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For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases

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For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases†

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In 1992, an all-white North Carolina jury found Kenneth Bernard Rouse, an African American, guilty of rape and first-degree felony murder.[1] *On the jury's recommendation, the judge sentenced Rouse to death, and the North Carolina Supreme Court affirmed.*[2] *After sentencing, one of the jurors admitted to purposefully concealing prejudicial information during voir dire in order to remain on the jury to convict Rouse.*[3] *When potential jurors were asked if any family members had been victims of a violent crime, the juror failed to report that his mother had been raped and killed by an African-American man who was later executed for the crime.*[4] *The juror also concealed his strong racial prejudice during voir dire; after the trial, he reportedly stated that "niggers" care less about life than white people and that they rape women to brag to their friends.*[5]

Upon discovery of this new evidence, Rouse collaterally attacked the imposition of a capital sentence in state court on a theory of juror bias, but the court denied relief without a hearing.[6] *After exhausting possible state remedies, Rouse's appointed attorney filed a federal habeas petition on*

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1. *See* Rouse v. Lee, 339 F.3d 238, 257 (4th Cir. 2003) (en banc) (Motz, J., dissenting) (stating the factual basis for Rouse's habeas claim), *cert. denied* 124 S. Ct. 1605 (2004).

2. *See* State v. Rouse, 451 S.E.2d 543, 574 (N.C. 1994) (affirming the capital sentence).

3. *Rouse*, 339 F.3d at 257 (Motz, J., dissenting) (stating Rouse's claim for juror misconduct).

4. *Id.* (Motz, J., dissenting).

5. *Id.* (Motz, J., dissenting).

6. *See id.* at 242 (explaining the procedural posture of the case).

February 8, 2000.[7] *The district court noted that the one-year statute of limitations for filing a federal habeas petition expired on February 7, 2000, the previous day, and dismissed the petition as untimely.*[8] *Sitting en banc, the Fourth Circuit affirmed the dismissal.*[9] *The reason for the one-day delay? Rouse's attorney erroneously relied on the facially-applicable "mailbox rule,"*[10] *under which the petition would have been timely.*[11]

Table of Contents

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7. *Id.* at 243.

8. *See id.* (noting the district court's dismissal).

9. *See id.* at 257 (affirming the dismissal as untimely).

10. The defendant's attorney believed he had three additional days to file under Rule 6(e) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 6(e) (adding three days to prescribed periods in which a party must complete some act after receiving notice by mail); *see also* Woodford v. Garceau, 538 U.S. 202, 208 (2003) (noting that the Federal Rules of Civil Procedure are applicable to habeas proceedings to the extent that they do not conflict with other rules governing habeas corpus). *But see* Donovan v. Maine, 276 F.3d 87, 91–92 (1st Cir. 2002) (stating that the mailbox rule does not apply to extend the AEDPA statute of limitations).

11. *See* Rouse v. Lee, 339 F.3d 238, 245–46 (4th Cir. 2003) (en banc) (finding that the mailbox rule in Federal Rule of Civil Procedure 6(e) does not apply to habeas petitions), *cert. denied* 124 S. Ct. 1605 (2004).

I. Introduction

The Antiterrorism and Effective Death Penalty Act (AEDPA) was signed into law on April 24, 1996.[12] For the first time in history, defendants seeking initial federal habeas corpus review were subject to a filing deadline.[13] Under this deadline, defendants must file their federal habeas petitions within one year of the conclusion of their direct appeal in the state system.[14] Due to the confusion of state law and the AEDPA itself, however, defendants occasionally miss this deadline, sometimes by just a few days.[15]

Defendants seeking federal habeas review of state-imposed capital sentences are often poor and uneducated.[16] Recognizing this problem, Congress passed a statute entitling every indigent capital defendant to

12. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 21 and 28 U.S.C.).

13. *See* 28 U.S.C. § 2244(d)(1) (2000) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."); *see also* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2 (4th ed. 2001) ("Until 1996, there was no fixed statute of limitations for filing federal habeas corpus petitions.").

14. *See* 28 U.S.C. § 2244(d)(1) (2000) (stating the date upon which the statute of limitations shall begin to run). Although conclusion of direct appeal is the most common starting point for the statute of limitations, § 2244 actually provides four possible starting points: (1) the date of conclusion of direct appeal; (2) the date on which a state-created unconstitutional impediment to filing is removed; (3) the date on which the right asserted by the habeas petitioner is first recognized by the Supreme Court; or (4) the date on which newly discovered evidence forming the factual basis for the petitioner's claim could have been discovered by due diligence. *Id.* § 2244(d)(1).

15. *See, e.g.*, Rouse v. Lee, 339 F.3d 238, 248–49 (4th Cir. 2003) (en banc) (listing cases where deadline missed by just a few days), *cert. denied* 124 S. Ct. 1605 (2004); Lookingbill v. Cockrell, 293 F.3d 256, 264–65 nn. 15–16 (5th Cir. 2002) (same).

16. AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 4 (1989) [hereinafter POWELL COMMITTEE] ("Capital inmates almost uniformly are indigent, and often illiterate or uneducated.").

representation by appointed counsel during federal habeas proceedings.[17] Although entitled to counsel, defendants retain little control over the appointment process.[18] Due to the shortage of qualified attorneys available for appointment, these indigent defendants must sometimes rely on representation by overburdened or inadequate counsel.[19] Fault generally lies with this appointed counsel when a defendant files his habeas petition after expiration of the one-year AEDPA deadline.[20] Regardless, courts have determined that defendants are strictly and vicariously liable for any errors committed by their appointed counsel,[21] and principles of constitutionally ineffective counsel do not apply in habeas proceedings.[22] Attorney error thus precludes any possibility of federal review for a significant number of defendants facing the death penalty.

To remedy problems arising from negligent appointed counsel, habeas scholarship is replete with calls for extending the guarantee of effective counsel to postconviction proceedings.[23] This Note, however, suggests a far more modest approach. The doctrine of equitable tolling permits a court to toll a statute of limitations when extraordinary circumstances make rigid application

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17. *See* 21 U.S.C. § 848(q)(4)(B) (2000) (stating that any state defendant facing the death penalty is entitled to counsel in federal habeas proceedings). The Supreme Court has repeatedly stated that capital defendants are not entitled to counsel under the Constitution. *See* Murray v. Giarratano, 492 U.S. 1, 7–8 (1989) (explaining that defendants are not constitutionally entitled to appointment of counsel during postconviction procedures, even in capital cases).

18. *See* Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 348, 353–64 (2003) (discussing the problem of ineffective assistance of habeas counsel and conducting a survey of state mechanisms enacted to ensure adequate representation).

19. *See* Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 902–03 (1996) (stating that capital defendants represented by appointed counsel are often no better off in federal habeas proceedings than *pro se* defendants).

20. *See infra* Part III.B (discussing the difficulties faced by attorneys in meeting the deadline).

21. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 754 (1991) (stating that attorney error short of ineffective assistance of counsel may be attributed to the defendant).

22. *See id.* at 752 (stating that constitutional principles of ineffective counsel are inapplicable where the defendant has no constitutional right to counsel).

23. *See* 1 HERTZ & LIEBMAN, *supra* note 13, § 7.2f (arguing that the Eighth and Fourteenth Amendments should require assistance of counsel in capital postconviction proceedings); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 63–69 (2002) (arguing that there is a constitutional right to postconviction counsel); Michael A. Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1078 (1989) (same).

of that statute unfair.[24] Most courts have drawn upon this equitable power only sparingly in the capital habeas context,[25] finding that defendants facing the death penalty should have no greater access to equitable tolling than noncapital defendants.[26] In the case of Kenneth Rouse, described above, the Fourth Circuit determined that the error by Rouse's attorney in miscalculating the statute of limitations did not warrant equitable tolling.[27] A more nuanced understanding of the AEDPA's fundamental purpose, however, reveals the essential role of equitable doctrines in accomplishing the AEDPA's goals. The doctrine of equitable tolling, in its current form, properly applies to ameliorate negligent untimely filings by appointed capital habeas counsel. Correct application of the equitable tolling doctrine would thereby provide capital defendants with meaningful access to counsel, while still promoting the AEDPA's countervailing goal of ensuring efficient and final resolution of federal habeas claims.

Part II of this Note briefly traces the history of the writ of habeas corpus, focusing on the importance of federal habeas review of state capital sentences. Part III discusses Congress's goals in passing the AEDPA and describes the practical operation of the statute of limitations. Part IV then looks to case law to elucidate the circumstances under which courts have equitably tolled the AEDPA deadline in capital cases, highlighting the current split in the federal

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24. *See, e.g.*, Davis v. Johnson, 158 F.3d 806, 810 (5th Cir. 1998) (stating that the AEDPA filing deadline is subject to equitable tolling). *See generally* David D. Doran, Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 WASH. L. REV. 681 (1989).

25. *See, e.g.*, Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (noting that equitable tolling should only rarely be applied); Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999) (stating that courts only equitably toll the AEDPA deadline in "rare and exceptional circumstances" (quoting *Davis*, 158 F.3d at 811)). The *Harris* court stated:

> [A]ny 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 would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.

Harris, 209 F.3d at 330.

26. *See* Rouse v. Lee, 339 F.3d 238, 256 (4th Cir. 2003) (en banc) (stating that the existence of a capital sentence receives no consideration in the equitable tolling analysis), *cert. denied* 124 S. Ct. 1605 (2004). Other courts, however, have reached a contrary result. *See, e.g.*, Fahy v. Horn, 240 F.3d 239, 244–45 (3d Cir. 2001) (permitting equitable tolling of the AEDPA's statute of limitations because the court found that capital cases require extra consideration); Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997) (giving weight to the capital sentence when equitably tolling the statute of limitations for attorney error).

27. *See Rouse*, 339 F.3d at 251 (refusing to equitably toll the statute).

circuits. Part V imports the equitable tolling analysis into the AEDPA framework, identifying several bases in statutory text and case law that advocate equitably tolling the AEDPA deadline to ameliorate error by appointed habeas counsel. Before concluding, Part VI contains a condensed practical analysis that underscores the inequity of refusing to toll the filing deadline for attorney error in capital habeas cases.

II. The Great Writ

A. Evolution of the Writ

The writ of habeas corpus, the Great Writ,[28] traces its roots to thirteenth-century England.[29] Since its inception, defendants have used habeas corpus to challenge the legality of the government's custody.[30] A federal prisoner's right to petition for habeas relief is embodied in the United States Constitution under the Suspension Clause.[31] After 1867, the right to federal habeas corpus has also extended by statute to state prisoners seeking federal review of state convictions.[32] The Habeas Corpus Act of 1867[33] ensured that any defendant

28. *See* Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 337–45 (1983) (discussing the history of the Great Writ).

29. *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) (describing the origins of the Great Writ); Rosenn, *supra* note 28, at 337–38 (noting the influence of English common law on American habeas corpus law).

30. *See* Fay v. Noia, 372 U.S. 391, 430–31 (1963) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him."), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); 1 HERTZ & LIEBMAN, *supra* note 13, § 2.3 (describing the evolution of the writ and tracing its usage).

31. U.S. CONST. art. 1, § 9, cl. 2 ("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.").

32. *See* DUKER, *supra* note 29, at 181–224 (explaining the historical extension of federal habeas review to include state defendants); *see also* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing that the Fourteenth Amendment incorporates the Suspension Clause, thus mandating federal habeas corpus review for state prisoners). Although broadly rejected, at least one federal court has expressly adopted Professor Steiker's view. *See* Rosa v. Senkowski, No. 97 Civ. 2468, 1997 U.S. Dist. LEXIS 11177, at *34 (S.D.N.Y. Aug. 1, 1997) (stating that the Suspension Clause is incorporated by the Fourteenth Amendment to guarantee habeas review for state prisoners), *aff'd on other grounds*, 148 F.3d 134 (2d Cir. 1998) (per curiam).

33. Act of Feb. 5, 1867, 14 Stat. 385 (now incorporated in 28 U.S.C. § 2241 (2000)). In *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), the Supreme Court interpreted the scope of the Habeas Corpus Act of 1867 for the first time. Chief Justice Chase, writing for the Court, stated:

> This legislation is of the most comprehensive character. It brings within the *habeas*

seeking to challenge a state conviction could receive habeas review in federal court for alleged violations of federal constitutional rights.[34]

The scope of federal habeas review over state convictions expanded exponentially through the middle part of the twentieth century.[35] The Warren Court extended authority to federal courts to review factual disputes de novo in habeas proceedings.[36] In another expansion, the Supreme Court ruled that the procedural default rules applying to state direct appeal did not apply to state collateral proceedings.[37] The tide of habeas expansion, however, soon began to recede, beginning in the 1970s.[38] In a series of decisions, the Supreme Court cut back the federal courts' jurisdiction and scope of review over state convictions.[39] The Court strengthened preclusion rules concerning total exhaustion,[40] procedural default,[41] and deference to state factfinding.[42]

> *corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

Id. at 325–26.

34. *See* DUKER, *supra* note 29, at 189–94 (discussing the effects of the Habeas Corpus Act of 1867).

