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Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time

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The Supreme Court has described the writ of habeas corpus as "a bulwark against convictions that violate fundamental fairness"[1] and as "the judicial method of lifting undue restraints upon personal liberty."[2] Unfortunately, obtaining federal habeas corpus relief has become close to impossible for many prisoners. The vast majority of habeas petitions are post-conviction petitions filed by state prisoners. Congress and the Supreme Court have erected a complicated maze of procedural obstacles that state prisoners must navigate, often without the assistance of counsel, to have their constitutional claims considered in federal court. One wrong procedural step means the prisoner's claims are thrown out of federal court altogether. In fact, federal judges now dismiss a majority of state prisoners' habeas claims on procedural grounds.[3]

The rare state prisoner who successfully manages to run this procedural gauntlet faces a merits review process that has become so deferential to the state that relief remains virtually unattainable. In the extremely rare case where a federal court grants relief, the judgment often comes years after a person has been wrongly imprisoned. At that point, the case has often been forgotten and the state actors responsible for the underlying constitutional violation have often changed jobs. As a result, the federal decision effectively has no deterrent value.

One empirical study revealed that only 0.29% of non-capital state prisoners obtain any form of federal habeas relief.[4] That number is troubling in light of evidence that states systematically violate criminal defendants' constitutional rights[5] and data documenting large numbers of

* Many thanks to Leah Litman for her feedback.

[1] Engle v. Isaac, 456 U.S. 107, 126 (1982).

[2] Price v. Johnston, 334 U.S. 266, 269 (1948).

[3] *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 6 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [hereinafter KING REPORT].

[4] *See* KING REPORT, *supra* note 3, at 9.

[5] *See, e.g.*, Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16-23 (2010) (documenting systemic violations of defendants' rights in the states); *see also* Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT MAGAZINE (Winter 2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-

wrongful state convictions.[6] Many state criminal defendants have no semblance of a fair process to determine their guilt or innocence. They are processed through a system populated by underfunded and overworked criminal defense attorneys who are often structurally ineffective,[7] prosecutors whose incentives often are to obtain convictions and appear tough on crime rather than pursue just results,[8] and overwhelmed trial court judges who are focused on docket management and often indifferent to the systemic mistreatment of poor people of color. To avoid reckoning with these failures, states often rely on (and even distort) state procedural rules to reject defendants' constitutional claims.[9]

Sadly, these problems typically are not fixed at the state appellate or post-conviction levels. When criminal defense attorneys fail to object to constitutional problems at the trial level, courts deem their claims waived on appeal. And most states are quite hostile to claims of deficient trial attorney performance, relegating those claims to later stages in post-conviction litigation when defendants won't have attorneys to help raise them.[10]

Experts concerned about the systemic violation of defendants' rights in state courts have suggested sweeping overhauls of the federal habeas review system. Some want to return to *de novo* federal court review (meaning that the federal court would decide the issues anew without deference to the state courts' legal conclusions) with fewer procedural barriers.[11] Others want habeas to focus more on whether an innocent person has been wrongfully convicted.[12] Still others want to restructure habeas review to focus more on correcting systemic problems in the states.[13] Were we creating a system from scratch with a sympathetic Congress, one or more of these proposals would do a lot to rectify systemic injustices in the states and prevent the conviction of innocents. But with the byzantine procedural and substantive obstacles to review codified in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")[14] and a gridlocked

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states-rights ("As a federal judge, I have observed a considerable number of cases where state courts overlooked clear constitutional violations….").

[6] *See* Brandon L. Garrett, *Actual Innocence and Wrongful Convictions* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

[7] *See, e.g.*, Eve Brensike Primus, *Defense Counsel and Public Defense* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

[8] *See, e.g.*, John F. Pfaff, *Prosecutorial Guidelines* in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017).

[9] *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002) (examining Missouri's distortion of two state procedural rules to prevent a defendant from presenting witnesses to support his alibi defense); *see also* Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75 (2017) (documenting how states use procedural rules to avoid constitutional challenges).

[10] *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (discussing this trend).

[11] *See, e.g.*, John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 471-78 (2011).

[12] *See, e.g.*, John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691-712 (1990).

[13] *See* Primus, *supra* note 5.

[14] 28 U.S.C. §§ 2241-2266 (1996).

