Death is Different: Actual Innocence and Categorical Exclusion Claims Under the Antiterrorism and Effective Death Penalty Act

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I. INTRODUCTION

The Eighth Amendment’s “Cruel and Unusual Punishments Clause... is not susceptible of precise definition.”1 Importantly, the Court has recognized that “death is a different kind of punishment from any other.”2 In fact, the death penalty is considered so unique that it typically requires a bifurcated trial.3 Practically speaking, this means that the trial is broken up into two phases, first to determine if the defendant is guilty of a capital offense,4 and if so, the second phase where the jury determines what sentence is appropriate.5 This Note primarily concerns the second phase: whether an individual can claim innocence of the death penalty by virtue of a categorical exclusion, despite a time barred habeas petition.

Recently, the Supreme Court has clarified the requirements of the Eighth Amendment by evaluating punishments against “the evolving standards of decency that mark the progress of a maturing society.”6 For example, the Court has found that capital punishment is “excessive” in the case of

4. See Pepson, supra note 3.
5. See id. at 15-16.
intellectually disabled individuals\(^7\) and "disproportionate" for juvenile offenders less than eighteen years of age.\(^8\) Therefore, these groups are categorically excluded from imposition of the death penalty.\(^9\) This exclusionary principle has become known as the "evolving standards of decency" doctrine.\(^{10}\) A narrow question that has arisen under Eighth Amendment jurisprudence is whether the writ of habeas corpus\(^{11}\) can serve to challenge the capital sentence of a categorically excluded individual on death row.\(^{12}\)

"The writ of habeas corpus is a time-honored mechanism for remedying unjust incarcerations"\(^{13}\) and a means of challenging the constitutionality of an individual's confinement or sentence.\(^{14}\) The ability to challenge the constitutionality of a sentence is vital to prevent the imposition of the death penalty in those cases where the convicted person is actually innocent of the crime or the sentence violates constitutional principles.\(^{15}\) Despite these concerns, in recent years Congress has restricted access to habeas petitions for a number of reasons.\(^{16}\)

Utilizing a time barred habeas petition to claim innocence of the death penalty is a strategy for challenging the constitutionality of a sentence. However, the restrictions on habeas petitions have made it more difficult for individuals to challenge their sentences. Therefore, it is important to understand the evolution of habeas corpus law and how it has affected the ability of individuals to seek relief from their sentences.

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8. Roper, 543 U.S. at 575.
11. Fay v. Noia, 372 U.S. 391, 402 (1963) ("Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.").
penalty would involve the actual innocence doctrine to equitably toll or provide an exception to the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations for habeas petitions. There are two types of actual innocence claims, one claiming actual innocence of the underlying offense,\(^{17}\) and the other claiming innocence of the penalty.\(^{18}\) The Court has set the standard for actual innocence of a capital offense rooted in factual innocence in *Herrera v. Collins*\(^{19}\) and *Schlup v. Delo*.\(^{20}\) In *Sawyer v. Whitley*, the Court set the standard for claiming innocence of the death penalty.\(^{21}\)

Current ineligibility law is an outgrowth from actual innocence law, typically thought of as “crime innocence,” or a factual innocence claim.\(^{22}\) However, unlike a factual innocence claim, a “death-ineligibility challenge” does not dispute that the offender committed the qualifying offense, but only “the constitutionality of the capital sentence.”\(^{23}\)

The passage of AEDPA,\(^{24}\) which was codified into federal law as a statute of limitations for a one year period, significantly restricted access to habeas petitions.\(^{25}\) AEDPA is the federal death penalty statute, designed to increase efficiency in sentencing and define the scope of review allowed to

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17. *See* Ross v. Berghuis, 417 F.3d 552, 556 (6th Cir. 2005). Ross “does not argue that he did not commit the acts giving rise to his conviction.” *Id.*
19. *Herrera v. Collins*, 506 U.S. 390, 416-17 (1993) (finding that a defendant is not entitled to habeas corpus review unless there is an independent constitutional violation in addition to the claim of innocence).
21. *Sawyer*, 505 U.S. at 341, 350. The petitioner must show “by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law.” *Id.*
22. *See* Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 330-31 (2010) [hereinafter Kovarsky, *Death Ineligibility*] (noting that crime innocence refers to an individual who actually did not commit the crime accused of, that “colloquially speaking, the petitioner ‘wasn’t there, and didn’t do it’”).
23. *Id.*
federal courts by minimizing the statute of limitations of a habeas corpus petition to only one year, subject to a few exceptions. The strict statute of limitations for habeas claims has initiated "fundamental disagreements [between the federal circuit courts] over the Supreme Court's equitable writ, as well as the related 'actual innocence' laws that often determine the outcome of federal habeas litigation." Importantly, the Court's standards for "actual innocence" claims were established prior to the passage of AEDPA, and the severe restriction to the statute of limitations raises questions about a court's authority to grant the writ when a claim is time barred.

This Note addresses two unsettled questions of law. First, whether an actual innocence exception exists at all in the habeas context, and if so whether such an exception constitutes an extraordinary circumstance and can thus be heard outside of the AEDPA statute of limitations. Second, whether death ineligibility is "actual innocence" as applied to AEDPA habeas petitions and is thereby able to equitably toll or qualify as an exception to the statute of limitations in a successive petition.

This Note will present two primary arguments: (1) a proper claim of actual innocence in an original or successive habeas petition can and should be considered an extraordinary circumstance to toll the statute of limitations of AEDPA; and (2) death penalty ineligibility is and should be considered "actual innocence" as applied to AEDPA habeas petitions. Part II of this Note will articulate the doctrines of equitable tolling and actual innocence prior to AEDPA and explore how AEDPA raised questions about the availability and applicability of those doctrines to a time barred habeas claim. Part III will review the "evolving standards of decency" categorical exclusion jurisprudence and its relation to habeas claims and the actual innocence doctrines. Part IV will address the circuit split regarding whether an actual innocence claim should be able to toll the statute of limitations under AEDPA, and will further address whether a categorical exclusion should be available under the "actual innocence" umbrella. Part V concludes this Note.

27. Kovarsky, Death Ineligibility, supra note 22, at 330.
28. See, e.g., David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003) (citing Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999)) ("Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort."); see also Flanders v. Graves, 299 F.3d 974, 977 (8th Cir. 2002) (discussing lack of actual innocence exception in AEDPA noting, "It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.").
II. HISTORY OF INNOCENCE CLAIMS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

AEDPA has severely restricted access to habeas relief by limiting the statute of limitations for an original habeas petition to only one year.29 This strict limitation period raises a poignant question: whether a person sentenced to capital punishment under AEDPA who presents evidence that they are categorically excluded from the death penalty could bring a habeas petition of actual innocence, despite the statute of limitations. The history of habeas corpus and the passage of AEDPA demonstrate that the underlying philosophy of a categorical exclusion to the death penalty comports with notions of "actual innocence," and therefore should be considered an exception to the strict AEDPA statute of limitations.

A. Habeas Corpus, Actual Innocence, and Equitable Tolling Prior to the Antiterrorism and Effective Death Penalty Act

A review of AEDPA's purpose and provisions is necessary to appreciate its role in modifying habeas corpus jurisprudence and its detrimental effect on wrongfully-sentenced prisoners seeking federal review of their "actual innocence" claims. In order to understand why a circuit split has emerged regarding tolling the statute of limitations, it is vital to understand the history and context of AEDPA.

1. Habeas law prior to AEDPA

Habeas corpus is a privilege provided through the Constitution,30 often termed "The Great Writ,"31 and is essentially a procedural mechanism32 to correct error during trial "which brings up the body of the person alleging illegal confinement" before a court to determine the legality of confinement.33 A habeas claim is "a new lawsuit, collateral in nature" and not intended to review error or factual findings, but a functional mechanism

29. 28 U.S.C. §§ 2244(a)-(d); see also Kappler, supra note 25, at 470.
33. Alldredge, supra note 31, at 1008. "Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." Fay, 372 U.S. at 402.
designed to ensure constitutional rights have been protected. By restricting federal habeas review to issues of Constitutional concern, the only issue addressed will be whether the petitioner has been deprived of constitutional rights. Due to the availability of habeas, petitioners began to abuse the writ by filing multiple and often frivolous habeas claims, because there was no limit on the number of times a petitioner could file a habeas claim.