35. *See* Rosenn, *supra* note 28, at 343–44 (describing the Warren Court era as the "zenith" of the writ's expansion).

36. *See* Townsend v. Sain, 372 U.S. 293, 312 (1963) ("[W]here an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

37. *See* Fay v. Noia, 372 U.S. 391, 398–99 (1963) (rejecting the suggestion that failure to exhaust every possible state claim precludes a defendant from receiving federal habeas review), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The *Fay* Court decided that, although intelligent and knowing waiver of the right to appeal may constitute procedural default, the defendant in *Fay* did not knowingly waive this right. *Id.* at 399. Even though the defendant failed to exhaust his right to appeal a state proceeding, state remedies were no longer available at the time of the federal habeas petition, and the defendant had thus fulfilled his exhaustion requirement. *Id.*

38. *See* 1 HERTZ & LIEBMAN, *supra* note 13, § 2.4d (discussing habeas reform by Congress and the Supreme Court prior to the AEDPA); *see also* Hammel, *supra* note 23, at 7–11 (discussing the Supreme Court's shift toward limiting access to habeas corpus through the exhaustion doctrine and procedural default).

39. *See* Rosenn, *supra* note 28, at 355–63 (describing the Supreme Court's narrowing of habeas review).

40. *See* Rose v. Lundy, 455 U.S. 509, 518–20 (1982) (requiring federal habeas petitioners to exhaust all claims contained in the petition before a federal court may review any claim in the petition).

41. *See* Engle v. Issac, 456 U.S. 107, 128–29 (1982) (reinforcing that a defendant must show cause and actual prejudice to overcome procedural default).

42. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5–6 (1992) (requiring courts to apply the cause-and-prejudice standard for procedural default when state findings of fact were

Despite the significant limitations imposed on access to habeas corpus in the latter part of the twentieth century, a defendant's right to seek initial habeas corpus review was never limited by a statute of limitations until passage of the AEDPA in 1996.[43] Since its introduction, the right to seek federal habeas corpus stayed free of time constraints.[44] As such, habeas corpus operated as a vital means of protecting a defendant's constitutional rights at any time, particularly for capital defendants.[45]

B. Federal Habeas Corpus in Capital Cases

After *Furman v. Georgia*[46] ushered in the modern era of capital punishment, federal habeas review has remained an essential mechanism for

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inadequate); *see also* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1874–76 (1997) (discussing the scope of federal review under the AEPDA concerning findings of fact).

43. *See, e.g.*, Chessman v. Teets, 354 U.S. 156, 165 (1957) (stating that federal courts must grant relief from constitutional violations at any time, regardless of when the habeas petition is filed). The Court stated:

> Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands.

Id.

44. *See* Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1514–18 (1997) (noting that despite several proposed laws imposing a statute of limitations on habeas petitions, the AEDPA was the first such legislation actually enacted into law).

45. This indefinite access to habeas corpus led to abusive successive filing by capital defendants. Seeking to stay executions, capital defendants could exercise their right to habeas at any time, thus leading to extraordinary delays in carrying out executions. *See* Thomas P. Bonczar & Tracy L. Snell, *Bureau of Justice Statistics Bulletin: Capital Punishment, 2002*, at 11 (Nov. 2003) (providing statistics regarding the average time elapsed between initial sentencing and actual execution), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf (on file with the Washington and Lee Law Review).

46. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). In *Furman*, the Supreme Court addressed whether the capital punishment schemes of Georgia and Texas violated the Eighth and Fourteenth Amendments. *Id.* at 239. Three defendants sentenced to death appealed the constitutionality of their sentences. *Id.* All nine Justices wrote individual opinions, and none of the five Justices making up the majority joined in the opinion of another Justice. Common themes from the plurality opinions, however, revealed concern about the lack of legislative guidance to prevent arbitrary exercise of judicial discretion, along with selective application of the death penalty to minorities and the poor. The Court ultimately struck down the death

protecting defendants' federal constitutional rights in state capital proceedings.[47] Only a tiny proportion of death sentences handed down by states actually result in executions.[48] James Liebman's exhaustive study[49] of the rate by which actual execution occurs after an initial imposition of a capital sentence estimates that only 5.4% of death penalties imposed between 1973 and 1995 resulted in executions.[50] The Liebman study estimates that 40% of the state capital sentences that found their way to federal habeas review[51] were overturned due to serious error.[52] Other studies, including one by the

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penalty schemes of Georgia and Texas as violative of the Eighth Amendment's protection from cruel and unusual punishment. *Id.* at 239. In so doing, the Court invalidated the statutes authorizing capital punishment in thirty-nine states, the District of Columbia, and the federal government. *Id.* at 411 (Blackmun, J., dissenting).

After *Furman*, state lawmakers revisited their capital sentencing legislation to ensure accordance with the principles laid down by the Supreme Court. Four years after *Furman*, the Supreme Court upheld several revised death penalty procedures that met the standards of *Furman* in *Gregg v. Georgia*, 428 U.S. 153 (1976) and its companion cases: Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). *Furman* remains the landmark case in modern capital punishment jurisprudence. For a discussion of the rationale in *Furman* and its lasting effect in death-penalty law, see generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

47. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846–60 (2000) (discussing error rates of state-imposed capital sentences in post-*Furman* cases that were reversed in habeas corpus proceedings).

48. *See infra* notes 50–56 and accompanying text (discussing the rates of execution for defendants sentenced to death). The states currently authorizing the death penalty are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. DEATH PENALTY INFORMATION CENTER, STATE BY STATE DEATH PENALTY INFORMATION, *at* http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Jan. 11, 2005) (on file with the Washington and Lee Law Review).

49. James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, *at* http://www2.law.columbia.edu/brokensystem2/index2.html (Feb. 11, 2002) (on file with the Washington and Lee Law Review).

50. *See* Liebman et al., *supra* note 47, at 1846 (relating empirical evidence of actual executions as a proportion of capital sentences handed down).

51. Liebman's group also provides reversal rates for state postconviction procedures. The Liebman study approximates that over 46% of capital sentences are reversed for serious error in direct appeal or state postconviction procedures. *See* Liebman et al., *supra* note 49, at I.A (noting overall statistics). Of the remaining 54% of death verdicts, 40% are reversed for serious error during federal habeas review. *Id.*

52. *Id.*; *see also* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052 & n.90 (2000) (discussing the rates by which courts at various stages of

Department of Justice (DOJ), also attest to the significant role played by postconviction review of state capital convictions.[53] According to DOJ statistics, over 77% of defendants sentenced to death between 1973 and 2002 ultimately left death row through means other than execution.[54] Another study indicates that 73.2% of all capital habeas cases heard in federal court resulted in rulings favorable to the defendant.[55] Clearly, these statistics indicate that federal review of capital sentences, which is the last level of review for most capital defendants, provides an essential forum for ensuring that defendants facing an irrevocable punishment receive the rights guaranteed by the Constitution. Narrowing or eliminating access to federal habeas corpus from state convictions could produce dire consequences, as serious constitutional errors in state convictions would go unreviewed by federal courts.[56]

III. The Antiterrorism and Effective Death Penalty Act of 1996

A. Background

President Clinton signed the AEDPA into law on April 24, 1996, concluding decades of debate in Congress about if and how it should reform habeas procedures. In the end, the final impetus needed to enact the habeas reform legislation came from the Oklahoma City bombing.[57] Republicans, strongly supported by President Clinton, reacted to the attack by pushing stronger antiterrorism legislation through Congress.[58] Believing that Timothy McVeigh would face the death penalty for the bombing, Congress attached the

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postconviction review reverse state capital sentences).

53. *See generally* Bonczar & Snell, *supra* note 45 (providing a wide range of annual statistics regarding capital punishment in the United States).

54. *See id.* at 14, app. tbl. 2 (providing statistics on the outcome of persons sentenced to death). Between 1973 and 2002, a total of 7254 people were sentenced to death. *Id.* Of these, 3557 remained on death row at the end of 2002. *Id.* Of the 3597 people no longer on death row, only 820 (22.1%) were executed. *Id.*

55. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520–21 (1988) (citing statistics on success rates for capital habeas petitioners).

56. *See* James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001) (criticizing the foreclosure of federal habeas corpus as a remedy for an ineffective death sentence).

57. *See id.* at 413 (describing the relationship between McVeigh's acts and the habeas reform provisions of the AEDPA).

58. *See id.* (noting that the habeas reform bill, which was originally part of the Republican "Contract with America" platform, passed through Congress only because President Clinton's endorsement swayed some Democrats to vote for it).

habeas reform measures to the antiterrorism bill to ensure efficient resolution of his likely challenges.[59] After so many years of redrafting and amending various habeas reform bills, the final legislation ended up unwieldy, awkward, and confusing.[60] Courts have grappled with the language and procedures of the AEDPA, prompting one scholar to note:

> The courts' efforts to work [the new AEDPA's rules] out resemble nothing so much as the proverbial fire-fighter returning from a night on the town—groping, lurching, muzzy, trying with exquisite and exaggerated concentration to make sense of utter incoherence, and beginning to wonder vaguely whether the excitement of the task is worth the headache it is bound to bring tomorrow morning.[61]

The general response to the legislation has been less than enthusiastic.

Congress's primary goal in passing the habeas reform provisions of the AEDPA was to "to reduce the abuse of habeas corpus that results from delayed and repetitive filings."[62] Frustrated with the long delays in implementing state capital sentences created by successive federal habeas petitions,[63] Congress set out to expedite the federal review process and to create finality in judgments in order to preserve efficacious state sentencing.[64] To ensure that efficiency and finality would not completely undermine the value of federal habeas corpus for capital defendants, however, Congress retained 21 U.S.C. § 848(q)(4)(B),[65] which entitles every indigent capital defendant to appointed counsel during federal habeas procedures.[66]

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59. *See id.* (remarking on the unlikely coupling of antiterrorism legislation and habeas reform).

60. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996) (attributing the statute's poor drafting to its tortuous and extended legislative history).

61. Anthony G. Amsterdam, *Foreword* to 1 HERTZ & LIEBMAN, *supra* note 13, at v. The Supreme Court appears equally unimpressed with the drafting of the legislation. Justice Souter remarked: "All we can say is that in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 U.S. 320, 336 (1997).

62. *See* H.R. REP. NO. 104-23, at 9 (1995) ("[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.").

63. *See* Bonczar & Snell, *supra* note 45, at 11 (providing statistics on the average elapsed time between sentence and execution).

64. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000) (discussing the AEDPA's purpose of furthering "the principles of comity, finality, and federalism").

65. *See* 28 U.S.C. § 2254(h) (2000) (noting that, in addition to the guarantee of counsel for capital defendants in 21 U.S.C. § 848(q), the court may choose to appoint counsel for other indigent defendants).

66. *See* 21 U.S.C. § 848(q)(4)(B) (2000) (stating that indigent defendants facing a state-imposed death penalty are entitled to counsel during federal habeas proceedings).

The AEDPA brought comprehensive changes to the treatment of federal claims by state prisoners without changing the fundamental framework of pre-existing habeas law.[67] The AEDPA's primary changes to habeas law involve the new statute of limitations,[68] increased deference to state court findings,[69] strict limitations on successive habeas petitions,[70] and special procedures for capital habeas petitioners.[71] Considerable litigation has been undertaken to smooth out the wrinkles in these new provisions, and much work remains.

B. The Statute of Limitations

Section 2244(d) of Title 28 contains the AEDPA statute of limitations, which states that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

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67. *See* Yackle, *supra* note 60, at 381 (noting that the AEDPA "takes the preexisting habeas landscape as its baseline").

68. *See* 28 U.S.C. § 2244(d) (2000) (establishing a one-year statute of limitations). *See generally* Sessions, *supra* note 44.

69. *See* 28 U.S.C. § 2254(a)(1) (2000) (stating the deferential level of review over state court findings of fact). *See generally* Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 432–40 (1998).

70. *See* 28 U.S.C. § 2244(b) (2000) (providing strict limitations on court discretion to review claims brought in successive habeas petitions). *See generally* Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115 (1998).

71. *See generally* 28 U.S.C. §§ 2261–2266 (2000) ("Special Procedures for Capital Habeas Cases"). Chapter 154 to Title 28 of the United States Code contains a series of optional federal procedures applicable to states that authorize the death penalty. Under Chapter 154, states can "opt-in" to receive special, expedited federal habeas procedures that provide a short statute of limitations and guarantees of finality. *Id.* § 2261(b). To opt into Chapter 154, the state must meet extensive requirements regarding provision of counsel for capital defendants at all stages of state and federal postconviction procedures. *Id.* §§ 2261(b)–(c). Presently, most states have not officially opted into the special procedures found in Chapter 154. Until the opt-in procedures gain a greater foothold, the general habeas procedures in Chapter 153 continue to govern capital habeas cases and, hence, are the subject of this Note. Some aspects of the opt-in provisions are discussed below in Part V.B. For a broad discussion of the operation of Chapter 154, see generally Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467 (2000); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 62–63 (discussing Chapter 154, including the current levels of state compliance); Benjamin Robert Ogletree, Note, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603 (1998).