Congress, sweeping overhauls of federal habeas seem unlikely. The most realistic path toward habeas reform might lie in finding and expanding existing inroads in federal habeas doctrine.

Hidden in the habeas doctrinal morass are a series of underused equitable exceptions that permit more expansive federal habeas review. These equitable exceptions give us insight into the federal courts' vision of the proper scope of habeas review of state criminal convictions. Looking at the exceptions to the procedural and substantive obstacles to habeas review, a pattern emerges. The federal courts are more likely to look past procedural barriers and provide more robust merits review when a state prisoner shows either that he (a) is innocent or (b) did not have a full and fair opportunity to have his federal claims adjudicated in state court.[15]

In this Issue Brief, I argue that habeas petitioners should highlight problems they had obtaining a full and fair review of their claims in state court as well as innocence concerns in an effort to push federal courts to expand the equitable exceptions that already permeate habeas doctrine. I begin by providing a brief overview of the substantive and procedural thicket of federal habeas review, including a description of the many roadblocks that state prisoners encounter when attempting to obtain relief. I then explore the doctrine's equitable exceptions and explain how concerns about a lack of access to adequate state process and actual innocence often motivate federal courts to look past obstacles to federal habeas review. Finally, I explore how litigants could use the animating principles behind these equitable exceptions to broaden procedural bypasses and inform the standard of review for merits determinations in federal court. I argue that state prisoners often fail to highlight process failures in ways that could broaden the scope and impact of federal habeas review. Sweeping reform of federal habeas review might not be feasible, but it may be possible to effectuate some change, one equitable gateway at a time.

I. An Overview of the Obstacles to Robust Federal Habeas Review

The writ of habeas corpus permits a prisoner to file a civil action in federal court asking a judge to order the warden of the prison where he is being held—the one who has ("habeas") the prisoner's body ("corpus")—to release the prisoner from unlawful custody. Originally, the writ was available only before conviction and only to establish that sufficient legal cause existed for a prisoner's detention.[16] A court of competent jurisdiction determined guilt or innocence, and habeas corpus was not intended to disturb that. The appellate process was the exclusive remedy for legal errors, and habeas was called "the Great Writ" because of its limited role in protecting against detention by the arbitrary will of a public official without sufficient legal cause.[17]

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[15] *Cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970-71) (arguing that federal habeas review of state criminal convictions should focus on preventing the conviction of innocents and ensuring that state prisoners get a full and fair opportunity to present their federal claims).

[16] *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1100-01 (1995).

[17] *See id.*

After the Civil War, Congress and the Supreme Court were concerned about state abuse of the criminal process to systematically violate some citizens' rights and wrongfully imprison disfavored minority community members and those sympathetic to them.[18] To protect against wrongful convictions and unfair state criminal procedures, Congress gave the federal courts jurisdiction to entertain post-conviction habeas corpus petitions from state prisoners who claimed that their convictions were obtained in violation of their federal constitutional rights.

Initially, post-conviction federal habeas review of state prisoners' constitutional claims was *de novo*, and there were few procedural obstacles to obtaining relief.[19] But with the incorporation of the criminal procedure provisions of the Bill of Rights in the 1960s and the draconian sentences that came with the War on Drugs, federal habeas dockets exploded. Concerns about federalism, finality, and conservation of judicial resources led Congress and the federal courts to create a number of procedural and substantive obstacles to federal habeas review.

A. Procedural Obstacles to Review

Three obstacles in particular—the statute of limitations, exhaustion requirement, and procedural default doctrine—ensure that many state prisoners' claims are never considered on the merits in federal court.

Statute of Limitations. To promote states' interests in finality, Congress created a statute of limitations, requiring state prisoners to file their applications for a writ of habeas corpus within one year from the date on which their state judgments became final at the conclusion of the direct appellate process.[20] Although the one-year statute of limitations is statutorily tolled when timely-filed state post-conviction petitions are pending,[21] many prisoners fail to file on time. According to one empirical study, federal district courts dismissed 22% of habeas petitions in non-capital cases as time-barred.[22]

Exhaustion Requirement. Grounded in the idea that the federal courts should respect their state counterparts and give the state the first opportunity to correct any mistake or injustice, the exhaustion doctrine requires a state prisoner to present any constitutional claim that she wants

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[18] *See, e.g.*, William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961) ("In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments."); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987) (describing Congressional concern about Southern state policies); *see also* Forsythe, *supra* note 16, at 1112 (discussing the Congressional records).