Over the years of this abuse of the writ, the Judiciary had created hurdles to prevent needless or abusive litigation, and Congress acted to restrict access to abusive claims. As a result, three types of obstacles to having a second or successive habeas petition heard existed prior to AEDPA. First, a “successive petition” raises grounds identical to those raised and rejected on the merits of a prior petition. Second, an “abuse of the writ” occurs when a petitioner raises issues that were previously available but not mentioned in a prior petition. Finally, a “procedurally defaulted” claim takes place when the petitioner fails to exhaust all state remedies prior to filing a habeas petition.

The abuse of the writ doctrine “defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.” The doctrine is aimed at exacting finality in criminal cases, and requires the dismissal

34. Alldredge, supra note 31; see also Holland v. Florida, 130 S. Ct. 2549, 2562 (2010).
37. See id.
38. Original habeas petitions existed to test the legality of Executive detention, and later to review the constitutionality of proceedings leading to conviction. See Schlup, 513 U.S. at 317-18 (internal citations omitted); see also Sawyer, 505 U.S. at 338 (elaborating on three circumstances that prevent a court from hearing habeas claims).
41. See Murray, 477 U.S. at 488-89 (holding that where respondent did not raise an appeal against a discovery ruling in state court, as required by state procedures, a procedural default should occur).
42. Barapind v. Reno, 225 F.3d 1100, 1110-12 (9th Cir. 2000) (quoting McCleskey, 499 U.S. at 470).
of a petition which successively repeats claims previously decided on the merits, or abusively asserts a new ground unjustifiably omitted from a prior petition. A habeas petitioner’s conduct is thus examined by asking “whether [the] petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process.”

In pre-AEDPA analysis, the Supreme Court determined that a petitioner’s failure to raise all of his claims in one petition could only be overcome by a showing of “cause” and “prejudice.” However, if a petitioner could not show cause, the failure to raise a claim in an earlier petition could be excused if the petitioner could show that “a fundamental miscarriage of justice” would result from a failure to entertain the claim. To show prejudice necessary to prevent a dismissal of a successive habeas petition under the pre-AEDPA abuse of writ standard, the petitioner “must demonstrate ‘not merely that the error at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with an error of constitutional dimensions.’” Accordingly, under pre-AEDPA analysis, federal courts still retained authority to grant a writ of habeas corpus, despite a petitioner’s failure to demonstrate cause and prejudice, in extraordinary instances when a constitutional violation has led to the conviction of an innocent person.

2. Equitable tolling and actual innocence

One avenue for excusing late habeas petitions is a doctrine whereby a court will equitably toll the statute of limitations. The doctrine of equitable tolling allows a court to toll a statutory deadline when a rigid application of the time limitation would be fundamentally unfair. A

44. See Hardemon v. Quarterman, 516 F.3d 272, 275-76 (5th Cir. 2008).
47. McCleskey, 499 U.S. at 494.
48. Dupuy v. Cain, 201 F.3d 582, 585 (5th Cir. 2000) (citing Frady, 456 U.S. at 170) (emphasis omitted).
50. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). The Supreme Court has recently settled a circuit split by holding “that § 2244(d) [of AEDPA] is subject to equitable tolling in appropriate cases.” Id.
"petitioner" is 'entitled to equitable tolling' only if he shows '(1) that he
has been pursuing his rights diligently, and (2) that some extraordinary
circumstance stood in his way' and prevented timely filing."

A second avenue to overcome the statute of limitations is the actual
innocence exception to the abuse of writ doctrine, which is not an
independent avenue to relief. Rather, "it functions as a 'gateway,'
permitting a habeas petitioner to have considered on the merits claims of
constitutional error that would otherwise be procedurally barred." The
actual innocence exception is an outgrowth of the "miscarriage of justice"
exception, which is an equitable remedy that would allow a court to hear a
barred habeas claim if "the ends of justice will not be served" by
preventing the claim. The miscarriage of justice exception requires "a
colorable claim of factual innocence" and applies to innocence of the
underlying crime or innocence of the death penalty.

Claims of actual innocence arise in habeas proceedings in two main
ways. First, prisoners can assert a "substantive" innocence claim under the
Fifth, Eighth, or Fourteenth Amendments. The essence of a substantive
innocence claim is that the petitioner claims he did not commit the crime he
was convicted of. Thus, a remedy exists for claiming factual innocence of
the crime. The second type of actual innocence claim is known as a
"gateway" claim. "In gateway claims, the prisoner asserts actual
innocence in order to obtain review of a procedurally defaulted habeas
petition." Here, habeas claims "are based not on his innocence, but rather
on [the] contention that [a constitutional violation] . . . denied [him] the full
panoply of protections afforded to criminal defendants by the
Constitution." The traditional understanding of actual innocence claims
allowed a habeas claim so long as a petitioner met the required abuse of the
writ standard, at any time. A series of cases articulate the differences

52. Holland, 130 S. Ct. at 2562 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).
53. Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997).
55. Id. at 454.
56. Sawyer, 505 U.S. at 340 ("A prototypical example of 'actual innocence' . . . is the
case where the State has convicted the wrong person of the crime.").
57. Id. at 347.
58. Id. at 711.
59. Id. at 716.
60. Id. at 711.
61. Nelson, supra note 13, at 711.
63. See generally Kuhlmann, 477 U.S. at 450-51 (discussing permissive language
regarding successive habeas petitions and courts' authority to grant the writ).
between claiming innocence of the death penalty, and factual innocence of the underlying crime from an error free trial, and factual innocence along with a constitutional violation.

_Sawyer v. Whitley_ is illustrative of the traditional understanding of claiming legal innocence of the death penalty. The Supreme Court established that there are three determinations for upholding a capital sentence: guilt of a capital offense, eligibility, and sentence selection. Under Sawyer, the habeas petition is a mechanism to have a capital sentence reviewed and thereby to claim “innocence of the death penalty” by virtue of an improper or erroneous assessment of one of the three determinations. The pre-AEDPA cases of _Herrera v. Collins_ and _Schlup v. Delo_ illustrate the functional use and traditional understanding of claiming actual innocence of an underlying crime.

In _Herrera_, the petitioner advanced his claim of factual innocence to support a substantive constitutional claim, namely, that the execution of an innocent person would violate the Eighth Amendment. Herrera claimed that his deceased brother had committed the murders for which he was

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64. _Sawyer_, 505 U.S. at 345-48 (discussing recognition of “‘actual innocence’ of the death penalty,” and how expansive term actual innocence should be).

65. _Herrera_, 506 U.S. at 404 (noting when claiming actual innocence habeas is available “only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence”).

66. _Schlup_, 513 U.S. at 316. Where a petitioner claims actual innocence and:

- presents evidence of [factual] innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

67. _Sawyer_, 505 U.S. at 335-36.

68. _Id._ at 341 (citing _Furman_, 408 U.S. at 274 (Brennan, J., concurring)) “Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence.” _Id._

69. _Id._ at 341-42 (noting that states using capital punishment “have adopted various narrowing factors that limit the class of offenders upon which the sentencer is authorized to impose the death penalty.”).

70. _Id._ at 343 (noting that once guilt and eligibility are established, it is “the jury’s or judge’s ultimate decision as to what penalty shall be imposed”).

71. _Id._ at 335-36.

72. See _Schlup_, 513 U.S. at 313-17; _Herrera_, 506 U.S. at 416-17. These cases articulate the differences between factual innocence (_Herrera_) and a constitutional violation (_Schlup)._ See _Schlup_, 513 U.S. at 321-22; _Herrera_, 506 U.S. at 416-17.

73. _Herrera_, 506 U.S. at 396-97, 416-17.
convicted. Under the petitioner’s theory in *Herrera*, even if the proceedings that resulted in his conviction and sentence were entirely fair and error free, his innocence would render his execution a “constitutionally intolerable event.”