State court."[72] The statute itself provides for limited tolling of the one-year period under specific circumstances delineated in the statute.[73]

Any time during which a "properly filed" application for state postconviction review is pending in state court, the limitations period is tolled.[74] Because of the properly filed requirement, if a state application is ultimately determined to have been improperly filed, the AEDPA's deadline is not tolled.[75] Bewildering state postconviction procedures and unclear filing requirements often lead to defendants filing improper state applications.[76] Although nearly every state that authorizes capital punishment now provides some assistance of counsel at postconviction stages,[77] state procedural requirements are often so confusing that even seasoned postconviction litigators can have difficulties navigating through them.[78] Procedural error during state proceedings can thus be fatal later on as the AEDPA's one-year limitation

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72. 28 U.S.C. § 2244(d)(1) (2000).

73. *See id.* § 2244(d)(2) (including the tolling provision).

74. *See id.* ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). Under the exhaustion doctrine, which is incorporated in the AEDPA at 28 U.S.C. § 2254(b)(1)(A), the defendant is required to exhaust all state postconviction remedies prior to seeking any federal review. *See* Duncan v. Walker, 533 U.S. 167, 178–79 (2001) (discussing the exhaustion requirement of the AEDPA); *see also* 2 HERTZ & LIEBMAN, *supra* note 13, at ch. 23 (discussing exhaustion).

75. *See* Dictado v. Ducharme, 189 F.3d 889, 892 (9th Cir. 1999) (noting that if Congress intended the statute of limitations to toll for pending improperly filed applications, it would not have included the "properly filed" language); *see also* Liebman, *supra* note 56, at 417–18 (discussing the problem of improperly filed state petitions). The Supreme Court will apparently resolve the question of when a disallowed state application for postconviction review may be deemed to be properly filed for purposes of the AEDPA. *See* Pace v. Vaughn, No. 02-3049, 71 Fed. Appx. 127, 128–29 (3d Cir. July 7, 2003) (discussing the problem of the improperly filed state application), *cert. granted sub nom.* Pace v. DiGuglielmo, 73 U.S.L.W. 3204 (U.S. Sept. 28, 2004) (No. 03-9627).

76. *See Duncan*, 533 U.S. at 184 n.2 (Stevens, J., concurring) (noting that even habeas experts are often unable to determine whether state claims have actually been exhausted); Morgan v. Bennett, 204 F.3d 360, 370–71 (2d Cir. 2000) (disagreeing with the district court's ruling that defendant failed to exhaust certain state claims).

77. *See* Hammel, *supra* note 23, at app. A (providing a complete list of states providing postconviction appointed counsel and the remedy for incompetent counsel in each of the states). Of the thirty-eight states currently authorizing the death penalty, thirty-six recognize some right to counsel during postconviction procedures. The two states that do not guarantee any form of counsel during state postconviction procedures, even to capital defendants, are Georgia and Alabama. *See* Hammel, *supra* note 18, at 364 (surveying state guarantees of counsel); *see also* Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999) (finding that capital defendants had no right to counsel in postconviction procedures).

78. *See* 1 HERTZ & LIEBMAN, *supra* note 13, § 6.1 (noting the diversity and complexity of state postconviction procedures).

continues to run, often expiring as defendants await resolution of their improper state claims before attempting to file federal petitions.[79] On the other hand, federal habeas petitions filed before all available state remedies have been fully exhausted will be dismissed as premature.[80] Adding to the confusion, many states began implementing comprehensive reforms of state postconviction procedures contemporaneous to the AEDPA's enactment, which has led to unsettled state law.[81] Furthermore, any time spent in the preparation of materials necessary for state postconviction proceedings does not toll the AEDPA statute of limitations—the statute is only tolled when state proceedings are actually pending.

Although one year may initially seem more than adequate for an attorney to file a habeas petition, in reality, the time limit will almost always be insufficient.[82] During that year, the defendant must obtain counsel,[83] pursue

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79. *See, e.g.*, Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (finding a habeas petition untimely when the defendant's attorney miscalculated the statutory tolling period for pending state claims).

80. *See* 28 U.S.C. § 2254(b)(1)(A) (2000) (requiring an applicant to exhaust state remedies before receiving federal habeas review).

81. *See* Hammel, *supra* note 23, at 11–12 (discussing the state reforms). While Congress was enacting the AEDPA, death penalty states were also attempting to speed up postconviction procedures and create stricter deadlines in capital cases. *See, e.g.*, Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (describing Pennsylvania's new postconviction procedures as "inhibitively opaque" at the time defendant was calculating statutory tolling of the AEDPA).

82. *See* Sessions, *supra* note 44, at 1567 (calling the imposition of a one-year statute of limitations an "unmitigated disaster"). Although this Note focuses on the AEDPA deadline's effect on capital cases, federal habeas review is, of course, an important protection for noncapital defendants as well. The AEDPA statute of limitations applies equally to noncapital defendants. *See* 28 U.S.C. § 2244(d) (2000) (setting a one-year statute of limitations for all petitions from state convictions). Furthermore, these defendants are forced to navigate the labyrinth of state and federal postconviction procedures without help of counsel. *See* Liebman, *supra* note 52, at 2043–45 (discussing the extreme difficulties for noncapital defendants caused by the AEDPA deadline). Perhaps because of their lack of representation, but more likely because of the special considerations regarded to capital defendants, noncapital defendants have a far lower success rate in federal habeas review. *See infra* note 163 (comparing success rates of capital and noncapital cases in federal habeas corpus).

Although the AEDPA's statute of limitations is harsh on unrepresented noncapital defendants, other considerations could make the effect of the deadline less deleterious. Noncapital defendants seeking federal habeas review are incarcerated, often raising issues concerning the length of their sentences. Therefore, these defendants have some incentive to proceed quickly, because their goal is reduction of their sentence. Capital defendants, on the other hand, harbor different motives. Waiting on death row, these defendants seek to delay the imposition of their punishment through successive petitions, constant appeals, and other delay tactics. The finality of the one-year statute of limitations therefore clashes with the incentives of the capital defendant more so than the noncapital defendant. Regardless of incentives, exhausting state claims and filing a federal habeas petition remains an awesome task for an unrepresented noncapital defendant.

time-consuming state postconviction relief, calculate the AEDPA deadline, and prepare the federal habeas petition. As the defendant waits for counsel to be appointed, the AEDPA's one-year clock keeps ticking.[84] Departing from the recommendations of the Powell Committee and the American Bar Association, the AEDPA statute of limitations is not tolled while the defendant awaits appointment of the habeas counsel guaranteed by 21 U.S.C. § 848(q)(4)(B).[85] Compounding the problem, Congress cut all federal funding for the Post Conviction Defender Organizations (PCDOs) the same year that the AEDPA was enacted.[86] The elimination of the PCDOs, which provided a ready pool of experienced and federally funded attorneys for appointment in capital habeas cases,[87] could not have come at a worse time. Now courts face great difficulty in finding and appointing a qualified attorney early in the one-year period.[88]

Furthermore, once federal habeas counsel is finally appointed, that attorney must still draft the federal habeas petition. Drafting a suitable habeas petition in a capital case can require extensive research and careful scrutiny of an immense record because the AEDPA requires fact pleading, not notice

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83. Capital defendants seeking federal habeas relief are entitled to counsel throughout the habeas proceedings. 21 U.S.C. § 848(q)(4)(B) (2000). The difficulty in finding competent counsel to take on the complexities of death-penalty litigation is well documented. *See* Woolley, *supra* note 69, at 428 (discussing the plight of capital defendants seeking their statutorily-guaranteed counsel for federal habeas proceedings). Noncapital defendants, however, have no right to counsel while seeking postconviction relief under federal law and the law of most states. Therefore, many defendants are forced to navigate the tolling provisions of the AEDPA by themselves to ensure the availability of federal review. *See generally* Sessions, *supra* note 44 (arguing that one year is often inadequate to prepare a habeas petition and thus constitutes deprivation of due process).

84. *See* 28 U.S.C. § 2244(d)(2) (2000) (stating that the statute of limitations continues to run until the defendant's state claim is properly filed); *see also* Lookingbill v. Cockrell, 293 F.3d 256, 264 (5th Cir. 2002) (finding that the statute of limitations is not tolled while the capital defendant waits for counsel to be appointed).

85. *Compare* 28 U.S.C. § 2244(d) (2000) (failing to provide for statutory tolling while a defendant waits for appointment of federal habeas counsel), *with* POWELL COMMITTEE, *supra* note 16, at 6 (stating that the statute of limitations should begin to run only at the time when counsel is appointed), *and* IRA P. ROBBINS, AMER. BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, at B-10 (1990) (proposing a statute of limitations that is tolled during any period in which the defendant is not represented by counsel).

86. *See* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 540–44 (1996) (describing the congressional defunding of the PCDOs).

87. *See* Howard, *supra* note 19, at 904–12 (discussing the function of the PCDOs).

88. *See id.* at 919–20 (describing the aftermath of the elimination of the PCDOs).

pleading.[89] Underpaid and overburdened appointed attorneys face difficulties in meeting the statute of limitations.[90]

Considering the sheer fortuitousness of receiving appointment of counsel early on in the statutory period and the enormous amount of labor that the appointed attorney must put forth during the year, the AEDPA's one-year limitations period arbitrarily cuts off federal review for many diligent defendants. In cases where a diligent defendant is unable to meet the deadline, Congress has achieved its goal of efficiency but only at the expense of ensuring fair protection of constitutional rights. In such cases, the AEDPA's corresponding focus on fair and final review of the merits of a petition is defeated by a dysfunctional appointment system and incompetent counsel.

C. Redefining an "Application for a Writ of Habeas Corpus" Under McFarland v. Scott

Some commentators suggest that the AEDPA's statutory text provides the key to correcting problems caused by overburdened and late-appointed federal habeas counsel running up against the AEDPA statute of limitations.[91] Section 2244(d) of Title 28, which lays out the AEDPA statute of limitations, states that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[92] In other words, defendants must "apply" for a writ of habeas corpus within the delineated one-year period.

In *McFarland v. Scott*,[93] a pre-AEDPA case, the Court discussed what constituted "commencement" of federal habeas proceedings.[94] The defendant

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89. *See* 1 HERTZ & LIEBMAN, *supra* note 13, at ch. 11 (discussing the contents of the petition); John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 275 (1996) (discussing how habeas petitions differ from appellate briefs); Liebman, *supra* note 52, at 2043 (discussing the fact-intensive pleading necessary for habeas pleading).

90. *See* Larry Yackle, Panel Discussion, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 560, 563 (1996) (noting that "it's going to be nearly impossible to comply" with the one-year deadline).

91. *See* 1 HERTZ & LIEBMAN, supra note 13, § 5.2b, at 267–69 (discussing *McFarland*).

92. 28 U.S.C. § 2244(d)(1) (2000).

93. McFarland v. Scott, 512 U.S. 849 (1994). In *McFarland*, the Supreme Court considered when habeas proceedings are commenced for the purposes of 21 U.S.C. § 848(q). *Id.* at 851. The defendant was sentenced to death in Texas and sought a stay of execution just a few days before the execution was to take place. *Id.* at 852. He filed a *pro se* motion in federal court stating that he "wish[ed] to challenge [his] conviction and sentence" under § 2254. *Id.* The motion also requested appointment of counsel under § 848(q). *Id.* The district court refused to appoint counsel, stating that under § 848(q) counsel may only be appointed once

in *McFarland* filed a request for appointment of habeas counsel without first filing a formal habeas petition.[95] The issue before the Court was whether the request for counsel commenced habeas proceedings, thus giving the federal court jurisdiction to appoint counsel and grant a stay of execution.[96] To resolve the issue, the Court interpreted the statutory language in 21 U.S.C. § 848(q)(4)(B), which provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to the appointment of one or more attorneys . . . .[97]

The Court reasoned that requiring the defendant to file a complex habeas petition without aid of counsel would substantially defeat the purpose of providing assistance of counsel.[98] For the appointment to be meaningful, counsel must be appointed earlier to assist in the preparation of the petition. The Court thus found that "a 'post conviction proceeding' within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting the appointment of counsel for his federal habeas corpus proceeding."[99] After the defendant requests appointment of counsel, habeas proceedings have commenced, thereby allowing a court to appoint counsel.

Professors Hertz and Liebman adopt the rationale of *McFarland* to propose that courts redetermine when an "application" for habeas review occurs

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federal habeas proceedings have commenced and that the defendant's motion did not constitute a petition for habeas corpus. *Id.* at 853. The Supreme Court reasoned that if counsel can only be appointed after the habeas petition is filed the statutory grant of counsel is defeated. *Id.* at 855. Instead, for § 848(q) to be meaningful, counsel must assist in the preparation and filing of the habeas petition. *Id.* at 855–57. Therefore, the Court reversed the district court, finding that a request for appointment of counsel under § 848(q) constitutes commencement of habeas proceedings, thus permitting counsel to be appointed. *Id.* at 856–57. The Court stated that its interpretation was necessary to protect the meaningful grant of assistance of counsel in § 848(q). *Id.* Furthermore, the Court found that the defendant's request for counsel also granted jurisdiction to the district court, enabling it to grant a stay of execution even though a formal habeas petition had not been filed. *Id.* at 858.

