges to the underlying conviction.[47] Thus, the case was remanded to the district court to give McCoy the opportunity to demonstrate, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner [guilty] under the applicable state law."[48] In a subsequent decision, the 8th Circuit, sitting en banc, cited this new application of the *Sawyer* standard with approval.[49] Other circuits likewise began applying the standard announced in *Sawyer* to challenges to findings of guilt.[50] In fact, only two circuits maintained separate standards depending on whether the claim of actual innocence related to the guilt phase or sentencing.[51]

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46 *Supra* note 45 at 650-651.

47 *Id.* at 651.

48 *Id.* at 652.

49 See, *Cornell* v. *Nix*, 976 F.2d 376 (8th Cir.1992) (en banc), cert. denied, 507 U.S. 1020, 113 S.Ct. 1820, 123 L.Ed.2d 450 (1993).

50 See, Nixon, J., Hawke, S. & Jung, F. (1994). Brief for Respondent, Schlup v. Delo, No. 93-7901, United States Supreme Court, Washington, D.C.; citing, *Washington* v. *Tames*, 996 F.2d 1442, 1447 (2d Cir. 1993) (applying Sawyer to guilt phase default); *Hull* v. *Freeman*, 991 F.2d 86, 91 n. 3 (3d Cir. 1993) (applying Sawyer to guilt phase claims in dicta); *Spencer* v. *Murray*, 5 F.3d 758, 766-67 (4th Cir. 1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1208 (1994) (applying Sawyer to discovery claim); *Spencer* v. *Murray*, 18 F.3d 229, 236 (4th Cir. 1994) (holding that Sawyer is not limited to penalty phase errors); *Kirkpatrick* v. *Whitley*, 992 F.2d 491, 495 (5th Cir 1993) (remanding cause to district court to apply Sawyer standard to guilt phase issues); *Verdin* v. *O'Leary*, 972 F.2d 1467, 1483 (7th Cir. 1992) (remanding cause to district court to apply Sawyer standard to guilt phase issues); *Clark* v. *Lewis*, 1 F.3d 814, 824-25 (9th Cir. 1993) (applying Sawyer to guilt phase issues); *United States* v. *Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) (applying Sawyer to 2255 guilt phase issues); *Ballinger* v. *Kerby*, 3 F.3d 1371, 1375 (10th Cir. 1993) (applying Sawyer to Brady claim impeaching the witnesses in guilt phase issue).

51 See, e.g., *Campbell* v. *Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992), cert. denied, 114 S. Ct. 1337 (1994); *Montoya* v. *Collins*, 988 F.2d 11, 13 (5th Cir.), cert. denied, 113 S. Ct. 1630 (1993).

The problem with this standard is that it is incredibly high. Some have even said that in the context of a challenge to the finding of guilt, this was an impossible standard to meet.[52] It is so stringent that the Texas Court of Criminal Appeals once ruled that even DNA evidence which excluded the defendant as the source of semen found in a rape victim was insufficient to show the defendant's innocence by clear and convincing evidence, given the dubious circumstantial evidence presented at trial. Others have argued that it goes against the well-developed body of capital sentencing case law by precluding consideration of evidence in mitigation.[53] It was the stringency of the *Sawyer* standard, when applied in the context of one claiming actual innocence of the crime charged, that led the Supreme Court to accept the case of Lloyd Schlup.

In 1984, Schlup was a prisoner at the Missouri State Penitentiary when a black prisoner named Arthur Dade was stabbed to death by three white assailants.[54] The only evidence linking Schlup to the murder was the testimony of two correctional officers who claimed they had seen the murder, one of whom apprehended a codefendant, Rodnie Stewart, at the scene. Since a surveillance video showed Schlup entering the dining hall shortly before officers were seen responding to the disturbance, the key issues at Schlup's trial centered on exactly how soon after the incident the disturbance alert went out.[55]

Schlup was convicted and sentenced to death.[56] His conviction and sentence were upheld on appeal, during state post conviction proceedings, and through his first federal habeas corpus petition.[57] With the help of new counsel, Schlup then brought a second federal habeas petition asserting his innocence, claims of ineffective assistance of counsel for failing to interview *alibi* witnesses, and that the prosecution had failed to disclose important evidence regarding the timing of the disturbance call.[58] Relying on the standard set forth in the *Sawyer* decision, both the district court and the Court of Appeals for the Eighth Circuit denied this second habeas corpus petition.[59] In applying *Sawyer*, the Eighth Circuit maintained its view that as long as evidence from Schlup's trial remained uncontradicted, Schlup had not met the clear and convincing evidence standard set forth in *Sawyer*.[60] The Supreme Court then granted review to specifically