Despite *Herrera’s* argument that the execution of a factually innocent person is a violation of the Eighth Amendment, the Rehnquist Court made clear that a claim of “actual innocence” is not an independent constitutional claim. Rather, the Court found that “habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state proceedings,” and “the threshold showing for such an assumed right would necessarily be extraordinarily high.” Thus, we see the Court emphasize the equitable purpose of habeas to review the constitutionality of the underlying trial, denying a grant of habeas review if a claim of factual innocence is not accompanied with a constitutional violation.

In *Schlup*, a procedural claim was at issue, rather than a substantive one, and the Supreme Court adopted the *Carrier*-standard for determining whether a prisoner may pass through the actual innocence gateway. The Court found that:

Schlup’s claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup’s claim of innocence does not by itself provide a basis for relief. Schlup’s claim of innocence is thus “not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”

The Court held that in order to establish actual innocence, the defendant must demonstrate that “in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”

It is important to appreciate the difference between *Sawyer* claims and *Schlup* claims in order to understand how AEDPA acts to restrict access to

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74. *Id.* at 396-97.
75. *Id.* at 419 (O’Connor, J., concurring).
76. *Id.* at 416.
77. *Id.* at 417.
78. *Id.*
79. *Schlup*, 513 U.S. at 313-15 (citing *Murray*, 477 U.S. at 496). “The *Carrier* standard requires the habeas petitioner to show that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent.’ . . . The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.*
80. *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404).
81. *Id.* at 329.
actual innocence claims. The Court has prescribed a higher burden of proof for establishing legal innocence as opposed to factual innocence from a constitutionally defective trial. Compounding the difficulty imposed by the steep burden of proof, Congress has made efforts to restrict access to habeas review of a sentence. Related to the increasing difficulty to access habeas, the Supreme Court has placed absolute constitutionally based prohibitions on subjecting certain categories of individuals to the death penalty. "Death is different," and as such a claim of legal innocence by virtue of a categorical exclusion should receive different analytical consideration in the habeas context than related factual innocence claims.

B. AEDPA's Statute of Limitations and Statutory Exceptions

The majority of AEDPA is designed to provide federal law enforcement with "increased powers to confront foreign and domestic terrorism in the aftermath of the Oklahoma City bombing." AEDPA contains provisions restricting habeas corpus, which are "some of the most controversial aspects of AEDPA." It has been recognized by the Supreme Court as furthering "the principles of comity, finality, and federalism" and to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."

AEDPA created a few statutory obstacles for a petitioner seeking habeas relief in federal court. It established, for the first time, a statute of limitations for habeas petitions from a state court judgment.

82. Id. at 326-27 ("[T]he Carrier 'probably resulted' standard rather than the more stringent Sawyer standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.").

83. Williams v. Taylor, 529 U.S. 362, 387 n.14 (2000). AEDPA created substantial changes by strictly limiting second or successive habeas petitions and the one year statute of limitations for original habeas petitions. Id.

84. See, e.g., Roper, 543 U.S. at 578 (holding execution of juveniles under eighteen unconstitutional); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding execution of intellectually disabled persons unconstitutional); Ford, 477 U.S. at 409-10 (holding execution of "insane" persons unconstitutional).

85. Gardner, 430 U.S. at 357-58 (citing Gregg, 428 U.S. at 188).

86. Graham, 130 S. Ct. at 2034; Roper, 543 U.S. at 568; see also Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 78-81 (2007).

87. Kappler, supra note 25, at 469.

88. Id.


91. See 28 U.S.C. § 2244(d); Blume, supra note 49, at 288 (citing Mayle v. Felix, 545 U.S. 644, 654 (2005)).
bars re-litigation of any claim adjudicated on the merits in state court, subject only to specific statutory exceptions.\textsuperscript{92} It also codified the "clearly established law" requirement from pre-AEDPA cases, meaning that a habeas petitioner cannot rely on a rule of federal law that has not been announced before a conviction becomes final.\textsuperscript{93} Finally, regarding second or successive habeas petitions, AEDPA codified the common law habeas petition procedure, known as "abuse of the writ" doctrine.\textsuperscript{94}

In overcoming the bar to a habeas petition imposed by the abuse of the writ doctrine, the Court has found that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."\textsuperscript{95} Further, AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings."\textsuperscript{96} The once ever-available habeas claim preserved a challenge to the legitimacy of a conviction,\textsuperscript{97} but the "standard of actual innocence that should apply to a time-barred habeas claim . . . remains an open question of law."\textsuperscript{98}

III. CATEGORICAL EXCLUSIONS AND THE EIGHTH AMENDMENT

AEDPA's dramatic reduction in the availability of habeas petitions has called into question what circumstances justify a court's grant of the writ.\textsuperscript{99} While the Supreme Court has created categorical bars to the death penalty rooted in constitutional principles, definitions of offenders within those categorical bars have largely been left to the states.\textsuperscript{100} Further, the Court has said, "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that

\begin{itemize}
\item \textsuperscript{92} Harrington v. Richter, 131 S. Ct. 770, 784 (2011).
\item \textsuperscript{93} Williams, 529 U.S. at 379-80 (citing Teague v. Lane, 489 U.S. 288 (1989)); see also Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (citing 28 U.S.C. §§ 2254(d)(1)-(2)) ("Under AEDPA, a federal court may grant habeas relief only if the state court's 'adjudication of a claim on the merits resulted in a decision that involved an unreasonable application' of the relevant law.").
\item \textsuperscript{94} See Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45 (1998); see also 28 U.S.C. § 2254(d).
\item \textsuperscript{95} Harrington, 131 S. Ct. at 786 (citing Lockyer v. Andrade, 538 U.S. 63 (2003)).
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Blume, supra note 49, at 288 (citing Mayle, 545 U.S. at 654).
\item \textsuperscript{99} Holland, 130 S. Ct. at 2562 (finding that AEDPA is subject to equitable tolling but not delineating what circumstances would merit equitable tolling).
\item \textsuperscript{100} See, e.g., Atkins, 536 U.S. at 317-18.
\end{itemize}
independent judgment should prevail." However, AEDPA's "clearly established law" requirement and intention to create greater deference to a state court's judgment have called into question what is meant by "clearly established law." Further, the strict deference to state court judgments provided by AEDPA raises issues of federalism and the role of a federal court in ensuring state laws are in accord with the fundamental requirements of the Federal Constitution. A review of the "evolving standard of decency" jurisprudence is necessary to understand the resultant division in application of the actual innocence doctrine under AEDPA.

A. Evolving Standards of Decency and Categorical Exclusions

The prohibition of cruel and unusual punishment by the Eighth Amendment is amorphous, and has been interpreted to reflect "the evolving standards of decency that mark the progress of a maturing society." This philosophy has been applied over the past several decades and has become known as the "evolving standards of decency" standard, which has been used to create "categorical rules to define Eighth Amendment standards." While evolving standards of decency can create categorical rules for both offenses and offenders, this Note is concerned with Eighth Amendment categorical exclusion from the death penalty based upon "characteristics of the offender."

The Court has established an approach to determining categorical rules. First, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." Second, the Court exercises a subjective assessment of the "standards elaborated by controlling precedents" and "interpretation of

101. Williams, 529 U.S. at 389.
102. Id. at 381.
103. Id. at 386. "AEDPA plainly sought to ensure a level of 'deference to the determinations of state courts'" that is higher than pre-AEDPA. Id.
104. U.S. CONST. amend. VIII.
105. Trop, 356 U.S. at 100-01 ("[T]he words of the Amendment are not precise, and that their scope is not static.").
108. See id.
109. See, e.g., Roper, 543 U.S. at 578 (juveniles before the age of eighteen); Atkins, 536 U.S. at 321 (intellectually disabled offenders); Ford, 477 U.S. at 409-10 (offenders who are "insane").
110. See Graham, 130 S. Ct. at 2022 (discussing the Eighth Amendment approach for "cases adopting categorical rules").
111. Id. (citing Roper, 543 U.S. at 572).
the Eighth Amendment’s text, history, meaning, and purpose” to find “whether the punishment in question violates the Constitution.”