94. *See id.* at 851 (stating the issue).

95. *See id.* at 852 (noting that defendant filed a motion seeking habeas relief but never filed a proper habeas petition).

96. *See id.* at 855–57 (finding that the request for counsel did commence the proceedings).

97. 21 U.S.C. § 848(q)(4)(B) (2000).

98. *See McFarland*, 512 U.S. at 856 (finding that Congress did not intend to defeat the purpose of § 848(q)).

99. *Id.* at 856–57.

in capital cases.[100] *McFarland* created a special exception for capital defendants to protect the substance of the statutory grant of counsel. Because the AEDPA was legislated into the backdrop of existing habeas case law, Hertz and Liebman argue that *McFarland* still governs when capital habeas proceedings commence.[101] Courts could rely on *McFarland* to find that commencement of capital habeas proceedings under *McFarland* also constitutes an "application" under § 2244.[102] This exception for capital petitioners would serve substantially the same purpose as the exception in *McFarland*—guaranteeing that diligent petitioners receive the statutory promise of counsel.

Although the argument by Hertz and Liebman certainly has appeal, it creates problems of its own. In *McFarland*, the Court could redefine the commencement of habeas proceedings because the redefinition did not conflict with any other applicable statutory language. In the AEDPA, however, the word "application" has a specific statutory meaning. Under § 2242, an application is a "writing signed and verified by the person for whose relief it is intended."[103] The statutory definition also sets pleading requirements for the application: "It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known."[104] Clearly, a *McFarland* motion, which merely asks for appointment of counsel, does not come close to meeting the technical requirements set forth in § 2242.

A finding that a *McFarland* motion constitutes an application for purposes of § 2244 would conflict with the word's statutory definition and put § 2244 at odds with the rest of the AEDPA.[105] Courts are unlikely to accept such a

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100. *See* 1 HERTZ & LIEBMAN, *supra* note 13, § 5.2b, at 267–69 (applying *McFarland* to the language the AEDPA).

101. *See id.* (stating that Congress legislated against the backdrop of *McFarland*).

102. *See id.* (arguing that the *McFarland* rule should apply to the AEDPA and, therefore, the filing of a request for appointment of counsel satisfies the AEDPA statute of limitations).

103. 28 U.S.C. § 2242 (2000); *see also* Isaacs v. Head, 300 F.3d 1232, 1245 (11th Cir. 2002) (deciding whether the AEDPA governed a case where the defendant filed a *McFarland* motion prior to the AEDPA's enactment but did not file the actual habeas petition until after enactment). The *Isaacs* court ultimately decided that a *McFarland* motion is not an application for purposes of § 2254. *Id.* "[T]he filing of a motion for appointment of counsel or other threshold motions might initiate some form of 'case,' at least in the constitutional sense. However, such a motion does not necessarily mark the genesis of the habeas case under § 2254." *Id.*

104. 28 U.S.C. § 2242 (2000).

105. *See* Brown v. Gardner, 513 U.S. 115, 118 (1994) (noting that "there is a presumption that a given term is used to mean the same thing throughout a statute"). *But see* Yackle, *supra* note 60, at 381–82 (stating that courts should interpret the language of the AEDPA using the

redefinition.[106] Moreover, if a request for appointment of counsel was found to satisfy the statute of limitations, the attorney would no longer have an incentive to move quickly and file the actual habeas petition. Without the pressing statute of limitations, federal habeas corpus would soon be plagued by the same stalling tactics Congress sought to prevent through enactment of the AEDPA. Thus, although *McFarland* still applies to determine when a court has jurisdiction to appoint an attorney under § 848(q), the case is unlikely to dictate when an application for a writ of habeas corpus occurs.[107]

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same flexibility and creativity that the Court exercised in *McFarland*). Although Professor Yackle does not necessarily endorse the result advocated by Hertz and Liebman—that courts treat a *McFarland* motion as an application for habeas corpus—he does suggest that courts use the same solution-oriented approach to statutory construction. *Id.* To redefine a term contrary to its statutory definition, however, exceeds the bounds of judicial creativity.

106. *See* Woodford v. Garceau, 538 U.S. 202, 208–10 (2003) (discussing whether a *McFarland* motion constituted an "application for a writ of habeas corpus" for purposes of determining whether habeas proceedings were pending when the AEDPA was enacted). The *Woodford* Court found that a *McFarland* motion did not qualify as an "application for a writ of habeas corpus" in these circumstances. *Id.* Although the Court did not address whether *McFarland* applies for purposes of § 2244(d), the Court's reasoning suggests that the *McFarland* motion would not satisfy the statute of limitations. *See id.* at 208–09 (noting that *McFarland*'s reasoning applied to § 2251, not § 2254); *see also* Moseley v. French, 961 F. Supp. 889, 893 (M.D.N.C. 1997) (discussing whether filing a *McFarland* motion for appointment of counsel satisfies the AEDPA statute of limitations). The *Moseley* court rejected the suggestion that, under *McFarland*, the court should deem the statute of limitations satisfied by the request for counsel. *Id.* The court explained that the motion commenced habeas proceedings only for purposes of § 848(q) and not § 2244. *Id.* Therefore, the defendant was still required to file a formal petition to meet the deadline. *Id.* The court noted, however, that while the *McFarland* motion did not by itself satisfy the statute of limitations, it could justify equitable tolling if appointed counsel failed to file in a timely manner. *Id.*

107. Other commentators have suggested that the time between filing a *McFarland* motion and the subsequent appointment of counsel should automatically equitably toll the statute of limitations. *See* Woolley, *supra* note 69, at 430–31 (stating that *McFarland* requires courts to equitably toll the AEDPA statute of limitations after a petitioner requests counsel). This approach is far more promising, considering the uniformity of language issues created by the Hertz and Liebman approach. *See also supra* note 85 (noting that both the Powell Committee and the American Bar Association recommended tolling the statute of limitations for any period in which the defendant was not represented by counsel). Reading *McFarland* in light of the Powell Committee recommendations, which were extremely influential in drafting the AEDPA, courts could determine that any period prior to appointment of counsel should be equitably tolled. *See* Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring) (discussing the availability of equitable tolling under the AEDPA). Justice Stevens noted that "a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Id.*

IV. Equitable Tolling of the AEDPA's Limitations Period

A. The Doctrine

Although *McFarland* may not provide the key to ensuring that capital habeas petitioners receive meaningful access to habeas corpus, equitable doctrines may offer such a solution. The doctrine of equitable tolling permits a court to toll a statutory deadline when, for reasons of fundamental fairness, it would be unjust to apply the statute of limitations rigidly.[108] Originally, English courts of equity created the doctrine of equitable tolling to ensure that parties could not profit from their own fraud.[109] Modern courts, however, apply the doctrine to a broader set of facts. Courts may equitably toll a statute of limitations when some external obstacle prevents a party from meeting the strict requirements of a statute of limitations despite diligent efforts.[110] Although the equitable tolling doctrine is not a judicial license to ignore a congressional statute of limitations,[111] it does permit courts to correct the injustices occasionally engendered by statutes of limitation.

Every court to address the issue has determined that the AEDPA's deadline is a statute of limitations subject to equitable tolling.[112] Federal courts have exercised their power to equitably toll the AEDPA deadline for numerous reasons, including failure by prison officials to mail a defendant's petition,[113] the defendant's mental incompetence,[114] the defendant's showing of "actual innocence,"[115] and misconduct

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108. *See* Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 96 (1990) (explaining the purpose of equitable tolling).

109. *See* Mark A. Wilner, Note, *Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments*, 75 WASH. L. REV. 675, 684 (2000) (discussing the origins of equitable tolling). The author points to an example where a defendant concealed a fraudulent bond transaction for nine years, then unsuccessfully asserted as a defense that the statute of limitations had passed. *Id.* (citing Booth v. Earl of Warrington, 2 Eng. Rep. 111, 111–13 (1714)).

110. *See* Doran, *supra* note 24, at 682–83 (describing generally the requirements of equitable tolling).

111. *See* Lookingbill v. Cockrell, 293 F.3d 256, 264–65 (5th Cir. 2002) ("At the margins, all statutes of limitations and filing deadlines appear arbitrary.").

112. *See* Taliani v. Chrans, 189 F.3d 597, 597–98 (7th Cir. 1999) (finding a statute of limitations and not a jurisdictional bar); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998) (finding the AEDPA's one-year period to be a statute of limitations that can be equitably tolled and noting agreement in the other circuits to address the issue); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (same); *see also* Doran, *supra* note 24, at 684–86 (discussing the distinction between statutes of limitation, which are subject to equitable tolling, and jurisdictional bars, which are not).

113. *See* Stillman v. Lamarque, 319 F.3d 1199, 1202 (9th Cir. 2003) (applying the prison mailbox rule to count the defendant's petition as filed at the time he delivered it to prison officials for mailing).

114. *See* Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas

or concealment of evidence by the state.[116] Most federal circuits use an "extraordinary circumstances" test to determine if the defendant is entitled to equitable tolling.[117] Under this test, courts will generally equitably toll the AEDPA 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.[118] Application of the extraordinary circumstances test begs the question: What circumstances should be deemed "extraordinary"?

In noncapital cases, courts universally agree that "garden variety" attorney negligence does not constitute the extraordinary circumstances necessary to trigger equitable tolling.[119] Courts describe garden variety error to include

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petitioner's mental incompetence in fact caused him to fail to meet the AEDPA filing deadline, . . . the deadline should be equitably tolled.").

115. *See* Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (stating that equitable tolling would be appropriate if a defendant is actually innocent). *See generally* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001); Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101 (2002).

116. *See* Valverde v. Stinson, 224 F.3d 129, 135–36 (2d Cir. 2000) (equitably tolling statute when prison officials confiscated the petitioner's papers, which prevented him from filing); *see also* 28 U.S.C. § 2244(d)(1)(D) (2000) (stating that the statute of limitations shall not begin to run until any state-created impediments to filing are removed).

117. *See Gibson*, 232 F.3d at 808 (applying extraordinary circumstances test); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (same); Miller v. N.J. State Dep't of Corrs., 145 F.3d 616, 618 (3d Cir. 1998) (same). *But see* Dunlap v. United States, 250 F.3d 1001, 1009–10 (6th Cir. 2001) (rejecting the extraordinary circumstances test for a different, though reasonably equivalent, test).

118. *See* Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (explaining the requirements for equitable tolling), *cert. denied* 124 S. Ct. 1605 (2004). The courts of appeals are divided on the proper standard of review over a lower court's decision concerning equitable tolling of the AEDPA statute of limitations. *See id.* at 247–48 (describing the various standards used by the circuit courts). While some courts have applied an abuse of discretion standard, most courts appear to review the lower court's decision de novo, particularly when the underlying facts are not in dispute. *Compare* Fierro v. Cockrell, 294 F.3d 674, 679 (5th Cir. 2002) (reviewing for abuse of discretion), Delaney v. Matesanz, 264 F.3d 7, 13 (1st Cir. 2001) (same), *and* Woodward v. Williams, 263 F.3d 1135, 1142 (10th Cir. 2001) (same), *with Rouse*, 339 F.3d at 248 (reviewing de novo), Jihad v. Hvass, 267 F.3d 803, 806 n.3 (8th Cir. 2001) (same), Helton v. Sec'y for the Dep't of Corrs., 259 F.3d 1310, 1312 (11th Cir. 2001) (same), *Dunlap*, 250 F.3d at 1007 n.2 (same), *and* Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999) (same).

119. *See, e.g.*, Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003) (stating that attorney error, including miscalculation of a statute of limitations, does not rise to extraordinary circumstances); Beery v. Ault, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally does not warrant equitable tolling."); Fierro v. Cockrell, 294 F.3d 674, 683 (5th Cir. 2002) (stating that miscalculation of the AEDPA statute of limitations does not warrant

misinterpretation of the statutory tolling provisions,[120] inadequate research,[121] miscalculation of the filing deadline,[122] and other types of minor attorney oversight.[123] Numerous courts of appeals have accordingly refused to toll the statute of limitations in noncapital cases when, through minor oversight or miscalculation of the deadline, a defendant seeks to file a habeas petition just a few days after the statute of limitations expires.[124] The defendant would not term this oversight as minor or garden variety because he loses access to federal habeas review, but courts have not recognized minor attorney error as an extraordinary circumstance in a noncapital case.[125]

B. Equitable Tolling in the Capital Context

1. Strict Adherence to the Extraordinary Circumstances Test

Untimely habeas petitions from capital defendants present additional challenges to federal courts. The harsh consequence of losing federal postconviction review is substantially magnified in capital cases, where defendants are not likely to receive any

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equitable tolling).

120. *See* Geraci v. Senkowski, 211 F.3d 6, 9 (2d Cir. 2000) (refusing to toll when the defendant's attorney misinterpreted the statutory tolling provisions).

121. *See* Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (refusing to equitably toll the statute when the defendant missed the deadline due to his attorney's inadequate research).