[19] *See* Brown v. Allen, 344 U.S. 443 (1953).

[20] *See* 28 U.S.C. § 2244(d) (1996). Section (d)(1) also discusses three other potential, less common, triggering dates for the statute of limitations: the date on which a State-create impediment to filing is removed if the State-impediment prevented the state prisoner from filing, the date on which the Supreme Court recognizes a new right and deems it retroactively applicable to cases on collateral review, and the date on which a state prisoner discovers the factual predicate of a claim if the facts could not have been discovered earlier through the exercise of due diligence.

[21] 28 U.S.C. § 2244(d)(2) (1996).

[22] *See* KING REPORT, *supra* note 3, at 6.

to raise in her federal habeas petition to the highest state court first.[23] If a state prisoner comes into federal court with a federal claim that she has not properly presented to the highest state court, and she still has a right under state law to raise the claim in state court, the federal court will deem the claim unexhausted. The federal court will dismiss the claim without prejudice to permit the prisoner to present it to the state courts first, though it may deny the claim on the merits if it is obviously frivolous.

If a state prisoner files a "mixed" federal habeas corpus petition—one that contains exhausted and unexhausted claims—the federal court must dismiss the petition.[24] The Supreme Court adopted this "total exhaustion" requirement to avoid piecemeal litigation of state prisoners' claims. A state prisoner whose mixed petition is dismissed may return to state court to exhaust her claims (and then return to federal court with a totally exhausted petition) or drop her unexhausted claims and amend her habeas petition to present only the exhausted claims.

Procedural Default Doctrine. Procedural default and exhaustion doctrine are doctrinal cousins. If a state prisoner fails to take advantage of an available opportunity to litigate her claim in state court, the problem is a failure to exhaust. But, if she failed to pursue an opportunity to present her claim to the state courts at an earlier time and that procedural avenue is no longer available under state law, she has procedurally defaulted—or waived—her underlying claim.[25] Similarly, if a state prisoner attempts to raise a federal constitutional claim in state court, but the state courts refuse to consider the claim because the prisoner failed to raise it properly under the state's procedural rules, the federal court will deem the claim procedurally defaulted and will refuse to consider the merits of the underlying constitutional claim out of respect for the state's procedural regime.[26] The state court determination that the prisoner failed to properly present the constitutional claim under the state procedural rules is deemed an adequate and independent state law ground to justify the state court decision denying relief.[27]

The vast majority of state prisoners have to navigate these complicated procedural obstacles alone, because the Supreme Court has never held that prisoners have a constitutional right to the assistance of counsel in post-conviction proceedings.[28] It is not surprising that, according to

[23] *See* 28 U.S.C. § 2254(b) & (c) (1996); Rose v. Lundy, 455 U.S. 509 (1982).
[24] *See* Rose v. Lundy, 455 U.S. 509 (1982).
[25] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).
[26] *See, e.g.*, Murray v. Carrier, 477 U.S. 478 (1986).
[27] *See, e.g.*, *Sykes*, 433 U.S. at 81 (discussing the adequate and independent state ground doctrine).
[28] *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.") (citation omitted)); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion).

one empirical study, these three procedural doctrines were responsible for the dismissal of 46% of state prisoners' non-capital federal habeas claims.[29]

B. Substantive Obstacles to Review

Even if a state prisoner avoids these procedural landmines and gets a substantive review of the merits of her claims, the Supreme Court has dramatically limited the scope of federal habeas review by refusing to address certain kinds of constitutional claims, deeming them not cognizable in habeas proceedings. In addition, Congress and the Court have made it difficult for state prisoners to expand the factual record in federal court through evidentiary hearings, created a presumption that state court factual findings are correct, and imposed highly deferential standards of review whenever a state has already adjudicated the merits of a claim.

Limits on Cognizable Claims. In *Stone v. Powell*,[30] the Supreme Court held that state prisoners may not raise Fourth Amendment challenges in federal habeas proceedings if they had a full and fair opportunity to raise those challenges in state court. The exclusionary rule exists to deter police officers from committing constitutional violations, and the Court deemed the additional deterrence achieved by applying the exclusionary rule at the habeas stage not sufficient to overcome the government interests in finality, conservation of resources, and federalism. In *Teague v. Lane*,[31] the Supreme Court relied on those same government interests to create a presumptive ban on the retroactive application of new law on habeas.