It is important to appreciate that a habeas petitioner claiming innocence of the death penalty is not necessarily claiming innocence of the underlying crime, but that certain punishments as applied to groups of individuals violate constitutional prohibitions. Similarly, “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.” Herein lies the issue: a habeas petition based on a claim of actual innocence of the death penalty due to evolving standards of decency involves both Constitutional and factual determinations. The three established areas of categorical exclusions derived from evolving standards of decency are for “insane,” juvenile, and intellectually disabled petitioners.

1. Juvenile petitioners

In 1988, the Supreme Court declared that juveniles under sixteen were categorically ineligible for the death penalty. In Roper v. Simmons, the Court extended the holding in Thompson v. Oklahoma and found that the execution of prisoners under eighteen at the time of the offense constitutes cruel and unusual punishment, thereby extending the scope of protection afforded to juvenile offenders as a class, categorically excluding them from

112. Id. (citing Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).
113. Id. (citing Roper, 543 U.S. at 572).
114. See Brandon L. Garrett, Claiming Innocence, 92 MINN. L. REV. 1629, 1684 (2008) (“Habeas corpus review provided a conduit for procedural constitutional claims pertaining to a criminal trial’s fundamental fairness, but not the defendant’s possible innocence.”).
115. Herrera, 506 U.S. at 400 (citing Moore v. Dempsey, 261 U.S. 86, 87-88 (1923)).
116. See, e.g., Roper, 543 U.S. at 570-71 (discussing the constitutional prohibition on capital punishment for juveniles).
117. See, e.g., Atkins, 536 U.S. at 317-18 (discussing fact determinations for intellectually disabled offenders and deferring to states to define the scope of a legal definition for constitutional and death penalty purposes).
118. Panetti v. Quarterman, 551 U.S. 930, 934 (2007) (quoting Ford, 477 U.S. at 409-10) (“The Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.”). Ford claims are unique among ineligibility arguments in that they are habeas relief issues based only on a prisoner’s status at the time of a potential execution, not at the time the crime was committed. Ford, 477 U.S. at 425 n.5. Due to this distinguishing feature in categorical exclusion claims, this Note will not address Ford claims.
119. Roper, 543 U.S. at 572.
120. Atkins, 536 U.S. at 317-18.
capital punishment.\textsuperscript{123}

Further, the Supreme Court has created a categorical exclusion for a particular sentence, life in prison without parole for a non-homicide juvenile offender,\textsuperscript{124} which has opened the door toward a path of individualized determinations regarding the definition of juvenile status.\textsuperscript{125} Indeed, the Court has acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18" and "[b]y the same token, some under 18 have already reached a level of maturity some adults will never reach."\textsuperscript{126} Thus, modern case law has recognized the overlap of diminished culpability due to underdeveloped cognitive functioning inherent in both juvenile and intellectually disabled individuals.\textsuperscript{127}

2. Intellectually disabled petitioners

Under \textit{Atkins v. Virginia}, the Eighth Amendment prohibits a petitioner's execution because he is intellectually disabled, thus inherently lacking the culpability required for imposition of the death penalty.\textsuperscript{128} While \textit{Atkins} articulated that intellectually disabled individuals are ineligible for the death penalty, the Court left to the states discretion in defining a qualifying intellectual disability.\textsuperscript{129} In defining intellectual disability, \textit{Atkins} relied primarily on clinical formulations used by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA).\textsuperscript{130}

A capital defendant seeking to establish ineligibility for the death penalty because of intellectual disability is not necessarily bringing a procedural challenge,\textsuperscript{131} but is instead challenging a substantive

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 574.
\item \textsuperscript{124} \textit{Graham}, 130 S. Ct. at 2034.
\item \textsuperscript{125} \textit{See id.} at 2031-33 (discussing the "problem with a case-by-case approach"); \textit{id.} at 2026-27 (quoting \textit{Roper}, 543 U.S. at 570) ("[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").
\item \textsuperscript{126} \textit{Roper}, 543 U.S. at 574.
\item \textsuperscript{127} \textit{Graham}, 130 S. Ct. at 2027 (recognizing parts of the brain involved in behavior control continue to mature through late adolescence); \textit{Roper}, 543 U.S. at 569 (relying on scientific and sociological research to find that juveniles possess underdeveloped maturity).
\item \textsuperscript{128} \textit{Atkins}, 536 U.S. at 317-21.
\item \textsuperscript{129} \textit{Id.} at 317; see also J. Amy Dillard, \textit{And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution}, 45 U. RICH. L. REV. 961, 975 (2011) (citing \textit{Atkins}, 536 U.S. at 317).
\item \textsuperscript{130} \textit{Atkins}, 536 U.S. at 308 n.3, 317 n.22.
\item \textsuperscript{131} \textit{See Atkins}, 536 U.S. at 317 (deferring to states to implement procedures and definitions to protect the constitutional prohibition established by the Court’s ruling.) It is
prerequisite for the imposition of the death penalty.\textsuperscript{132} The Supreme Court has noted that intellectually disabled individuals are substantively and thus categorically ineligible for the death penalty due to an inherent lack of culpability.\textsuperscript{133} In assessing the three determinations for upholding a capital sentence,\textsuperscript{134} a showing that a petitioner is ineligible for capital punishment is akin to showing exonerating DNA evidence: both petitioners would be wholly ineligible for capital punishment. A categorically ineligible petitioner raising a habeas challenge to capital punishment in this context is thus making a substantive “actual innocence” claim that the state law determination of eligibility and subsequent imposition of the death penalty is in violation of his constitutional rights, and therefore sufficient to toll the statute of limitations.\textsuperscript{135} As the Supreme Court has said, the categorically ineligible individual has insufficient culpability for capital sentencing, thereby having insufficient guilt, similar to exonerating DNA evidence to impose the death penalty.\textsuperscript{136}

Thus, what we see is a categorical exclusion for juveniles under the age of eighteen,\textsuperscript{137} intellectually disabled individuals,\textsuperscript{138} and life without parole for nonhomicide offenses by juveniles.\textsuperscript{139} The Court has created categorical bars for penalties as applied to classes of people, and generally left definitions of those classes to the several states.\textsuperscript{140} However, as we see in \textit{Atkins}, the states’ definition is not always satisfactory.\textsuperscript{141} Thus, the issue with AEDPA’s stringent deference to state court judgments and clearly established law becomes problematic for habeas petitioners.\textsuperscript{142} The nature conceivable that a petitioner would challenge the procedural protections and definitions implemented by the state as opposed to the substantive qualifications of the petitioner.

\begin{enumerate}
\item[132.] Kovarsky, \textit{Death Ineligibility, supra} note 22, at 364 (noting that “ineligibility challenges are not procedural”).
\item[133.] \textit{See Atkins}, 536 U.S. at 318; \textit{Graham}, 130 S. Ct. at 2026-27.
\item[134.] \textit{See supra} notes 67-71 and accompanying text.
\item[135.] \textit{See Sawyer v. Whitley}, 505 U.S. 333, 348 (1992) (noting that in order to demonstrate actual innocence that would allow the merits of otherwise barred habeas claims to be heard a petitioner must show “by clear and convincing evidence that but for constitutional error, no reasonable juror would have found [petitioner] eligible for death penalty under [state] law”).
\item[136.] \textit{See Atkins}, 536 U.S. at 319 (“[P]ursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.”); \textit{Graham}, 130 S. Ct. at 2026-27.
\item[137.] \textit{Roper}, 543 U.S. at 574.
\item[138.] \textit{Atkins}, 536 U.S. at 319.
\item[139.] \textit{Id}.
\item[140.] \textit{Id. at 317}.
\item[141.] \textit{Graham}, 130 S. Ct. at 2031 (“The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue.”).
\item[142.] \textit{See supra} notes 91-98 and accompanying text.
\end{enumerate}
of the evolving standards of decency doctrine is evident in the name of the
doctrine; it evolves to define the requirements of the Eighth
Amendment.143

To present a successful "actual innocence" claim, the petitioner would
need to present evidence that demonstrates an Atkins claim, which was not
presented in the courts below. While rare, these instances do happen.144 In
light of the recent judicial exclusions from the death penalty, and the
complex nature of habeas petitions, a circuit split has arisen regarding the
applicability of the actual innocence claims to the AEDPA statute of
limitations.