122. *See* Harris v. Hutchinson, 209 F.3d 325, 331 (4th Cir. 2000) (refusing to toll statute when the defendant's attorney simply miscalculated the deadline in a noncapital case).

123. *See, e.g.*, *Geraci*, 211 F.3d at 9 (refusing to toll statute when attorney received late notice of a denial of pending state petition that statutorily tolled deadline).

124. *See id.* (noting that the petition was only a few days late). For a remarkable noncapital case where the court refused to equitably toll the statute for minor attorney error, see *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (per curiam). In *Sandvik*, the defendant's attorney mailed out the petition by regular mail five days before the AEDPA deadline expired. *Id.* at 1270. The petition did not arrive at the clerk's office until one day after the deadline. *Id.* The court explained that the attorney should have mailed the petition from Atlanta by private delivery service or courier rather than by regular mail to ensure that it reached the destination in Miami in less than a week. *Id.* at 1272. This type of attorney oversight did not warrant equitable tolling, and the court dismissed the defendant's petition as untimely, thus precluding the defendant from receiving federal habeas corpus review. *Id.*

125. In some exceptional instances, courts have found egregious attorney error to constitute extraordinary circumstances, even in noncapital cases. *See* Spitsyn v. Moore, 345 F.3d 796, 800 (9th Cir. 2003) ("Though ordinary attorney negligence will not justify equitable tolling, we have acknowledged that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitations."); Baldayaque v. United States, 338 F.3d 145, 152–53 (2d Cir. 2003) (stating that attorney behavior far outside the range of ordinary performance can qualify as extraordinary circumstances and thus warrant equitable tolling).

further review before execution.[126] These cases raise questions about whether equity requires a more nuanced standard for equitable tolling to ensure capital defendants receive federal review on the merits of their claims. The federal circuits that have addressed the issue of treating capital cases differently for equitable tolling have reached different conclusions.

In *Rouse v. Lee*,[127] the Fourth Circuit addressed whether the imposition of a capital sentence affects the equitable tolling analysis.[128] The defendant, who was sentenced to death, presented a colorable claim of jury misconduct in his initial federal habeas petition.[129] His appointed habeas attorney erroneously believed that the mailbox rule applied to extend the deadline, and thus filed the habeas petition one day after the deadline passed.[130] Noting the expiration of

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126. *See* Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) ("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' . . . ."); *see also supra* Part II.B (discussing the importance of federal habeas review for state capital convictions).

127. Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), *cert. denied* 124 S. Ct. 1605 (2004). In *Rouse*, the court addressed whether the sentence imposed affects the extraordinary circumstances test. *Id.* at 251. Rouse's attorney filed his federal habeas petition one day past the deadline. *Id.* at 244. As an initial matter, the court found that regardless of whether defendant was one day, one month, or one year late, the statute of limitations had expired. *Id.* The court then determined that attorney error, which is attributable to the defendant through principles of agency law, caused the petition to be filed late. *Id.* at 249. Therefore, the defendant failed to provide extraordinary circumstances external to his own conduct to warrant equitable tolling. *Id.* at 249–51. The court refused to apply a more lenient test because of the capital nature of the case. *Id.* at 256. In holding the defendant's habeas petition untimely, this en banc decision overturned a previous ruling in the case by a panel of Fourth Circuit judges, which had held that a more lenient standard should apply to equitably toll the AEDPA deadline in capital cases. *See* Rouse v. Lee, 314 F.3d 698, 708 (4th Cir. 2003) (finding the trial court's denial of equitable tolling "unconscionable" because the attorney's minor procedural error barred all federal review in capital case), *rev'd en banc*, 339 F.3d 238 (4th Cir. 2003). For a complete discussion of the facts of the case, see generally Jessie A. Seiden & Priya I. Nath, Case Note, Rouse v. Lee, *339 F.3d 238 (4th Cir. 2003)*, 16 CAP. DEF. J. 179 (2003).

128. *See Rouse*, 339 F.3d at 251 (finding that the sentence imposed is irrelevant to postconviction proceedings).

129. *See id.* at 257 (Motz, J., dissenting) (stating the allegations of constitutional violations in the habeas petition). After Rouse's direct appeal was denied, a juror admitted to concealing information during voir dire. *Id.* The juror hid his racist views and provided evasive answers in order to stay on the jury that convicted Rouse. *Id.*

130. *See id.* at 244 (describing the one day delay). After taking into account statutory tolling, Rouse's one-year statute of limitations period expired on February 5, 2000. *Id.* Because this was a Saturday, the petition became due the following Monday, on February 7, 2000. *Id.* Rouse's lawyers, interpreting facially applicable federal rules of civil procedure, relied on the mailbox rule in the belief that the petition could be filed up to three days after the February 7 deadline. *Id.* at 245. The magistrate dismissed the petition, which was filed on February 8, 2000, as untimely. *Id.* at 244.

the AEDPA's statute of limitations, the federal district judge dismissed the petition as untimely.[131] The Fourth Circuit affirmed, finding that the statute of limitations barred the habeas corpus review.[132]

In refusing to equitably toll the statute, the Fourth Circuit stated that courts should not consider 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.[133] Instead, the court looked solely to the reason for the delay—attorney oversight.[134] Finding that miscalculation of the statute of limitations does not constitute extraordinary circumstances as a matter of law, the court's equitable tolling analysis was complete.[135] The gravity of the sentence imposed was irrelevant.

The court rejected the suggestion that a different test should apply in capital cases.[136] Instead, the *Rouse* court interpreted Supreme Court case law to find that the "death is different" line of cases only operate to guarantee greater protections for capital defendants during the trial and sentencing phases.[137] The court thus determined that no basis existed to afford capital defendants any greater protections than noncapital defendants during collateral review.[138]

Considering the facially strong constitutional claim of jury bias in Rouse's petition and the mere one-day delay in filing, it is difficult to imagine any more compelling facts that could cause the Fourth Circuit to reconsider its holding in *Rouse*. Therefore, after *Rouse*, a defendant presenting a colorable claim of a constitutionally invalid death sentence in the Fourth Circuit may be denied federal postconviction relief altogether because a court-appointed attorney negligently filed the habeas petition one day late.[139]

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131. *See id.* at 243–44 (explaining the procedural stance of the case).

132. *See id.* at 257 (affirming the district court).

133. *See id.* at 248–51 (determining that the merits of the petition and the sentence imposed play no part in whether extraordinary circumstances beyond the defendant's control prevented him from filing the habeas petition on time).

134. *See id.* at 253 (looking only at the reason for the delay to deny equitable tolling).

135. *See id.* at 251 (refusing to toll the statute of limitations). The Court refused to apply a less stringent standard for equitable tolling because of the capital sentence. *Id.* at 256.

136. *See id.* (refusing to grant extra protections to capital defendants in federal habeas review).

137. *See id.* at 254–55 (limiting extra protections for capital defendants to trial and sentencing phases).

138. *See id.* (refusing to extend extra protections for capital defendants to habeas petitioners).

139. Furthermore, because the defendant necessarily exhausted all his opportunities for state postconviction relief, the denial of federal habeas review all but guarantees that the defendant's claim of constitutional error will not receive any later consideration at all.

2. Death Is Different

Not all courts follow the Fourth Circuit's inflexible, formalistic application of the extraordinary circumstances test in capital cases. The Third Circuit took a different approach in *Fahy v. Horn*.[140] The *Fahy* court relied heavily on the capital nature of the case to equitably toll the AEDPA, allowing consideration of an otherwise untimely habeas petition. The court noted:

> If the limitation period is not tolled in this case, Fahy will be denied all federal review of his claims. . . . 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.[141]

In refusing to apply the extraordinary circumstances test, the *Fahy* court recognized that the irrevocability of a death sentence required additional safeguards, including greater access to federal habeas review.[142] Denying the possibility of habeas corpus to a defendant facing the death penalty, according to the *Fahy* court, is too harsh a consequence for minor procedural errors committed under inordinately confusing federal and state law.[143] Instead, capital defendants that diligently and reasonably pursue their claims can receive federal review of the merits of a habeas petition.[144]

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140. *See* Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (refusing to apply the extraordinary circumstances test to capital defendants who diligently pursue their claims). In *Fahy*, the defendant was convicted of first-degree murder and sentenced to death. *Id.* at 242. Due to confusion about whether state proceedings were pending, his attorney filed the federal habeas petition over two years after the AEDPA deadline expired, just six days before he was to be executed. *Id.* at 242. Although the defendant pursued his postconviction remedies with diligence, state law regarding whether the defendant had exhausted all of his state claims was unclear. *Id.* at 245. Because of the confusing state procedural requirements, Fahy had a reasonable belief that a federal habeas petition under § 2254 would be dismissed as unexhausted. *Id.* The court found that the evil sought to be protected by the AEDPA—abuse of the habeas system producing long delays in capital cases—was not present in this case because the defendant pursued his remedies diligently. *Id.* The court upheld the lower court's decision to equitably toll the statute, stating that death penalty cases require greater leniency than noncapital habeas petitions. *Id.* at 244–45. The court refused to apply the extraordinary circumstances test. *Id.*

141. *Id.* at 245.

142. *See id.* (rejecting the extraordinary circumstances test for capital cases).

143. *See id.* (noting that Fahy's interpretation of the law was reasonable, though ultimately incorrect).

144. *See id.* (requiring that capital defendants be diligent and reasonable in pursuit of their remedies to qualify for the relaxed equitable tolling standard). The Supreme Court appears poised to resolve the issue of whether reasonably diligent defendants should be entitled to

3. The Middle Ground

Although the Fourth Circuit and the Third Circuit stand at opposite ends of the spectrum on this issue of equitable tolling in capital habeas cases, the remaining circuits fall somewhere in the middle. The Ninth Circuit appears to side with the Third Circuit, granting greater leniency to capital defendants in claims for equitable tolling.[145] 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. In particular, attorney error that would not ordinarily rise to the level of extraordinary circumstances can trigger equitable tolling in capital cases.[146] Other circuits addressing equitable tolling in capital cases have not explicitly granted any weight to the sentence in their equitable tolling analyses.[147]

V. Distinguishing Capital Cases for Equitable Tolling

A. Defining the Purpose of the AEDPA

The AEDPA does not dictate how courts should apply the equitable tolling doctrine. It is clear, however, that application of equitable tolling should not be

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equitable tolling of the AEDPA. *See* Pace v. Vaughn, No. 02-3049, 71 Fed. Appx. 127 (3d Cir. July 7, 2003) (addressing the availability of equitable tolling to a diligent defendant), *cert. granted sub nom.* Pace v. DiGuglielmo, 73 U.S.L.W. 3204 (U.S. Sept. 28, 2004) (No. 03-9627). Although the equitable tolling issue in *Pace* arises in a noncapital case, the Court will apparently address one of the more general questions presented in the petition for certiorari: "Should this Court grant the writ and review the Third Circuit's denial of equitable tolling, where the Third Circuit denies all federal habeas review to petitioners who act appropriately, reasonably and diligently, and as demanded by the exhaustion requirement, in seeking state court remedies?" The broad language in this question is not limited to the noncapital context, and the Court could resolve broader questions about the relevance of equitable tolling to federal habeas procedures.

145. *See* Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997) (tolling statute when defendant's attorney withdrew in the middle of the capital case, leaving unusable work product).

146. *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).

147. *See* Fierro v. Cockrell, 294 F.3d 674, 684 (5th Cir. 2002) (finding that attorney error did not equitably toll statute in capital case); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (dismissing an untimely habeas petition without according any weight to the capital sentence).

utilized to defeat the purpose of the AEDPA's statute of limitations.[148] Courts exercise their power to equitably toll a statute in order to overcome injustice, not to undermine legislation. To determine how equitable tolling relates to the purpose of the AEDPA statute of limitations, a court must first establish the purpose of the legislation.

The *Fahy* court determined that equitable tolling did not conflict with the AEDPA's purpose, which was to prevent delays in state convictions resulting from abusive use of the federal habeas system.[149] The defendant in *Fahy* diligently asserted his claims in a reasonable manner,[150] but the exceedingly confusing procedural mechanisms of state law and the AEDPA tripped him up.[151] By defining the purpose of the AEDPA as prevention of abusive delays in the habeas system, the court was not bound to formalistically bar *every* untimely habeas petition, only *abusive* delays. The court could inquire into the presence of any abusive purpose behind the delay in filing. Finding no evidence of abuse in *Fahy*,[152] equitably tolling the statute presented no real conflict with the AEDPA's purpose.

Contrasting *Rouse* with *Fahy*, it is clear that a court's definition of the AEDPA's primary purpose greatly shapes the resulting equitable tolling analysis.[153] In *Rouse*, the court found Congress's primary goal in enacting the AEDPA to be promotion of efficiency in capital cases.[154] Therefore, any equitable tolling of the statute of limitations directly frustrates Congress's express intent of avoiding delay and should be used only in the most extraordinary of circumstances.[155] In *Fahy*, the court's determination that the AEDPA's primary purpose was to curb abuse of the habeas system allowed greater judicial discretion in providing relief. The *Fahy* court thus had

148. *See supra* notes 24–25 and accompanying text (discussing the need for limited invocation of the equitable tolling doctrine).