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52 Pettys, T.E. (2007) Killing Roger Coleman: Habeas Finality, and The Innocence Gap, 48 *William and Mary Law Review* 2313 (May, 2007)

53 K.T. Daniel, "*Sawyer* v. *Whitley*: The Deadly Game of Procedures In Death Penalty Cases" , 61 *UMKC Law Review* 599 (Spring, 1993)

54 *Schlup* v. *Delo*, 513 U.S. 298 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Schlup* v. *Delo*, 11 F.3d 738 (1993).

60 *Id.* at 743.

"consider whether the Sawyer standard provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent."[61]

The Supreme Court would begin its analysis of this issue by distinguishing Schlup's claim of innocence from the type the Supreme Court previously rejected in *Herrera* v. *Collins*[62] Basically, *Herrera* raised a free-standing claim of actual innocence, where Schlup was raising innocence as a gateway issue to allow the federal courts to hear claims of ineffective assistance of counsel and the prosecution's withholding favorable evidence.[63] As a result of this difference, the assumptions about the validity of the conviction presented in *Herrera,* which stemmed from an error-free trial, did not apply in the consideration of Schlup's claims.[64]

However, Schlup faced procedural issues in presenting these claims to the federal courts. As noted, this proceeding was Schlup's second petition for habeas corpus in the federal court.[65] In addition, some of the claims Schlup was seeking to raise were the same or similar to those raised in his first habeas petition, particularly his claims of ineffective assistance of trial counsel. Schlup was asking the court to reconsider this claim in light of additional evidence not presented or considered in those prior proceedings.[66] He also raised additional claims which the Court of Appeals felt he could have raised previously. Since Schlup could not show cause and prejudice for these procedural shortcomings, it was necessary for him to show that failure to hear his claims would result in a fundamental miscarriage of justice.[67] The question in this case was just how much evidence Schlup needed to present to demonstrate that he was the victim of a miscarriage of justice.

Despite actions by the Supreme Court to limit habeas corpus throughout the late 1980s and 1990s on principles of federalism, comity, and finality, the Court still recognized that habeas corpus, by its nature, provides an equitable remedy.[68] As such, there are cases when these principles must yield in the name of justice. Specifically, the Supreme Court restated the long-recognized concept that there is a "fundamental value determination" our society places within the criminal justice system that is better

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61 R.C. Stacy II, "*Schlup* v. *Delo*: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion", 74 *N.C. L. Rev*. 897, 904 (1996)

62 *Herrera* v. *Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

63 *Supra* note 54

64 *Ibid.*

65 *Id.* at 307.

66 *Id.* at 308.

67 *Id.* at 314-315.

68 *Id.* at 319.

to let many guilty people go free than it would be to imprison one innocent person.[69] In other words, the protection of the innocence is a quintessential component of the miscarriage of justice exception. This is an individual interest which would not be served by the more exacting standard set forth in *Sawyer*. Rather, a proper balancing of this individual interest and the State interests in finality of its judgments, which has underscored the Supreme Court's cases limiting habeas corpus, is best served by a standard which requires a petitioner to show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[70]

Having crafted this more lenient standard to be applied in cases where a petitioner is seeking to use a claim of innocence as a gateway to present barred claims, the Supreme Court then turned to what level of proof was necessary to satisfy this new standard.[71] While not as high as the *Sawyer* standard of proof, this "more likely than not" standard did require something greater than that needed for mere prejudice.[72] With its focus on the "innocence" of the petitioner, the reviewing court on a habeas petition should look at all available evidence, including that presented at trial, that which may have been excluded, and any new evidence presented by the petitioner.[73] To constitute new, this evidence must not have been presented at trial, be reliable, and could include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[74] After reviewing all of this evidence, the federal court must then determine if the petitioner has successfully shown that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."[75] Under these standards, the Supreme Court remanded Schlup's case to the Court of Appeals with instructions for them to remand the case to the District Court for consideration of Schlup's evidence under this more lenient standard.[76]

IV Habeas Corpus Reform, 1996

As was noted by Edward Freidman, by 1995, it appeared that federalism and finality had surpassed fairness in importance when considering a State prisoners request for habeas relief, at least in rhetoric. However, an analysis of Supreme Court case decisions

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69 There are those in society that no longer feel this way though; See, E. van den Haag, "The Ultimate Punishment: A Defense" 99(7) *Harvard Law Review* 1662 (1986). (The execution of a few innocent people is acceptable as long as guilty are executed).