IV. THE CIRCUIT SPLIT

Whether death ineligibility can be considered actual innocence as
applied to AEDPA habeas petitions is the last in a series of open questions
of law. The first open question was recently resolved when the Supreme
Court held that the AEDPA statute of limitations is subject to equitable
tolling,145 and commented that the statute of limitations "reads like an
ordinary, run-of-the-mill statute of limitations."146 Still lingering are two
questions of law, which circuits are divided upon, involving actual
innocence claims based on a categorical exclusion.147 The first issue
follows from the recent Holland decision.148 Since AEDPA is subject to
equitable tolling, can the actual innocence exception be recognized for
purposes of equitable tolling of, or an exception to, the AEDPA statute of
limitations?149 If so, the second issue is whether death ineligibility is

143. See, e.g., Roper, 543 U.S. at 561 (citing Trop, 356 U.S. at 100-01).
144. See, e.g., Brief for Petitioner at *4, *10, Webster v. United States, 131 S. Ct. 794
(2010) (No. 10-150). The government alleged that petitioner had never been in special
education classes, which was directly refuted by the new evidence of social security and
school records, along with IQ scores, a low of forty-eight and a high of sixty-eight, well
within clinical range of intellectual disability. Brief for the United States in Opposition at
145. Holland, 130 S. Ct. at 2560.
146. Id. at 2561.
147. Kovarsky, Death Ineligibility, supra note 22, at 387-88; Lee v. Lampert, 610 F.3d
1125, 1134-35 (9th Cir. 2010) (discussing circuit split and existence of actual innocence
exception).
148. Holland, 130 S. Ct. at 2560.
149. Compare Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005) (finding
those claiming innocence must meet statutory limits just like those raising other claims),
and Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) (claims of actual innocence do not
constitute a rare and exceptional circumstance permitting equitable tolling), and Flanders v.
Graves, 299 F.3d 974, 977-78 (8th Cir. 2002) (finding no actual innocence separate from
usual equitable tolling factors), with Lee v. Lampert, 653 F.3d 929, 945 (9th Cir. 2011)
(recognizing actual innocence exception to the AEDPA statute of limitations), and Souter v.
"actual innocence" as applied to AEDPA habeas petitions and is thereby able to equitably toll or qualify as an exception to the statute of limitations in an original or successive habeas petition.150

A. Equitable Tolling and the Actual Innocence Exception

The circuits are split regarding whether the AEDPA statute of limitations is subject to equitable tolling by virtue of a claim of actual innocence.151 Generally, a person must file their original federal habeas corpus claims within one year after the judgment being challenged becomes final on direct review, and exhaust all state remedies for redress of their claim.152 Successive habeas corpus petitions can be raised regarding different claims only if the offender can establish "cause" for his failure to previously raise the claim and "prejudice" if the claim is not heard.153

The AEDPA statute of limitations has been found to be subject to equitable tolling154 for numerous reasons.155 Often, the "extraordinary circumstances" test is used to determine if the defendant is entitled to equitable tolling,156 meaning that a court can "equitably toll the AEDPA

Jones, 395 F.3d 577, 599-600 (6th Cir. 2005) (same), and Lopez v. Trani, 628 F.3d 1228, 1230 (10th Cir. 2010) (holding that "in the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims . . .").

150. See In re Lewis, 484 F.3d 793, 798 n.20 (5th Cir. 2007); Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005) (rejecting equitable tolling because petitioner failed to "establish a causal connection between his alleged mental incapacity and his ability to file a timely petition."); Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003) (discussing evidence of mental impairment as evidence of actual innocence); Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001) ("[T]he alleged mental incompetence must somehow have affected the petitioner's ability to file a timely habeas petition.").

151. At least four circuits have held that no actual innocence exception exists to serve as a gateway through AEDPA's statute of limitations to the merits of a petitioner's constitutional claims. See, e.g., Escamilla, 426 F.3d at 871-72; David v. Hall, 318 F.3d 343, 346-48 (1st Cir. 2003); Cousin, 310 F.3d at 848-49; Flanders, 299 F.3d at 976-78.


154. Holland, 130 S. Ct. at 2560.

155. See Stillman v. Lamarque, 319 F.3d 1199, 1202 (9th Cir. 2003) (enumerating reasons); see, e.g., Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental incompetence in fact caused him to fail to meet AEDPA filing deadline . . . the deadline should be equitably tolled."); Gibson v. Klingler, 232 F.3d 799, 808 (10th Cir. 2000) ("Equitable tolling would be appropriate . . . when a [defendant] is actually innocent.").

156. See, e.g, Gibson, 232 F.3d at 808 (applying extraordinary circumstances test); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000); Miller v. N.J. State Dep't of Corrs., 145 F.3d 616, 618 (3d Cir. 1998).
statute when the defendant presents: (1) extraordinary circumstances, (2) beyond the defendant’s control or external to the defendant’s own conduct, (3) that prevented him from filing on time.”

The question in the circuits is whether actual innocence satisfies these conditions.

In capital cases, the permanent consequence of losing federal post-conviction review is intensified where defendants are not likely to receive any further review before execution. The federal circuits that have addressed the issue of treating capital cases differently for equitable tolling purposes have reached different conclusions, applying either a strict or permissive view of the equitable tolling doctrine.

1. Strict application of the statute of limitations

The Fourth Circuit addressed how strictly AEDPA should be interpreted when facing the issue of whether the imposition of a capital sentence should affect the equitable tolling analysis. In Rouse v. Lee, the capital defendant presented a claim of error at trial in his first federal habeas petition. His habeas attorney falsely believed that the mailbox rule applied to extend the deadline, and thus filed the habeas petition one day late. Noting that the “death is different” line of cases does not apply in the post-conviction context, the Fourth Circuit refused to toll the statute of limitations.

Refusing to equitably toll the statute, the Fourth Circuit stated that issues of the merits of the petition, the length of the delay, or the presence of a capital sentence when deciding to equitably toll the statute of limitations should be dealt with after “the application of the AEDPA limitations period.” The court looked to the reasons for delay and found that miscalculation of the statute of limitations does not constitute extraordinary circumstances as a matter of law. The court reasoned that applying an equitable tolling analysis would be a “judicial subversion” of Congressional intent of the AEDPA statute of limitations and would


158. See Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (quoting Miller, 145 F.3d at 618) (“In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of equity would make the rigid application of a limitation period unfair.”).


160. Id. at 254.

161. Id. at 245, 248.

162. Id. at 254-55.

163. Id. at 254.

164. Id. at 253.
"undermine 'principles of comity, finality, and federalism.""  

The Fifth Circuit also applied a strict interpretation of the equitable tolling doctrine. Petitioner brought an Atkins claim after the statute of limitations had run, claiming that Sawyer directed that "irrespective of equitable tolling, the court must address the merits of his mental retardation claim because failing to do so would constitute a fundamental miscarriage of justice." Citing the Eighth and Ninth Circuits, the Fifth Circuit decided that "there is not 'an actual innocence exception that serves as a gateway through the AEDPA statute of limitations to the merits of a petitioner's claims.'"

The Eighth Circuit has also rejected a claim that innocence should toll AEDPA's statute of limitations, finding that to do otherwise "would take the equitable-tolling doctrine far from its original and legitimate rationale." The Flanders court noted that portions of AEDPA partially codify actual innocence doctrines, and stated, "It is our duty to apply statutes as written." Essentially, the Eighth Circuit found that because Congress included the actual innocence exception in some provisions, the exclusion of the exception in other provisions was an intentional omission, requiring judicial deference to statutory construction. However, the Eighth Circuit did not foreclose the actual innocence exception completely, and stated only that the present facts did not present a sufficient showing to grant the exception.