149. *See* Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (noting the lack of any evidence suggesting that the defendant abused the habeas system).

150. *See id.* (stating that the defendant diligently asserted his claims).

151. *See id.* (describing the relevant state law as "opaque").

152. *See id.* (remarking on the lack of abusive purpose behind the defendant's late habeas petition).

153. *See generally* Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451 (2002) (discussing the difficulties of determining a clear statement of legislative purpose).

154. *See* Rouse v. Lee, 339 F.3d 238, 253 (4th Cir. 2003) (en banc) (discussing the purpose of the AEDPA), *cert. denied* 124 S. Ct. 1605 (2004).

155. *See id.* (stating that courts may not create ad hoc alterations to a statutory limitation that Congress found to accommodate the interests involved) (citing Lonchar v. Thomas, 517 U.S. 314, 327–28 (1996)).

flexibility to act as equity required, placing the need to guard against constitutional violations ahead of Congress's legitimate concerns over efficiency.[156]

Reducing the legislative purpose of comprehensive legislation such as the AEDPA to one particular goal is clearly an oversimplification. However, this oversimplification, as is made clear by comparing *Fahy* and *Rouse*, is not without analytical value. Considering the background to the AEDPA, defining the purpose of the legislation as prevention of abuse appears to more accurately encompass the AEDPA's goals.[157] This definition of legislative purpose then allows courts the "wiggle room" to consider the full spectrum of issues confronting them.[158] Under circumstances where no abuse is present, courts may then exercise their equitable powers without concern of frustrating Congress's direct purpose. Moreover, as the next section of this Note highlights, the overarching purpose of the AEDPA suggests that broad use of equitable tolling for diligent capital defendants is fundamental to the AEDPA's scheme.[159] Even if other circuits refuse to adopt *Fahy*'s lower standard for equitable tolling in capital habeas cases, persuasive reasons exist for equitably tolling the AEDPA deadline under the widely used extraordinary circumstances test under facts identical to those in *Rouse v. Lee.*

B. Basis for Special Treatment of Capital Cases

The *Rouse* court stated that the "death is different" cases apply only to guarantee extra procedural safeguards at the trial level and direct appeal.[160]

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156. *See Fahy*, 240 F.3d at 245 ("We elect to exercise this leniency under the facts of this capital case where there is no evidence of abuse of the process.").

157. *See* H.R. CONF. REP. NO. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944 (stating that the AEDPA "sets a one year limitation on an application for a habeas writ" in order to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases"); H.R. REP. NO. 104-23, at 9 (1995) ("[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.").

158. As Justice Frankfurter noted long before passage of the AEDPA:

> The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

Brown v. Allen, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring).

159. *See infra* Part V.B (discussing the AEDPA's tradeoff between efficiency and fairness).

160. *See Rouse*, 339 F.3d at 254 (stating that the "death is different" cases do not apply to

Thus, the court concluded, there was no basis for treating capital habeas petitions differently for purposes of equitable tolling of the statute of limitations.[161] However, persuasive reasons do exist for providing special treatment to capital defendants in federal habeas review. Regardless of whether the death is different cases apply to postconviction procedures, which is disputable in itself,[162] the court's error lies in its failure to acknowledge the overriding purpose of the AEDPA legislation. The statutory scheme of the AEDPA provides ample basis for distinguishing capital cases during federal habeas review.[163]

Throughout the AEDPA, capital habeas cases are singled out for special treatment. In fact, one of the primary innovations of the AEDPA is the addition of Chapter 154 to the Judicial Code, entitled "Special Habeas Corpus Procedures in Capital Cases."[164] Broadly stated, the AEDPA overwhelmingly manifests Congress's goal of ensuring that capital habeas petitioners receive competent counsel throughout habeas review. Providing meaningful access to counsel is fundamental to the AEDPA's tradeoff between efficient resolution of capital cases and ensuring the absolute constitutionality of state capital

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collateral review).

161. *See id.* at 256 (stating that the capital sentence should not affect the equitable tolling analysis).

162. Although the Supreme Court stated in the past that the death is different cases do not apply to collateral review, Murray v. Giarratano, 492 U.S. 1, 9–10 (1989) (rejecting the suggestion that capital sentences require a different standard of review on federal habeas corpus), the Supreme Court has acted to provide extra procedural safeguards in federal habeas. *See* McFarland v. Scott, 512 U.S. 849, 856–57 (1994) (creating an exception that deemed a capital defendant's habeas petition to be commenced when the defendant requested appointment of counsel). After *McFarland*, contrary to the Court's claim, capital and noncapital habeas petitioners do receive different treatment for federal habeas review. *See* Kappler, *supra* note 71, at 569–70 (discussing how *McFarland* marks a departure from the Supreme Court decisions that limit the death is different cases to trial and direct appeal).

163. Empirical evidence suggests that federal courts clearly do, in fact, accord special treatment to capital defendants in federal habeas review. *See* Mello, *supra* note 55, at 520–21 (noting that capital habeas petitions have a success rate of over 70% in federal courts, while noncapital habeas petitions are successful only about 3% of time in the same courts). The disparity between the success rates of capital and noncapital petitions shows that federal courts take pains to ensure the constitutionality of state-imposed capital sentences. *See Murray*, 492 U.S. at 23–24 (Stevens, J., dissenting) (citing Professor Mello's article for the principle that federal courts treat capital defendants differently in habeas corpus proceedings). Justice Stevens, joined in his *Murray* dissent by Justices Brennan, Marshall, and Blackmun, noted that federal courts treat capital habeas petitions as a meaningful extension of direct appeal, providing another level of review to guarantee the integrity of the capital sentence. *Id.* (Stevens, J., dissenting).

164. 28 U.S.C. §§ 2261–2266 (2000) (delineating the "opt-in provisions" of Chapter 154).

convictions.[165] It is the AEPDA's promise of counsel to capital defendants that provides the jumping-off point for courts to recognize a special distinction between capital and noncapital habeas petitioners for purposes of equitably tolling the statute of limitations for attorney error.

Incorporating the recommendations of the Powell Committee,[166] Chapter 154 creates special procedures for capital cases to expedite habeas review for defendants from states that comply with Chapter 154's broad appointment of counsel requirements.[167] By providing competent counsel throughout state postconviction proceedings, states can opt into the AEDPA's special procedural system for capital defendants during federal habeas. The opt-in procedures evidence a strong preference for reviewing the habeas claim on its merits.[168] Section 2263 permits a court to toll the statute of limitations at any time for thirty days for "good cause."[169] The bargain between efficiency and protection foreseen by the drafters of Chapter 154, however, has gone unrealized. Of the thirty-eight states authorizing the death penalty, only Arizona has officially opted into Chapter 154 of the AEDPA.[170]

Although Chapter 154 is not controlling for defendants from states that have not opted in, the idea of a bargain between efficiency and adequate representation resonates equally throughout the non-opt-in provisions. Section 848(q) of Title 21 guarantees that every defendant facing a capital sentence

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165. *See* POWELL COMMITTEE, *supra* note 16, at 6 ("Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant.").

166. *See id.* at 5–7 (proposing new federal habeas procedures that would apply only to capital habeas petitioners).

167. The procedures in Chapter 154 are generally called the "opt-in" procedures. States can opt into the expedited federal review process by complying with the statutory requirements of Chapter 154.

168. *See* Woodford v. Garceau, 538 U.S. 202, 206–07 (2003) (discussing the AEDPA's focus on addressing the merits of habeas claims).

169. The problem of attorney miscalculation of the AEDPA deadline is partly ameliorated under Chapter 154. While a defendant in a non-opt-in state will normally be precluded from federal habeas corpus if his attorney files the petition one day late, defendants in opt-in states may still be able to receive review after the deadline. Section 2263(b)(3)(B) expressly allows courts to equitably toll the Chapter 154 statute of limitations for up to thirty days if "good cause" is shown. However, because states have not opted into Chapter 154, courts have had no opportunity to interpret the language of Section 2263(b)(3)(B). Thus, it remains to be seen whether the good cause standard is the same as extraordinary circumstances, or whether an attorney's late filing would constitute good cause in the opt-in procedures.

170. *See* Spears v. Stewart, 283 F.3d 992, 1015 (9th Cir. 2002) (finding Arizona's procedures to qualify for Chapter 154 treatment); *see also* McConville, *supra* note 71, at 62–63 (discussing the effect of the opt-in provisions, including the levels of state compliance).

shall have the right to representation by counsel during federal habeas proceedings.[171] The AEDPA expressly retained this guarantee of counsel for capital defendants that proceed in non-opt-in states.[172] Much like in Chapter 154, defendants must rely on the promise of adequate counsel to counterbalance the difficulties caused by imposition of a one-year statute of limitations.

In *Frye v. Hickman*,[173] the Ninth Circuit acknowledged the careful balance created by the AEDPA scheme for capital defendants.[174] Because capital defendants are entitled to counsel, the *Frye* court noted, an appointed attorney's failure to file the habeas petition before expiration of the AEDPA's statute of limitations should not automatically preclude the defendant from receiving federal habeas review.[175] Although ordinary attorney error does not warrant equitable tolling in noncapital cases, the guarantee of counsel to capital defendants through Section 848(q) suggests that capital defendants are entitled to equitable relief from error by appointed counsel.[176]

As the *Frye* court recognized, when appointed counsel, through his own error, causes the defendant to miss the filing deadline, the statutory grant of counsel in Section 848(q) is deprived of any substance. This illusory grant of

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171. *See* 21 U.S.C. § 848(q)(4)(B) (2000) (stating that capital defendants shall receive counsel in all habeas proceedings under 28 U.S.C. §§ 2254 and 2255).

172. In 1996, the AEDPA altered the language of § 848(q) while purposely leaving intact the guarantee of counsel to indigent habeas petitioners seeking review of state capital sentences. *See* 28 U.S.C. § 2254(h) (2000) (expressly retaining the guarantee of counsel for indigent capital habeas defendants provided for in 21 U.S.C. § 848(q)).

173. Frye v. Hickman, 273 F.3d 1144 (9th Cir. 2001). In *Frye*, the court decided whether the defendant was entitled to equitable tolling after his attorney miscalculated the statute of limitations. *Id.* at 1145. After taking into account any statutory tolling, the defendant's federal habeas petition was filed seventy-eight days after the expiration the AEDPA's statute of limitations. *Id.* at 1146. The defendant could only receive habeas review, therefore, if the court equitably tolled the statute to accommodate the delay. The defendant missed the deadline because his appointed attorney failed to file within the statute of limitations. *Id.* Because this was not a capital case, the defendant was not entitled to counsel by statute or the Constitution. *Id.* The court distinguished *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), which equitably tolled the statute because of attorney neglect, on the grounds that *Beeler* was a capital case. *Id.* "In capital cases, an indigent petitioner has a statutory right to counsel. Thus, the dereliction of his appointed counsel made it impossible for the petitioner to file the petition he was statutorily entitled to file." *Id.* (citation omitted). The *Frye* court refused to toll the statute. *Id.*

174. *See id.* at 1146 (refusing to toll statute in noncapital case but noting that the outcome in a capital case may be different).

175. *See id.* (distinguishing capital cases from noncapital cases for purposes of equitably tolling the AEDPA statute of limitations).

176. *See id.* (citing Ninth Circuit case law). *Cf.* 28 U.S.C. § 2263(b)(3)(B) (2000) (allowing equitable tolling for capital defendants in Chapter 154 procedures for "good cause").

counsel can be extremely detrimental to the defendant's interests. Considering that the defendant could file the petition without aid of counsel, Section 848(q) inevitably leads to reliance by the capital defendant on the promise of his appointed counsel to fulfill the requirements of the AEDPA.[177] As shown in *Rouse v. Lee*, this misplaced reliance can ultimately defeat any opportunity for the petitioner to receive federal review if the attorney fails to meet the requirements of the AEDPA.

By refusing to equitably toll for error by appointed attorney, the court punishes reliance by indigent petitioners on a federal statutory entitlement to counsel. An indigent petitioner, no matter how diligent his research into the AEDPA deadline, will be refused habeas review if his appointed attorney negligently files too late. In other areas of law, such as *Miranda*[178] and the privilege against self-incrimination,[179] courts have made very clear that a defendant may not be punished for relying on a federal entitlement.[180] The same is not true under the AEDPA. By providing a meaningless grant of counsel, courts effectively dictate that defendants must file their federal habeas petitions *pro se* in order to positively ensure timely filing. And if the petitioner is obligated to personally comply with technical requirements of the AEDPA, the statutory guarantee of counsel is meaningless.[181]

The problem of detrimental reliance on an appointed attorney is minimized in the trial context, of course, because defendants are protected from irreversible attorney error by the Sixth Amendment right to effective counsel.[182]

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177. Capital habeas petitioners may, of course, still choose to file their petitions *pro se*. Due to the complexity of the AEDPA and state law, however, a prudent defendant will likely defer to the purported expertise of an appointed attorney.