70 *Id.* at 327.

71 *Ibid.*

72 *Ibid.*

73 *Id.* at 327-328.

74 *Id.* at 324.

75 *Id.* at 329.

76 *Id.* at 332.

through the early 1990s showed only a small amount of progress towards restricting habeas corpus relief for State prisoners. This led some legislators to support their calls for reform of habeas corpus laws because the courts were not acting quickly enough to limit habeas corpus appeals, primarily by inmates under sentences of death.[77]

Into this backdrop of development dropped a number of events that moved the efforts to limit habeas corpus from the Supreme Court to the political circle. It began when then Chief Justice William Rehnquist formed the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the Powell Commission), which recommended severe restrictions on the ability of federal courts to hear habeas petitions by State prisoners. While not successful in getting them passed by Congress that year, it was clear they were not going away. Not with a very conservative Congress taking office in 1994. Then in April 1995, Timothy McVeigh set off a truck bomb in Oklahoma City which killed 168 people and destroyed the Murrah Federal Building. Before McVeigh was even caught, a group of families of the victims were brought to the White House where they told then President Bill Clinton that habeas corpus reform was the "most important thing he could do for them."[78] As a result, President Clinton agreed to sign whatever habeas reform bill Congress sent him.[79] This was seen by some as one of the greatest flip-flops of his presidency.[80]

As a result, in April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which included as one of its components, the Habeas Corpus Reform Act of 1996.[81] This Act added the following to Title 28 U.S.C.A. §2254;

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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77 Editorial, "Death Penalty Appeals make a Mockery of System." *The State Journal-Register.* (Early and City Editions)April 13, 1995; see also, J. Rowley, "Officials Say Court's Limitations on Death Penalty Appeals Not Enough" *Washington Dateline*, April 17, 1991.

78 *Supra* note 17 at 31.

79 *Ibid.*

80 J. Rosen, "Shell Game" *The New Republic*, May 13, 1996.

81 Public Law No. 104-132, 110 Stat. 1214. Codified as Title 28 U.S.C.A. § 2254, et.al.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, 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.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) he 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 applicant guilty of the underlying offense.[82]

These provisions, and the court decisions interpreting them, have removed any power the writ of habeas corpus once had to help State prisoners seeking justice.[83] Similar restrictions were also added to section post-conviction habeas petitions filed by federal prisoners.[84]

Specifically, what this law did was to adopt the suggestions from the Powell Committee and case decisions of the United States Supreme Court, and turned them into statutory enactments. The first provisions of the Act were stringent new procedural guidelines, such as a one-hundred-and-eighty-day statute of limitations period for a state prisoner to file a habeas corpus petition.[85] The period begins to run at the point that the state prisoners direct appeal is concluded by either the denial of a petition for certiorari to the United States Supreme Court, or the expiration of the time period for seeking such review. However, such time period does not run during any time in which the petitioner has a valid state post-conviction motion pending before the State courts.[86]

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82 *Ibid.*

83 Press Release, "The American Constitution Society", *US Official News*, March 12, 2018.

84 Title 28 U.S.C. § 2255

85 Andrea A. Kochan, "The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?" *Washington University Journal of Urban and Contemporary Law* 1-14 (1997).

86 Title 28 U.S.C. § 2263(a)

Some might see this stringent time limit as adequate in a capital case, where the prisoner is presumed to have been appointed competent counsel to assist in the preparation and filing of all known claims.[87] A similar requirement to provide competent counsel does not exist for the noncapital state prisoner post-conviction proceedings.[88] This leaves the noncapital prisoner alone in the effort to protect his or her constitutional rights within the court system.