2. Permissive view of the statute of limitations

Some circuits appreciate the finality of capital punishment and contemplate the gravity of the sentence when applying the statute of limitations. The Third Circuit took a broader approach and recognized the capital nature of the case to equitably toll AEDPA, allowing consideration of an otherwise untimely habeas petition. The court noted:

165. Id. at 256 (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).
166. See Henderson v. Thaler, 626 F.3d 773, 780 (5th Cir. 2010).
167. Id. at 777.
168. Id. at 779-80 (citing Sawyer v. Whitely, 505 U.S. 333, 346-47 (1992)).
169. Id. at 780 (quoting Lee v. Lampert, 610 F.3d 1125, 1133, 1136 (9th Cir. 2010)) (citing Flanders v. Graves, 299 F.3d 974, 977 (8th Cir. 2002)).
170. Flanders, 299 F.3d at 977.
171. Id.
172. See id.
173. Id. at 978.
174. See Fahy, 240 F.3d at 245.
If the limitation period is not tolled in this case, Fahy will be denied all federal review of his claims. Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions Fahy attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than "extraordinary" circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair.175

By declining to apply the extraordinary circumstances test, the Fahy court recognized that the irrevocability of a death sentence required additional procedural safeguards. The consequence for procedural errors committed under "inhibitively opaque" or "unclear" law was considered too high to deny additional review.176 Instead, the Third Circuit held that capital defendants who diligently and reasonably pursue their claims may seek relief through the habeas mechanism.177

The Ninth Circuit leans toward granting greater leniency to capital defendants in claims for equitable tolling.178 Although "the Ninth Circuit nominally applies an extraordinary circumstances test in all requests for equitable tolling regardless of the sentence imposed, the standards are more relaxed in application for capital cases."179 For example, attorney error that would not ordinarily rise to the level of extraordinary circumstances can trigger equitable tolling in capital cases.180 However, there appears to be division within the Ninth Circuit as to whether an actual innocence exception exists that would toll or except the AEDPA statute of limitations.181

175. Id.
176. Id.
177. Id.
178. See Calderon v. United States D.C.D. of Cal., 163 F.3d 530, 541 (9th Cir. 1998) (stating mental incapacity would justify equitable tolling).
179. See McCollough, supra note 157, at 390.
180. See Spitsyn v. Moore, 345 F.3d 796, 800 n.1 (9th Cir. 2003) (stating that capital cases provide an exception to the general rule that ordinary attorney error does not warrant equitable tolling of the AEDPA deadline).
181. Compare Lee v. Lampert, 610 F.3d 1125, 1136 (9th Cir. 2010) ("[T]here is no 'actual innocence' exception to the one-year statute of limitation for filing an original petition for habeas corpus relief."), with Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011) ("We hold that a credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period, and a petitioner who makes such a showing may pass through the Schlup gateway and have his otherwise time-barred claims heard on the merits.").
B. Categorical Exclusion as Actual Innocence

If a court will equitably toll the statute of limitations to entertain an actual innocence petition or allow an actual innocence claim as a pure exception, the next question is whether a categorical exclusion qualifies as actual innocence under the "actually innocent" umbrella. If so, the claim can proceed to the merits as a challenge to the imposed sentence, and if not, the claim will be denied and the statute of limitations not tolled.

1. The circuits are divided on whether a showing of actual innocence is grounds for equitable tolling

The Eleventh Circuit adheres to the interpretation that Congress' use of the word "offense" is different from "sentence," and plainly excludes, or bars, habeas challenges to sentences, including death sentences. The Eleventh Circuit has noted that the actual innocence "exception applies only to claims going to the question of whether or not the applicant is 'guilty of the underlying offense'—not to claims related to sentence." In In re Jones, the petitioner had alleged a constitutional claim in regards to his sentence, and the court noted that actual innocence claims only apply to challenges against the underlying offense, not legal sufficiency of the sentence imposed.

The Seventh Circuit has espoused a similar view. The petitioner in Burris v. Parke sought successive habeas relief claiming that a brain injury from a bullet wound rendered him categorically ineligible for capital punishment, akin to the Atkins line of cases. The court denied the claim.

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182. Compare In re Lewis, 484 F.3d 793, 798 n.20 (5th Cir. 2007), with United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1100 (C.D. Cal. Aug. 18, 1998) (noting the Eighth Amendments' cruel and unusual punishment clause "may require when a claim of actual innocence is involved that habeas review remain open until the defendant has had a least one meaningful opportunity for review").

183. See, e.g., Calderon v. United States D.C.D. of Cal., 163 F.3d 530, 541 (9th Cir. 1998) ("Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations.").

184. In re Lewis, 484 F.3d at 798 n.20.

185. See In re Jones, 137 F.3d 1271, 1274 (11th Cir. 1998); see also Ward v. Hall, 592 F.3d 1144, 1161 (11th Cir. 2010); In re Medina, 109 F.3d 1556, 1565 (11th Cir. 1997); Burris v. Parke, 116 F.3d 256, 258 (7th Cir. 1997).

186. In re Jones, 137 F.3d at 1274 (quoting In re Medina, 109 F.3d at 1565).

187. See id. at 1273 (noting petitioner claimed evidence had been withheld rendering his confession involuntary, violating his constitutional rights, which provided the gateway to hear newly discovered evidence).

188. Id. at 1274.

189. Burris v. Parke, 130 F.3d 782, 785 (7th Cir. 1997).

190. See id. at 784.
stating that the same claim was presented on appeal in an earlier habeas proceeding, that the evidence did not show that the petitioner was actually innocent, and that the arguments concerned only his sentence, not his guilt of the underlying offense. The court further noted that “[w]hat a neuropsychologist might turn up today is irrelevant” because even if the new evidence supported the proposition of ineligibility, “[a]ll this means . . . is that Burris wants to re-litigate, with the aid of better evidence.” The Seventh Circuit took the view that new evidence which does not show factual innocence of the underlying offense, only that the sentence was improperly imposed, ought not to be brought on a successive habeas petition.

Judge Cudahy dissented, addressing the difference between an imprisonment sentence and a capital sentence. Judge Cudahy noted that brain deficits can impair cognitive functioning, suggesting that a lack of intellectual functioning would be sufficient grounds to grant a habeas petition to investigate the asserted facts in a capital case.

Later, the Seventh Circuit recognized the emerging division among the circuits. The court noted, “The assumption underlying [petitioner’s appeal] is that his petition does not comfortably fall within any of the statutory or equitable principles.” The court assessed both sides of the argument, noting, “The State contends that [the petitioner’s] ‘actual innocence’ claim must ‘by default . . . fall within the equitable tolling camp.’” On the other hand:

[I]f actual innocence is not a freestanding exception his case would most closely fall within the statutory provision in § 2244(d)(1)(D)—he must file within one year of the date on which the facts on which his claim is based could have been discovered “through the exercise of due diligence.”

The court hinted in dicta that to have a successful “actual innocence” claim a petitioner needs to have timely filed or have made a “[sufficient showing of actual innocence.” The court went on to say that a “sufficient showing” likely would not be subject to interpretation, such as DNA evidence.

191. Id. at 783-85.
192. Id. at 785.
193. Id.
194. Id. at 785-86 (Cudahy, J., dissenting).
195. Id. at 787 (Cudahy, J., dissenting).
197. Id.
198. Id. at 681.
199. Id.
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The Fifth Circuit has also applied a narrow interpretation, holding "a habeas petitioner must establish a reasonable probability of a different verdict had the alleged error not occurred." In application, the court found that medical records, school records, testimony of family abuse, and psychiatric evaluation would not have been sufficient to "establish that this evidence was material to the punishment he received."