178. *See* Doyle v. Ohio, 426 U.S. 610, 618–19 (1976) (discussing the principle that if a defendant is granted *Miranda* rights, the prosecution cannot point to the defendant's failure to speak as evidence of guilt).

179. *See* Griffin v. California, 380 U.S. 609, 614 (1965) (stating the rule that the prosecution cannot comment on a defendant's decision not to testify in order to draw negative inferences). These cases illustrate the principle that a defendant cannot fairly be punished for relying on his rights. Furthermore, *Griffin* discusses cases that relied on a federal statute creating the right not to testify rather than the Fifth Amendment to prohibit the prosecution from commenting. *Id.* (citing Wilson v. United States, 149 U.S. 60 (1892), Adamson v. California, 332 U.S. 46 (1946), and Bruno v. United States, 308 U.S. 287 (1939)). In the habeas context, however, the defendant can lose all possibility of access to habeas review because he relied on his appointed attorney's promise to file by the deadline.

180. *See Doyle*, 426 U.S. at 618 (stating that using the defendant's reliance on his federal right to remain silent as evidence of guilt would be "fundamentally unfair and a deprivation of due process").

181. *See* McConville, *supra* note 71, at 69 (stating that the "meaningfulness" rule of statutory construction prohibits courts from voiding a statutory grant of counsel).

182. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (presenting the standard for

In the habeas context, where defendants have no such right to effective counsel, their reliance on an appointed attorney's compliance with the AEDPA is an exercise in risk, and the stakes—losing federal habeas review of a capital sentence—could not be higher. Recognizing this disparity, courts could remedy such detrimental reliance through use of the courts' equitable powers. When the government fails to hold up its side of the bargain in providing counsel to ensure fairness of postconviction proceedings, equity must step in. As the *Frye* court determined, the government's failure to provide adequate counsel should constitute extraordinary circumstances that caused the defendant to miss the statute of limitations. Of course, a finding of extraordinary circumstances does not finally resolve the equitable tolling analysis. Even if a court finds that attorney error does constitute extraordinary circumstances, these circumstances must still be external to the defendant's conduct in order to warrant equitable tolling under the extraordinary circumstances test.[183]

C. *Inapplicability of Agency Theory*

Despite the apparent inequity in holding a federal habeas petitioner liable for significant attorney error, courts have generally attributed error vicariously to the defendant through agency principles. In *Rouse*, the Fourth Circuit held the defendant vicariously liable for errors committed by his appointed attorney in interpreting the AEDPA statute of limitations—thus the attorney error was not external to the defendant's conduct under the extraordinary circumstances test.[184] Courts addressing the issue have generally agreed, finding defendants to be strictly and vicariously liable for errors committed by their habeas attorneys in postconviction procedures. Because a capital habeas defendant's right to counsel originates in statute[185] and not the Constitution, habeas petitioners have no right to constitutionally effective assistance of counsel.[186] Absent the

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ineffective trial counsel).

183. *See supra* note 118 and accompanying text (explaining the elements of the extraordinary circumstances test).

184. *See* Rouse v. Lee, 339 F.3d 238, 249 (4th Cir. 2003) (en banc) (attributing attorney error to the defendant), *cert. denied* 124 S. Ct. 1605 (2004).

185. *See* 21 U.S.C. § 848(q) (2000) (stating that all defendants facing state capital punishments are entitled to counsel during federal habeas proceedings).

186. *See* McFarland v. Scott, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting from denial of certiorari) (remarking that the Supreme Court has yet to hold that indigent capital defendants have a constitutional right to counsel during federal habeas proceedings). Blackmun's statement, while noting that the Sixth Amendment does not apply to indigent capital defendants, clearly tries to leave the door open that a future decision could extend the

guidelines of ineffective counsel principles, courts have thus looked to agency law to analyze the extent of a defendant's liability for acts of his appointed habeas counsel.[187]

The *Rouse* court stated the general rule that attorney error falling short of ineffective assistance of counsel shall be attributed vicariously to the defendant through principles of agency.[188] The cruel irony of this rule in the habeas context, of course, is that any attorney error will *always* fall short of ineffective assistance of counsel because defendants have no right to effective counsel at this stage.[189] In agency law, the extent of a defendant's liability for attorney error is defined by the scope of the agency relationship. Under general agency principles, any attorney misconduct or negligence within the scope of the normal attorney-client relationship would be attributed vicariously to the defendant.[190] A closer look at the relationship between the capital defendant and his appointed attorney, however, makes courts' analogies to agency law untenable.

On a very fundamental level, the imposition of an agency relationship into the habeas context is artificial and inappropriate. The basis of the traditional principal-agent relationship stands on the cornerstones of loyalty, consent, and free choice.[191] As the Supreme Court stated in *Link v. Wabash Railroad Co.*:[192]

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right to counsel to these defendants in the course of federal proceedings. Some commentators suggest that the Court could find a constitutional right to effective counsel in the Due Process Clause. *See* 1 HERTZ & LIEBMAN, *supra* note 13, §§ 7.2a–e (suggesting that the Supreme Court could find strong basis for a guarantee of counsel under procedural due process protections, the meaningful access component of the Due Process Clause, the Suspension Clause, or the Equal Protection Clause).

187. *See, e.g.*, Spitsyn v. Moore, 345 F.3d 796, 800 (9th Cir. 2003) (stating that particularly egregious attorney error will not be attributed to the defendant and can thus constitute extraordinary circumstances external to the defendant's conduct); *Rouse*, 339 F.3d at 250–51 (stating that the statutory grant of counsel is fulfilled unless counsel's acts are so inadequate that they constitute abandonment and defendant could not be said to have counsel at all).

188. *See Rouse*, 339 F.3d at 249–50 (stating the rule).

189. *See id.* at 250 (stating that the defendant has no right to constitutionally effective counsel in habeas proceedings).

190. *See id.* at 250 & n.14 (relying on traditional agency principles to define the scope of the defendant's liability for his attorney's negligence).

191. *See* RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

192. Link v. Wabash R.R. Co., 370 U.S. 626 (1962). In *Link*, the Court decided whether the district court could dismiss a civil suit with prejudice for failure by the plaintiff's attorney to attend a pretrial conference. *Id.* at 628–29. The district court, sitting in a diversity suit, invoked its inherent power to dismiss the suit when the attorney failed to provide a "reasonable reason" for missing the pretrial conference. *Id.* The Supreme Court rejected the contention that

"Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."[193] There is no inequity in attributing an attorney's error to the client when the client has freely selected and retained the attorney—when a client fully and manifestly consents to the agency relationship, normal agency rules may fairly be applied.[194]

The free choice and consent that form the basis of a traditional agency relationship are notably lacking in the habeas context. The vast majority of capital defendants seeking federal habeas review are indigent and, therefore, entitled only to court-appointed habeas counsel.[195] Because of the staggering time commitment and costs that accompany habeas representation, a ready pool of qualified habeas attorneys does not exist.[196] Defendants therefore have little or no free choice concerning their representation. Once the court finds a willing attorney, that attorney is appointed.[197] These attorneys are often overburdened and overmatched by the tortuous passages of habeas procedure.[198]

Furthermore, once an attorney is found and appointed, the defendant does not have unilateral authority to dismiss him.[199] Unless a court agrees to

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dismissal with prejudice unfairly punishes the client for error by the attorney. *Id.* at 633–34. The Court explained that, because the client freely selected the lawyer to act as his agent, the basic system of representative litigation required the client to be bound by the lawyer's actions. *Id.* at 634. Noting other evidence of delays by the attorney, the Court upheld the dismissal. *Id.* at 636.

193. *Id.* at 633–34; *see also* RESTATEMENT (SECOND) OF AGENCY § 15 (1958) ("An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.").

194. *See* A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285, 290 (Minn. 1981) ("[T]he principal must be shown to have consented to the agency since one cannot be the agent of another except by consent of the latter.").

195. *See* Howard, *supra* note 19, at 902 (noting that habeas petitioners can only rarely afford to retain their own counsel).

196. *See id.* (describing the defunding of public postconviction representation and the corresponding dearth of competent habeas attorneys).

197. *See* 1 HERTZ & LIEBMAN, *supra* note 13, § 12.3a (describing the appointment process). Although many appointing authorities will favor appointment of an attorney familiar with the case, if no such attorney is available, the court will simply follow its usual procedures for appointment from a pool of possible appointees. *See id.* (discussing courts' procedures for appointment).

198. *See* Hammel, *supra* note 23, at 3 (discussing the problem of inexperienced or incompetent postconviction counsel).

199. *See* Hunter v. Delo, 62 F.3d 271, 274 (8th Cir. 1995) (discussing factors that would permit substitution of appointed habeas counsel). The *Hunter* court explained that, although habeas petitioners are not entitled to Sixth Amendment effective counsel, the requirements for substitution of counsel are the same for both appointed habeas counsel and appointed trial

terminate the representation, the defendant will be represented without his consent. If the defendant seeks to substitute appointed counsel, the court must determine whether the defendant has a "justifiable dissatisfaction" with appointed counsel.[200] Only if the defendant's request is justifiable and the substitution will not substantially delay proceedings will the court allow the defendant to substitute. Furthermore, unlike representation in civil suits where a represented party provides consideration for the services of an attorney of his own choosing, the habeas attorney is appointed by the federal government; consideration for the attorney comes not from the represented party but from government coffers.[201]

Considering all the interceding obstacles in the relationship between a habeas petitioner and appointed counsel, attribution of every attorney error strictly and vicariously to the defendant is a perversion of agency theory.[202] The defendant's ability to consent to the relationship is so fundamentally limited that any determination of consent is a stark fiction. The defendant cannot select his agent; rather, the court appoints it.[203] The defendant cannot terminate the agency; rather, the court must terminate it.[204] The defendant does not provide consideration to his attorney; rather, the state provides it.[205] To attribute the court-appointed attorney's errors to the defendant as in a traditional agency relationship is clearly a fallacy.[206]

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counsel. *See id.* ("[W]e believe that substitution-of-counsel standards applied in cases in which the Sixth Amendment is implicated should apply here as well."). The court also noted that the petitioner could include specific preferences for his appointed attorney in his motion for appointment. *Id.* at 276. The court, however, would not be obligated to honor any specific request. *See id.* (stating that the court need not honor the petitioner's requests). The petitioner clearly lacks any real power to choose his representation during habeas proceedings.

200. *See id.* at 274 (discussing the basis for granting a request for substitution). The defendant must present evidence suggesting "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant" before a court will grant the request for new counsel. *See id.* (quoting United States v. Swinney, 970 F.2d 494, 499 (8th Cir. 1992)) (discussing specific grounds for substitution).

201. *See* 21 U.S.C. § 848(q)(10) (2000) (authorizing payment to attorneys appointed for indigent defendants in federal habeas proceedings in capital cases).

202. *Cf.* William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733, 753–54 (arguing that agency law is inapplicable to the attorney-client relationship, even in civil litigation).

203. *See Hunter*, 62 F.3d at 276 (stating that the court need not accommodate the defendant's preferences in appointing an attorney).

204. *See id.* at 274 (discussing when substitution of habeas counsel would be appropriate).

205. *See* 21 U.S.C. § 848(q)(10) (2000) (authorizing payment of attorney fees).

206. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 633–34 (1962) (noting that a civil litigant's ability to freely select his attorney permits a court to fairly attribute attorney

The unfairness of imposing a traditional agency relationship into the habeas context is exacerbated by the operation of the AEDPA. The one-year statute of limitations imposed by the AEDPA effectively guarantees that the defendant cannot exercise his only real opportunity to "consent" to the agency relationship—the ability to petition the court for new counsel. The AEDPA statute does not toll when the defendant is seeking habeas counsel; therefore, if the court did terminate counsel, the defendant would need to find new counsel that could be prepared to file the habeas petition before the AEDPA deadline expires. Considering the complexity and time commitment necessary to properly mount a collateral attack, the new counsel would be hard pressed to put together an adequate and complete petition within the remaining time.

In several pre-AEDPA cases, the Supreme Court relied on agency principles to attribute error by a criminal attorney to the defendant for conduct that fell below the level of ineffective assistance of counsel. In *Murray v. Carrier*,[207] the Court stated that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*,[208] we discern no inequity in

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misconduct to the client).

207. Murray v. Carrier, 477 U.S. 478 (1986). In *Murray*, the Court considered whether an attorney's inadvertent failure to raise a claim of error on appeal constituted cause for purposes of overcoming procedural default. *Id.* at 481–82. After being convicted of rape and abduction by a Virginia jury, the defendant's attorney accidentally omitted a substantive claim of discovery error in the petition for appeal. *Id.* at 482. This oversight, however, did not rise to the level of ineffective assistance of counsel. *Id.* at 486. To show cause for procedural default, the defendant must show some obstacle, external to the defense, that caused the default. *Id.* at 488. The existence of constitutionally ineffective counsel constitutes cause because counsel's errors are imputed to the state through operation of the Sixth Amendment, making the errors external to the defendant. *Id.* If the defendant's right to counsel is not violated, however, that error is imputed not to the state, but to the defendant. *Id.* Error by counsel falling short of ineffective counsel cannot constitute cause because it is not external to the defense. *Id.* Although the defendant was entitled to effective assistance of counsel during his appeal of right, the defendant disavowed any claim of ineffective assistance; therefore, the defendant failed to establish cause for the default, and the Court rejected his claim. *Id.* at 497.