Evidentiary Hearings. Under AEDPA, federal courts may not hold evidentiary hearings on claims that a state prisoner failed to develop in the state courts unless the prisoner can show by clear and convincing evidence that she is innocent and can also show that her claim relies on either a new rule of law that the Supreme Court has deemed retroactively applicable or new facts that she couldn't have discovered before.[32] The Supreme Court has interpreted AEDPA to limit federal habeas review in most cases to the factual record created in the state courts.[33] As a result, evidentiary hearings in federal court are quite rare.[34] Typically, when federal courts review state prisoners' claims on the merits, they do so on the basis of limited state factual records.

Presumption of Correctness on State Factual Findings. Out of respect for state factfinding procedures, Congress requires federal habeas courts to presume that any determination of fact that a state court makes is correct.[35] To overcome that presumption, the prisoner must show by

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[29] *See* KING REPORT, *supra* note 3, at 6. If you add in the habeas petitions that the federal courts refuse to consider because they deem the petitions to be successive (another procedural obstacle to review), the number of claims dismissed reaches a majority. *See id.*

[30] *See* Stone v. Powell, 428 U.S. 465 (1976).

[31] *See* Teague v. Lane, 489 U.S. 288 (1989).

[32] *See* 28 U.S.C. § 2254(e)(2) (1996).

[33] *See* Cullen v. Pinholster, 563 U.S. 170 (2011).

[34] See KING REPORT, *supra* note 3, at 5 (noting that, post-AEDPA, evidentiary hearings were granted in only 0.41% of non-capital cases).

[35] *See* 28 U.S.C. § 2254(e)(1) (1996).

clear and convincing evidence that the state court's factual determination was wrong.[36] Given how rare evidentiary hearings are in federal court, most attempts to rebut a state court's factual findings are limited to an often-anemic state evidentiary record. The presumption of correctness is therefore quite difficult to overcome.

Deferential Standards of Review. Section 2254(d) of AEDPA famously implemented a highly deferential standard of review in federal court for claims previously adjudicated on the merits in the states.[37] A federal habeas court may only grant a prisoner relief if the prior state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" or if the state court's legal determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[38] As the Supreme Court has explained, it is not enough if the state court's determination of the facts or application of the law was clearly erroneous.[39] Rather, the state court's determination must have been patently unreasonable and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[40]

For all of these reasons, even a habeas petitioner who successfully navigates the procedural complexities has less than a 0.3% chance of winning on the merits.[41] Many experts believe that federal habeas doctrine is convoluted, incoherent, and not worth the amount of time and judicial energy spent on it,[42] while others complain that we've lost sight of the historic function of the Great Writ to remedy injustice and check abuses of government power.[43] Perhaps most damning, some federal judges lament that current habeas law requires them to "to place their stamp of approval on constitutional error."[44] While procedural and substantive obstacles pose challenges, the animating principles of the equitable exceptions to these barriers reveal possible ways to expand the scope and impact of federal habeas review of state prisoners' claims.

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[36] *See id.*

[37] *See* 28 U.S.C. § 2254(d) (1996).

[38] *Id.*

[39] *See* Williams v. Taylor, 529 U.S. 362 (2000).

[40] Harrington v. Richter, 562 U.S. 86, 103 (2011).

[41] *See* KING REPORT, *supra* note 3, at 9. The chances in capital cases are higher at 12.4%. *See id.*

[42] *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009).

[43] *See, e.g.*, Primus, *supra* note 5, at 13-16.

[44] *See, e.g.*, Adelman, *supra* note 5; *see also* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015) (describing how the federal court have "embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary").

II. Equitable Exceptions to Habeas

Hidden in the procedural and substantive morass of federal habeas doctrine is a consistent equitable thread. When a federal court believes that a state prisoner either (a) did not get a full and fair opportunity to present her claims to the state courts or (b) is innocent, it is more likely to bypass the procedural and substantive barriers to relief. To be sure, this practice is not universal. Though some federal judges are more willing to close the federal courthouse doors to habeas petitioners than others, the cases in which federal courts, including the Supreme Court, have bypassed procedural and substantive obstacles to review share these characteristics.[45] Even if there are no sure formulas for procuring more expansive federal habeas review, there are clear indications about what sorts of claims might succeed.