Unlike the Fifth, Seventh, and Eleventh Circuits, some jurisdictions find that actual innocence can be a ground for equitably tolling AEDPA’s statute of limitations. The Sixth Circuit has taken the view that the inquiry is not whether a petitioner is guilty of the underlying offense, but rather an inquiry into the legitimacy of the sentence, whether "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." "Thus, the threshold inquiry is whether "new facts raise sufficient doubt about the petitioner’s guilt to undermine confidence in the result of the trial." "Without the assurance that that trial was untainted by constitutional error, [a petitioner’s] threshold showing of innocence would justify a review of the merits of the constitutional claims."

The Fourth Circuit has suggested that an offense in the AEDPA statute of limitations could encompass attacks on sentences of imprisonment as well as attacks on sentences of death, but both only in rare situations. The Fourth Circuit noted:

"As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules." The doctrine has been applied in "two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs’ control made it impossible to file the claims on time.” But any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously

200. Id.
202. Id. at *11-15.
203. Souter, 395 F.3d at 590; Ross v. Berghuis, 417 F.3d 552, 556 (6th Cir. 2005).
204. Souter, 395 F.3d at 590 (quoting Schlup, 513 U.S. at 317).
205. Schlup, 513 U.S. at 317.
206. Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (internal citations omitted); see In re Vial, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997).
would lose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.\footnote{Harris, 209 F.3d at 330 (internal citations omitted).}

Further, the Third Circuit has not decided the issue specifically in reference to categorical exclusions, but in dicta has favored a broader over a narrower interpretation.\footnote{Miller, 145 F.3d at 618-19.} The Tenth Circuit has declined thus far to decide the issue of whether categorical exclusions can be included within an actual innocence claim.\footnote{LaFevers v. Gibson, 238 F.3d 1263, 1267 (10th Cir. 2001) (reserving the question whether § 2244(b)(2)(B)(ii) extends to capital sentencing challenges); Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (reviewing when equitable tolling would be appropriate yet not including an example of a categorical exclusion); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (acknowledging § 2244(d) is not jurisdictional, but stating it \textit{may} be subject to equitable tolling).}

The Ninth Circuit noted that it could entertain a petitioner's categorical exclusion claim, even though it concluded that the petitioner had not established actual innocence.\footnote{See Landrigan v. Brewer, 625 F.3d 1132, 1139 (9th Cir. 2010); Babbitt v. Woodford, 177 F.3d 744, 747-48 (9th Cir. 1999).} The Ninth Circuit has noted that the phrase "guilty of the underlying offense" did not encompass a constitutional claim that petitioner's counsel had inadequately presented.\footnote{See Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997) (citing 28 U.S.C. § 2244(b)(2)).}

This is cohesive with later precedent, in that a constitutional gateway claim, such as ineffective assistance of counsel, would not be recognized as a claim of actual innocence.\footnote{See Lee, 610 F.3d at 1129, 1136.} As the Ninth Circuit acknowledged in \textit{Thompson v. Calderon}, there is disagreement among the circuits over whether actual innocence claims could be heard, and further "whether the scope of the 'actual innocence' standard articulated in Sawyer has been superseded by a narrower exception in the AEDPA." Of note, the \textit{Thompson} court hinted that under the language of AEDPA a constitutional violation may create an actual innocence claim because the language "'underlying offense' in a death penalty case is capital murder rather than merely homicide."\footnote{Thompson v. Calderon, 151 F.3d 918, 923 (9th Cir. 1998). Id. at 924.}
2. Solutions to the circuit split

The particularly cumbersome and "confusing" terminology under AEDPA actual innocence habeas claims has been a cause of turmoil in the circuits. However, what has been recognized as a circuit split may be less divisive than it appears. If a circuit split does exist, the division should be resolved in favor of a court hearing a meritorious categorical exclusion claim under the actual innocence doctrine as an exception to the AEDPA statute of limitations.

First, *Holland* put to rest any doubt that the AEDPA statute of limitations is subject to equitable tolling. However, the Court stopped short of articulating what circumstances would be sufficient to invoke the equitable tolling doctrine. Even so, language from *Holland* is suggestive that the standards that applied pre-AEDPA are still applicable. Furthermore, the Court's reliance on pre-AEDPA habeas cases is suggestive that pre-AEDPA equitable principles apply. Finally, the Court emphasized the "'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.'"

Second, since AEDPA is subject to equitable tolling, the next question is what constitutes the extraordinary circumstances necessary to toll the statute of limitations; more specifically, is actual innocence sufficient reason to toll the statute of limitations? *Holland* instructs that equitable tolling is available if a petitioner has been diligent in pursuit of their rights, and there were extraordinary circumstances that prevented timely filing. In pre-AEDPA analysis, even if the petitioner could not show cause and prejudice warranting equitable tolling, a habeas court may still consider the

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215. Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997) ("The terminology in this area is sometimes confusing.").

216. Lee, 610 F.3d at 1134 (recognizing circuit split).

217. *Holland*, 130 S. Ct. at 2562 (holding § 2244(d) subject to equitable tolling).

218. *Id.* at 2553 (noting that equitable tolling may be granted if a petitioner shows ""(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing"").

219. Compare *id.* at 2562 (citing Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions ... incorporate earlier habeas corpus principles.")), with Lee v. Lampert, 610 F.3d 1125, 1131 (9th Cir. 2010) ("The Schlup exception never applied to federal statutes of limitations because AEDPA created such limitations later.").

220. See *Holland*, 130 S. Ct at 2562-65 (citing Rose v. Lundy, 455 U.S. 509 (1982)); see also *id.* at 2563 (citing Baggett v. Bullitt, 377 U.S. 360 (1964)).

221. *Id.* at 2563 (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)).

222. See *id.* at 2562.

223. *Id.*
barred claim “in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.”\textsuperscript{224} Sawyer applies to claims of innocence in death penalty cases, and as such the petitioner would need to show “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”\textsuperscript{225}

Due to AEDPA’s goal of restricting access to habeas and expediting the habeas process, several circuits have restricted access to pre-AEDPA equitable tolling doctrines.\textsuperscript{226} Further, some courts have noted that because actual innocence standards are incorporated into select provisions of AEDPA, Congress intentionally omitted an actual innocence exception from provisions without the same or similar language.\textsuperscript{227} As to the latter argument, Congress presumably drafted AEDPA against the backdrop of existing habeas law, as is evidenced by inclusion of language into certain provisions.\textsuperscript{228} Thus, if Congress had desired an absolute ban on actual innocence claims being capable of equitably tolling the statute of limitations, express language could have accomplished this goal, and omission of the language should not be read as an intention to restrict actual innocence jurisprudence.

Third, the circuits appear divided on the question of whether a categorical exclusion would justify utilizing the actual innocence doctrine to equitably toll or provide an exception to the AEDPA statute of limitations. Some circuits have found that factual innocence would merit tolling under the Schlup and Herrera factual innocence doctrine.\textsuperscript{229} Notably, the crux of a categorical exclusion is that the underlying philosophy of inadequate culpability is due to a characteristic or trait inherent to the person,\textsuperscript{230} and if membership to a categorical exclusion is factually found, renders that individual ineligible for capital sentencing.\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{224} Murray, 477 U.S. at 496.
\item \textsuperscript{225} Sawyer v. Whitley, 505 U.S. 333, 336 (1992).
\item \textsuperscript{226} See supra notes 159-73 and accompanying text.
\item \textsuperscript{227} See, e.g., Lee v. Lampert, 610 F.3d 1125, 1129 (9th Cir. 2010) (citing Flanders v. Graves, 299 F.3d 974, 976-77 (8th Cir. 2003)) (“It is not our place to ‘engraft an additional judge-made exception onto congressional language that is clear on its face.’”).
\item \textsuperscript{228} Holland, 130 S. Ct. at 2561 (“The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided Irwin and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption.”).
\item \textsuperscript{229} See Segal, supra note 98, at 244-45 (discussing that “the trend in the federal circuit is towards adoption of the Schlup gateway standard” in the wrongful conviction context).
\item \textsuperscript{230} See supra notes 104-20 and accompanying text.
\item \textsuperscript{231} See, e.g., Atkins v. Virginia, 536 U.S. 313, 320 (2002).
\end{itemize}
Thus, circuit courts should find that newly discovered evidence of a categorical exclusion should provide the extraordinary circumstance required to hear a Sawyer claim.