208. Strickland v. Washington, 466 U.S. 668, 687 (1984) (stating the test for violation of Sixth Amendment right to effective counsel). In *Strickland*, the Supreme Court addressed the proper standard for determining whether a criminal attorney's behavior was so defective as to deprive the defendant of his constitutional right to effective counsel. *Id.* at 671. After pleading guilty to three capital murder charges, the defendant was sentenced to death by the trial judge. *Id.* at 672. The defendant raised several claims of ineffective assistance of counsel concerning the sentencing phase of his trial. *Id.* at 675. The Court first noted that the Sixth Amendment right to counsel is the right to effective counsel. *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). The *Strickland* Court laid out a two-part test to determine when counsel's performance is so defective as to constitute constitutionally ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This

requiring him to bear the risk of attorney error that results in a procedural default."[209] The Court determined that the defendant was therefore entitled to redress only for error of his counsel that rose to the *Strickland* level of ineffective assistance.[210]

Murray does not directly apply to the habeas context, however, because it involved a defendant who was guaranteed constitutionally effective counsel. No basic performance safeguards exist in habeas procedures to govern attorney behavior. The error complained of in *Murray* occurred during the defendant's appeal of right while the Sixth Amendment still operated to guarantee effective counsel.[211] Even though the attorney failed to raise one claim on appeal, the Sixth Amendment still ensured that the defendant would receive a meaningful appeal of some kind. If the attorney had failed to file the petition of appeal altogether, for example, the defendant would have been permitted to file an out-of-time appeal.[212] In the habeas context, however, the failure of an appointed attorney to file a timely habeas petition does not entitle the defendant to file an out-of-time habeas petition. Instead, the defendant is entirely precluded from receiving federal review on his claims. Thus, attributing minor trial error to the defendant through agency principles makes sense in *Murray* where the defendant is still guaranteed effective counsel; however, attributing far more serious error to the defendant in the habeas context, where the defendant has no basic level of protection, is exceedingly harsh.

A second pre-AEDPA case, *Coleman v. Thompson*,[213] is more relevant to this discussion. In *Coleman*, the Supreme Court attributed error by the

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> requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Applying its test to the facts, the Court determined that the error complained of was the result of reasonable professional judgment by the attorney. *Id.* at 699. Furthermore, any possible error did not prejudice the defendant. *Id.* at 700. Under the facts of this case, therefore, the attorney's behavior was constitutionally effective. *Id.*

209. *Murray*, 477 U.S. at 488.

210. *See id.* (stating that attorney error short of ineffective assistance does not constitute cause).

211. *See id.* at 497 (noting that the defendant was entitled to effective assistance of counsel during his appeal of right).

212. *See* Ferguson v. United States, 699 F.2d 1071, 1072 (11th Cir. 1983) ("[A]n attorney's total failure to file an appeal after being instructed to do so will always entitle the defendant to an out-of-time appeal, regardless of the defendant's chances of success.").

213. Coleman v. Thompson, 501 U.S. 722 (1991). In *Coleman*, the Court decided whether the failure of the defendant's state habeas attorney to file a timely appeal from state collateral proceedings procedurally defaulted the claims for federal habeas review. The attorney filed the

defendant's state habeas attorney vicariously to the defendant through agency principles.[214] The defendant's attorney failed to properly file a timely appeal in state court from initial state collateral proceedings; therefore, the claims were procedurally defaulted for purposes of federal habeas.[215] Although *Coleman*'s language may suggest that agency rules of vicarious liability should apply whenever attorney error does not amount to constitutionally ineffective counsel, *Coleman* is not dispositive.

Coleman was a pre-AEDPA case discussing a defendant who had no right to postconviction counsel at all. At the time of the case, capital defendants seeking postconviction review in Virginia had no statutory right to the assistance of counsel. As the United States Supreme Court has stated, "[i]t is well settled that habeas corpus is a civil proceeding."[216] Without any guarantee of counsel, therefore, the attorney-client relationship in *Coleman* resembled the attorney-client relationship in any other civil litigation. This traditional agency relationship, however, is a very different creature than the convoluted attorney-client relationship in capital federal habeas proceedings. Considering all of the interceding factors present in the federal appointment process[217] along with the statutory guarantee of counsel,[218] the federal attorney-client relationship in AEDPA proceedings is clearly distinguishable from the relationship considered in *Coleman*.

The *Coleman* Court explained why attorney error constituting ineffective assistance of counsel cannot be attributed to the defendant: "[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor,

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petition for appeal three days after the state deadline, which precluded the state court from hearing the appeal. *Id.* at 727. The Court reaffirmed that attorney error short of ineffective assistance of counsel does not constitute cause under the cause and prejudice standard. *Id.* at 754. To constitute cause, the error complained of must be an external factor that impeded the defendant's efforts to comply with the time requirement. *Id.* at 753. Unlike error that violates the defendant's right to counsel, which is imputed to the state and is thus external to the defendant, error that does not violate a right to counsel is attributed to the defendant through agency principles. *Id.* at 753–54. The error complained of was not external to the defendant and therefore did not constitute cause. Consequently, the defendant's claims were procedurally defaulted. *Id.* at 729.

214. *See id.* at 754 (attributing attorney error to the defendant through principles of agency law).

215. *See id.* at 752 (explaining the reason for the default).

216. Browder v. Dir., Dep't of Corrs., 434 U.S. 257, 269 (1978).

217. *See supra* notes 202–06 and accompanying text (describing substantial obstacles to the agency relationship in the habeas context).

218. *See* 21 U.S.C. § 848(q)(4)(B) (2000) (stating that indigent capital defendants are entitled to counsel during federal habeas proceedings).

i.e., 'imputed to the State.'"[219] In *Coleman*, the defendant had no right to counsel, so that right could not be violated. In the AEDPA context, however, where the defendant *does* have a right to counsel, the attorney's error constitutes a violation of that right to counsel.[220] Under *Coleman*, therefore, the attorney's error in habeas proceedings should be imputed to the government for the violation of that right to counsel.

The argument for imputing error by appointed postconviction counsel to the government is bolstered by the conception of the AEDPA as a bargain between efficiency and fairness in capital habeas proceedings.[221] When the government's grant of counsel, which acts to counterbalance the difficulties created by setting a one-year statute of limitations, causes the defendant to miss the deadline, the bargain of the AEDPA has been defeated. To ensure fair application of the AEDPA, this error should be imputed to the government.

The extraordinary circumstances test, which most circuits apply for equitable tolling analysis, requires that the circumstances causing the delay be external to the defendant's own conduct before the statute may be tolled.[222]

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219. *Coleman*, 501 U.S. at 754. The *Coleman* Court clearly intended to refer to the Sixth Amendment when it discussed a "petitioner's right to counsel." For the statutory grant of counsel of § 848(q) to have any meaning, however, attorney errors that violate this right to counsel should also be attributed to the state. *See* McConville, *supra* note 71, at 80–84 (arguing that statutory grants of counsel create due process meaningfulness requirements that contain an effectiveness component).

220. *Cf.* Barrientos v. United States, 668 F.2d 838, 842 (5th Cir. 1982) (permitting out-of-time appeals for a defendant whose attorney failed to file for an appeal of right). In *Barrientos*, the court explained why a defendant should always be granted an out-of-time appeal when his appointed attorney failed to file in a timely manner:

> The basic principles upon which our rule entitling a defendant to an out-of-time appeal is founded are (1) that every person has an absolute right to an appeal from a trial court conviction, and (2) that a criminal defendant's right to counsel extends through the period for taking an appeal. The failure of trial counsel to perfect an appeal denies a defendant the absolute right to appeal his jury conviction and, therefore, deprives him of his right to effective assistance of counsel.

Id. (citations omitted). The reasoning in *Barrientos* translates easily into the habeas context. Every capital defendant convicted in state court has an absolute right to seek federal habeas review of preserved, exhausted claims, 28 U.S.C. § 2254 (2000) (permitting federal habeas review), and the right to counsel extends to capital defendants through the period for filing the habeas petition. *See* 21 U.S.C. § 848(q)(4)(B) (2000) (entitling capital defendants to the right to counsel during federal habeas proceedings). When counsel's error denies the defendant his right to receive federal habeas review, the defendant is deprived of his statutory right to counsel. This denial of the defendant's right to counsel should permit defendants to receive out-of-time habeas review, much as denial of the right to counsel permits defendants to file an out-of-time appeal.

221. *See supra* Part V.B (describing the quid pro quo arrangement of the AEDPA where the guarantee of counsel offsets the new statute of limitations).

222. *See, e.g.*, Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (requiring that

The attorney error attributed to the government thus satisfies the external component of the equitable tolling test. Agency principles, therefore, should not operate to prevent courts from equitably tolling the AEDPA statute of limitations when the appointed attorney files an untimely petition. Unless equitable tolling would defeat the purpose of the AEDPA—because, for instance, the reasons for the delay evidenced abusive disregard for the deadline—courts can and should equitably toll the AEDPA for attorney error under the "extraordinary circumstances" test.

VI. Ensuring Federal Postconviction Review for Capital Defendants

A. A Suggested Approach to Equitable Tolling in Capital Habeas Cases

Currently, Congress's objectives in the AEDPA are unfulfilled. The bargain envisioned by Congress between efficiency and constitutional protection is defeated when appointed counsel fails to properly initiate the proceedings for which he was appointed. The AEDPA represents Congress's attempt to prevent abuse of the federal habeas system and to bring fair, efficient, and final resolution of capital habeas cases.[223] Precluding a capital defendant from receiving federal habeas review because his attorney filed the petition one day late defeats this purpose.

As described above, the courts of appeals are currently divided regarding treatment of untimely habeas petitions from capital defendants.[224] Unless and until the Supreme Court resolves this split,[225] courts must rely on tools they already possess to correct the problem of untimely petitions from diligent capital defendants. Any judicial analysis must be flexible enough to balance the goals and the text of the AEDPA with the traditional principles of equity and fairness embodied in the writ of habeas corpus.

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the circumstances preventing the defendant from meeting the statute of limitations be "external" to the defendant's own conduct), *cert. denied* 124 S. Ct. 1605 (2004).

223. *See supra* Part III.A (discussing Congress's purpose in enacting the AEDPA).

224. *See supra* Part IV (discussing the various approaches taken to equitably tolling the AEDPA statute of limitations in capital habeas cases).

225. The Supreme Court recently granted certiorari to resolve a dispute concerning equitable tolling of the AEDPA statute of limitations in a noncapital cases. *See* Pace v. Vaughn, No. 02-3049, 71 Fed. Appx. 127 (3d Cir. July 7, 2003), *cert. granted sub nom.* Pace v. DiGuglielmo, 73 U.S.L.W. 3204 (U.S. Sept. 28, 2004) (No. 03-9627). While *Pace* raises equitable tolling questions in the noncapital context, the Court could take this opportunity to address analogous equitable tolling issues in the capital context as well.

To account for the myriad considerations at play, courts should first recognize the primary function and practical operation of AEDPA. Through the AEDPA, Congress provided a quid pro quo that ensures fast, final resolution of collateral claims by capital defendants in exchange for assurance that defendants are competently and adequately represented to guarantee review of their constitutional claims on the merits.[226] The guarantee of counsel is an essential component of this balance.

Second, courts should acknowledge that dismissing an untimely petition caused by a negligent appointed attorney violates the arrangement foreseen in the AEDPA. When the appointed attorney fails to live up to his side of the bargain, holding the defendant strictly liable for that failure without any evidence of abuse is unfair and counter to the AEDPA's scheme. Considering the convoluted relationship between the defendant and appointed counsel, reliance on agency rules to impute attorney error to the defendant is inappropriate. Instead, violation of the defendant's right to counsel requires imputing the attorney's error to the state.

Courts should then turn to the doctrine of equitable tolling to carry out the bargain of the AEDPA. The AEDPA evidences a strong preference for resolving habeas cases on the merits of the petitions.[227] Such review benefits not just defendants by providing another forum to ensure constitutionality, but state death penalty regimes as well by ensuring the integrity and finality of capital sentences.

B. Conclusion

Maintaining workable and fair habeas corpus procedures for capital cases requires flexibility.[228] Equitable doctrines afford the flexibility needed to maneuver through the clunky machinery of the AEDPA. Rather than relying on formalistic pronouncements that ordinary attorney error can never justify equitable tolling, courts should inquire into the particular facts of the case to find a resolution that satisfactorily accommodates the interests of states, defendants, and the AEDPA. Equitable tolling provides this accommodation.

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226. *See* H.R. REP. NO. 104-23, at 10 (1995) (noting that the Powell Committee recommendations provided a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants").

227. *See* Woodford v. Garceau, 538 U.S. 202, 206–07 (2003) (discussing the AEDPA's focus on addressing the merits of habeas claims).

228. *See* Harris v. Nelson, 394 U.S. 286, 291 (1969) ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.").