Another component of this Act was the requirement that federal courts offer a presumption of correctness to any issue decided by a State court.[89] To overcome this new standard, the prisoner would have to show that the finding of fact or ruling was contrary to, or an unreasonable application of federal law, as determined by the United States Supreme Court.[90] At the same time, a State court's findings of fact are practically unchallengeable in a federal habeas court.[91] This presumption can only be overcome if the prisoner shows that the findings were an unreasonable interpretation of the facts presented at a State evidentiary hearing, or that there is evidence which could not have been discovered and presented at the State hearing. To make it through this threshold though, the State prisoner must show that the unpresented evidence could not have been discovered through the exercise of due diligence.[92] This determination of due diligence is the same standard applied to whether counsel could have discovered the evidence, with no regard given to the limitation a prisoner faces in performing investigations.

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87 Section 2261 requires the States to enact a procedure for appointment of counsel in order for the limiting provisions of the act to apply in capital cases. These provisions also mandated the provision of investigative, expert, and other resources needed to fully litigate issues in state post-conviction proceedings challenging a capital sentence. A. Rundlet "Opting for Death: State Responses to The AEDPA's Opt-In Provisions And The Need for A Right to Postconviction Counsel" 1 *U. Pa. Journal of Constitutional Law* 661 (Spring, 1999).

88 See, *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (state prisoner has not right to counsel in post conviction proceedings). Despite this holding, the Supreme Court has recently held that, at least in regards to claims of ineffective assistance of trial counsel, failures by counsel in the initial state post-conviction proceedings can constitute cause so as to allow for review of that claim in a federal habeas corpus proceeding. *Martinez* v. *Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (U.S. Supreme Court, 2012). In agreement with Justice Scalia's dissent in Martinez, there are those who speculate that this ruling will ultimately be expanded and require the appointment of counsel in all state post-conviction proceedings. See, K. Davis, "Justice Scalia Was Right: No One Really Believes That [Martinez] Will Remain Limited to Ineffective-Assistance-Of-trial-Counsel Cases" 54 *Houston Law Review* 1349 (Spring, 2017).

89 See §§ 2254(d)

90 *Ibid.*

91 See, § 2254(e)

92 *Ibid.*

Further, this Act also barred a prisoner from filing a successive or abuse petition in most situations.[93] In order to file a successive or abusive petition, the prisoner would first have to seek permission to do so from the court of appeals for their circuit.[94] Such permission is only to be granted where the prisoner can demonstrate that due diligence could not have discovered the facts supporting the new claims in time to have raised or supported the claims in the prior petition.[95] The petitioner must also show, by clear and convincing evidence, that this successive claim is such that, if not for its effect, no reasonable juror would have voted to convict.[96] This would appear to have been designed specifically to overturn the recently adopted standard for actual innocence announced by the United States Supreme Court in *Schlup*.[97]

Very quickly after the passage of the Habeas Corpus Reform Act, the political and legal circles began to discuss the wisdom and benefits of these reforms. Michael Barnes, President of the National District Attorneys Association, was one of the first to defend the new limitations as being reasonable and just, a necessary law to avoid the increasing delays in carrying out capital sentences.[98] Others, like Representative Bill McCollum (R-FL), former Chairman of the House's Crime Committee, argued that the Act's restrictions were justified to prevent the Writ from being abused, even if they created a possibility that an innocent person would be executed.[99] He felt that the number of prisoners released from death row after being proven innocent was proof that the system worked and under habeas reform, these claims would be discovered and brought forth earlier.[100] Representative Bob Barr (R-Ga) disputes that DNA evidence had ever proven the innocence of anyone and feels the country would be better off had those released from death row after DNA testing been executed.[101] There were even those in the legal community who described this "important" legislation as a method of streamlining habeas process.[102]

On the other hand, there are those who were critical of this effort at reform and its implications on the ability of prisoners to obtain review of their claims before the

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93 A.A. Kochan, "The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?" 52 *Washington University Journal of Urban and Contemporary Law* 1-14 (1997).

94 *Id.* at 5.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 M. Barnes, "Habeas Revision Is Just And Reasonable" *The New York Times*, April 21, 1996.