The other issue is that a categorical exclusion is an Eighth Amendment based prohibition. Hence, while the factual determinations are sometimes bright line rules, in other instances the definitional requirements are deferred to the states. The issue then becomes whether a petitioner on the cusp of the state defined categorical exclusion could challenge the constitutionality of the states' definition in an actual innocence habeas petition. Essentially, the petitioner would use the habeas mechanism to ensure that constitutional rights, the Eighth Amendment prohibition against the execution of certain categories of offenders, have been preserved. If Sawyer is to be read as unchanged by AEDPA, then a constitutional challenge to a state definitional procedure or rule should be challengeable via a habeas petition to ensure that the state's procedure is in accord with evolving standards of decency jurisprudence.

Further, AEDPA's strict window for obtaining federal habeas review of a state court judgment is arguably legitimate regarding factual claims of innocence. However, the arguments regarding "the principles of comity, finality, and federalism" bear less weight regarding the preservation of federal constitutional rights because a federal court is the traditional guardian of an individual's federal rights. By denying review, a state could potentially have an unconstitutional sentencing scheme that would escape federal review, thereby allowing for the execution or sentencing of an individual in violation of their constitutional rights. Therefore, habeas review serves the purpose of ensuring an individual's rights have been preserved during sentencing, and restricting federal review of state decisions regarding issues rooted in federal law, such as defining intellectual disability for death penalty purposes, undermines the function and purpose of habeas corpus.

Significantly, what appears to be a circuit split may instead be that

232. See, e.g., id. at 311-12.
234. See Atkins, 536 U.S. at 317-18.
235. See Garrett, supra note 114, at 1685-86. "Federal courts rarely conduct factual review of claims asserted in habeas petitions." Id. at 1685-86. Additionally, they also "rarely conduct purely substantive review, and when they do, it is typically to examine the constitutionality of a criminal prohibition's scope." Id. at 1685.
237. Stephen T. Parr, Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause, 68 TENN. L. REV. 41, 67 (2000) (discussing that "federal intervention" was the perceived solution to protect individual rights).
238. See supra notes 30-35 and accompanying text.
circuits that have declined to recognize a categorical exclusion claim have not been presented with evidence that would be considered sufficiently reliable to justify the doctrine. For example, in Lucidore v. N.Y. State Div. of Parole, the Second Circuit explicitly reserved the question of the existence of an actual innocence exception because the petitioners’ claim was factually insufficient and thus there was no need to answer the substantive legal issue. As such, circuits require a presentation of “new reliable evidence” to recognize the availability of the actual innocence doctrine to provide a vehicle for categorical exclusion claims.

However, if the circuits are indeed split, a resolution should allow a meritorious categorical exclusion to be heard as an actual innocence claim under the Sawyer test, just as exonerating DNA evidence would be allowed under the actual innocence Herrera and Schlup test. Thus, of the three determinations for a capital sentence, an individual who is categorically excluded should be considered ineligible for capital punishment just as a person who did not commit the crime.

For practical application, there are two theories of how a categorical ineligibility actual innocence claim is properly heard. First, the Sawyer eligibility standard requires “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” As such, there are two requirements: establishing factual ineligibility and constitutional error. Hence, under a Sawyer claim, the evidence need not be new, but must be sufficient to demonstrate that no reasonable juror would have found the petitioner eligible. Alternatively, a Sawyer claim could be a vehicle to challenge the “applicable state law” as the constitutional error under the Eighth Amendment.

Similarly, there is emerging thought that a categorical exclusion claim does not require equitable tolling or actual innocence standards. The

239. Lucidore v. N.Y. State Div. of Parole, 209 F.3d 107, 114 (2d Cir. 2000).
240. Bell, 547 U.S. at 537 (stating examples of “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence”).
241. See supra note 67-73, and accompanying text.
242. Sawyer, 505 U.S. at 343.
243. Id. at 344.
244. Id.
245. Id. at 338 (citing Murray v. Carrier, 477 U.S. 478 (1986)).
246. See Lee v. Lampert, 610 F.3d 1125, 1129 (9th Cir. 2010) ("[T]he actual innocence exception is not a type of tolling because it does not involve extending a statutory period for a particular amount of time."); see also Henderson v. Thaler, 626 F.3d 773, 787 (5th Cir. 2010) (Wiener, J., dissenting) ("Properly, Henderson’s unfettered right to assert his Atkins claim must be assessed entirely separately and apart from any actual innocence analysis and
heart of this ideology is that in order to avoid a "miscarriage of justice," a categorical exclusion claim should be heard as a pure exception to the AEDPA statute of limitations, wholly apart from a tolling analysis.247

V. CONCLUSION

"The Great Writ should be the substance of 'justice,' not the form of procedures."248 In recognizing that "death is a different kind of punishment ... in both its severity and its finality,"249 the Court recognizes the special need for equitable principles to prevail over strict statutory reading. While AEDPA can be read to exclude late habeas petitions, the judiciary retains equitable authority over the writ of habeas corpus.250 As such, an actual innocence claim can and should consist of evidence demonstrating an inherent quality in the defendant that creates insufficient culpability for imposition of the death penalty, such as "juvenile status" or "mental deficiency."251

Currently, we know that AEDPA is subject to equitable tolling.252 However, the claims and evidence that constitute grounds sufficient to grant the equitable doctrine create division amongst the circuits.253 The first step is to find that a claim of actual innocence is sufficient to qualify for equitable tolling. Once that is recognized, the next step is to appreciate that the death penalty is typically bifurcated.254 The bifurcation is to ensure that the death penalty is not arbitrarily or capriciously imposed, and as such, both prongs of the bifurcation procedure warrant equal deference regarding innocence claims.

A categorical exclusion is an absolute prohibition of imposition of a penalty upon a class of offenders. Just as an individual can claim factual

likewise without application of the AEDPA's time bar."); Harris v. Vasquez, 949 F.2d 1497, 1516 (9th Cir. 1990) ("[I]t is clear that the mere presentation of new psychological evaluations ... does not constitute a colorable showing of actual innocence ... ").

247. See generally Scott v. United States, 740 F. Supp. 2d 1317, 1329 (S.D. Fl. 2010) (recognizing equitable tolling as a different exception than "manifest injustice exception"); see also Henderson v. Thaler, 626 F.3d 773, 786 (5th Cir. 2010) (Wiener, J., dissenting).


251. See Roper, 543 U.S. at 573; Atkins, 536 U.S. at 317.

252. Holland, 130 S. Ct. at 2560.

253. Harris v. Vasquez, 949 F.2d 1497, 1515 (9th Cir. 1990) ("[I]t is clear that the mere presentation of new psychological evaluations ... does not constitute a colorable showing of actual innocence.").

254. Gregg, 428 U.S. at 195.
innocence from a crime, a person can claim exclusion from the death penalty. The Constitution incorporates America’s evolving standards of decency, and along with our decency, we ought not lose sight that “[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.” These are not merely hortatory commands, but rather principles imbedded as the foundation for American society, “for ever changing and for ever improving.”

As such, circuits should resolve to incorporate categorical exclusion jurisprudence into actual innocence jurisprudence under the Sawyer standard, or as a free standing claim of relief. “[I]t is a [C]onstitution we are expounding,” and while “[c]ourts must not consider the wisdom of statutes . . . neither can they sanction as being merely unwise that which the Constitution forbids.” The Great Writ is intended to preserve our constitutional rights, and as such, habeas corpus is a proper means to test the constitutionality of a state conviction on collateral review to ensure that individual federal rights have been preserved. Finally, courts should resolve to allow habeas to include categorical exclusion claims so that the several states are in unison in America’s pursuit in accord with the Constitution toward our evolving standards of decency.

255. Schlup, 513 U.S. at 327.
256. Atkins, 536 U.S. at 320.
257. Roper, 543 U.S. at 568 (citing Thompson, 487 U.S. at 856).
259. Id. at 407.