99 J. Greenfield and F. Sawyer, "Innocence And the Death Penalty" *ABC Nightline*, July 14, 1997.

100 *Ibid.*

101 *Ibid.*

102 *Supra* note 13.

federal courts. In the words of one commentator, the restrictions and limitations enacted in this Act amounted to a mangling of a basic liberty.[103] Others described it as a terrible law that elevated questionable state convictions above constitutional rights in a misguided attempt for politicians to appear "tough on crime."[104] Even those who take a more neutral review of the law have reached the conclusion that this new law has led to an era where the primary focus of habeas review is in creating finality, often at the expense of fairness and justice.[105] An outcome which served to please Chief Justice Rehnquist, but which deprived Americans of their fundamental rights.[106]

V Conclusion

Upon review of the outcome of the Habeas Corpus Reform Act on habeas corpus jurisprudence, it is easily determined that the critics of this reform were the more accurate. This Act was designed to make habeas cases move quicker and more efficiently through the process. However, studies have shown that what it did was lengthen the process. According to Stephen Hanlon, the average time to process a habeas action brought by a prisoner under a sentence of death prior to passage of the AEDPA was fifteen months. After its passage, this almost doubled to twenty-nine months.[107] At the same time, the average time between sentencing and execution increased from 10 years, five months before the Act to 15 years, ten months after it was enacted.[108] A primary basis for this increase is that federal courts now spend considerable time and resources reviewing procedural matters, before they can begin to analyze the merits of the issues presented in the petition.

At the same time, the limitations and restrictions brought about in this Act have deprived many prisoners review of their meritorious claims on procedural grounds or in deference to a state court judgment which may or may not have been on the merits of a factual issues. Prisoners have been denied review of claims such as incompetent counsel, racial discrimination, mental retardation, and the prosecutor with-holding evidence

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103 C. Lovendosky, "In the U.S., Liberty's Great Guarantor Suffers a Bodyblow" *The VanCouver Sun*, April 22, 1996.

104 L. Adelman "Who Killed Habeas Corpus?" 65(1) *Dissent* (00123846),97-105 (2018).

105 D. Blumberg,"Habeas Leaps from the Pan and Into the Fire: *Jacob* v. *Scott* and the Antiterrorism and Effective Death Penalty Act of 1996" 61 *Albany Law Review* 557 (1997).

106 J.S. Liebman, "A Right of Citizens Abandoned" *Christian Science Monitor*, Feb. 21, 1995.

107 Hanlon, S. (2009) Testimony before Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Committee on the Judiciary, Federal News Service (Dec 8, 2009)

108 K. Armstrong,"Lethal Mix: Lawyer's Mistakes, Unforgiving Law" *Washington Post*, November 16, 2014.

because the claim was not brought within the strict deadlines included in the Act.[109] Even strong claims of innocence have been turned away under this Act.[110]

Through its restrictions and limitations, this Act has turned the Writ into nothing more than an empty shell of procedures.[111] No longer will the Lloyd Schlup (Mo), Joseph Burrows (Il), Rolando Cruz (Il), Kenneth Richey (OH), Russell Hadley (Mo), or any of the other three hundred plus prisoners who have been exonerated through habeas corpus have an avenue to obtain relief from their unjust incarcerations. In 1970, Justice Harlan of the United State Supreme Court noted there is a fundamental value determination of our society [United States] that it is far worse to convict an innocent man than to let a guilty man go free.[112] Now we have elected officials stating very casually that it is inevitable that an innocent person will be executed.[113]

Such is the law of unintended consequences. While there are those who might complain about the length of time it takes to get around to executing a sentence of death, such is the nature of invoking the ultimate punishment. Habeas corpus is a necessary component of the justice system in the United States and should be preserved. This Act was wrong when it was passed and it is wrong today. Which is why it should be repealed.

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109 *Rouse* v. *Lee*, 339 F.3d 238 (4th Cir 2003)(Deliberately concealed racial bias of juror claim barred due to one day late filing of habeas petition); *Hedrick* v. *True*, 443 F.3d 342 (4th Cir 2006)(claim of mental retardation barring execution precluded as not properly presented in state courts); and, *Neal* v. *Puckett*, 286 F.3d 230 (5th Cir 2002)(although federal court found counsel was ineffective for failing to investigate and present evidence in mitigation, court required to defer to state court decision that was not completely unreasonable).

110 T.R. Murphy,"But I still Haven't Found What I'm Looking For; The Supreme Court's Struggle Understanding Factual Investigations In Federal Habeas Corpus" 18 *University of Pennsylvania Journal of Constitutional Law* 1129 (April 2016); Referencing *Burton* v. *Dormire*, 295 F.3d 839 (8th Cir 2002)(denying relief despite significant evidence of innocence on the ground that habeas corpus could not grant the relief).

111 *Supra* note 104.

112 In *re Winship*, 397 U.S. 358, 372, 90 S. Ct. 1068, 1077, 25 L. Ed. 2d 368 (1970).

113 *Supra* note 99.