A. Lack of Full and Fair Process

Federal habeas review has historically been about ensuring that states provide criminal defendants with a full and fair opportunity to have their federal claims adjudicated. After all, it was a concern about state hostility to newly-created federal rights that first led Congress to give federal courts the power to entertain habeas petitions filed by state prisoners.[46] Supreme Court justices who are typically quite hostile to expansive federal habeas review of state convictions have agreed that federal courts should review claims alleging a lack of available state processes for vindicating federal rights.[47] As one scholar explained it, the states have a responsibility under the due process clause "to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case," and if the state fails to do so, "the due process clause itself demands that its conclusions of fact or law should not be respected."[48]

1. Bypassing Procedural Obstacles to Review

For each of the procedural obstacles outlined above, the Supreme Court and lower federal courts have relied on equitable doctrines to carve out exceptions—ways petitioners can bypass those procedural obstacles—when state prisoners have not had a full and fair opportunity to litigate their federal claims.

Statute of Limitations. In *Holland v. Florida*,[49] the Supreme Court recognized that a state prisoner could toll the one-year statute of limitations on equitable grounds if he could demonstrate that he had been pursuing his rights diligently and that some extraordinary circumstance beyond his control interfered with his ability to timely file his petition.

A state's failure to provide prisoners with access to the necessary resources to timely file their pleadings is a frequently-invoked circumstance to justify equitable tolling. For example, federal

[45] *See, e.g.*, Trevino v. Thaler, 569 U.S. 413 (2013); McQuiggin v. Perkins, 569 U.S. 383 (2013); Martinez v. Ryan, 566 U.S. 1 (2012); Maples v. Thomas, 565 U.S. 266 (2012); Holland v. Florida, 560 U.S. 631 (2010).
[46] *See supra* note 18.
[47] *See, e.g.*, Brown v. Allen, 344 U.S. 443, 532-48 (1953) (Jackson, J., concurring in the result).
[48] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).
[49] Holland v. Florida, 560 U.S. 631 (2010).

courts have held that prisoners are entitled to equitable tolling when their inability to file on time is the result of the state (a) denying a prisoner reasonable access to the law library;[50] (b) failing to maintain legal materials about AEDPA in the prison library;[51] (c) denying a prisoner reasonable access to his legal files;[52] (d) affirmatively misleading a prisoner about the available time he has left;[53] (e) affirmatively misleading a prisoner to file the wrong document or to file in the wrong court or at the wrong time;[54] or (f) substantially delaying the mailing of the prisoner's court filings or the notice of a state court decision on them.[55] In all of these circumstances, state action prevents the prisoner from complying with the statute of limitations, thus ensuring that the prisoner will not have a full and fair opportunity to present his federal claims.

In addition to state action that prevents timely filing, some federal courts will also equitably toll the statute of limitations when a prisoner suffers from an extreme medical condition, whether physical or psychiatric, which interferes with her ability to file.[56] Egregious misconduct by a state prisoner's attorney, such as failing to perform basic legal research, meet with or respond to client communications, or affirmatively misleading a state prisoner about the time restrictions, may lead to equitable tolling as well.[57]

In short, when a state prisoner is otherwise diligently attempting to vindicate his rights, and an extraordinary, external factor prevents him from having his claims heard, the statute of limitations will not prevent federal habeas review.[58]

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[50] *See, e.g.*, Sossa v. Diaz, 729 F.3d 1225, 1235 (9th Cir. 2013).

[51] *See, e.g.*, Pabon v. Mahanoy, 654 F.3d 385, 399-401 (3d Cir. 2011); Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000).

[52] *See, e.g.*, Socha v. Boughton, 763 F.3d 674 (7th Cir. 2014); Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002).

[53] *See, e.g.*, Pliler v. Ford, 542 U.S. 225, 234 (2004).

[54] *See, e.g.*, Spottsville v. Terry, 476 F.3d 1241, 1245-46 (11th Cir. 2007).

[55] *See, e.g.*, Drew v. Department of Corr., 297 F.3d 1278, 1288 (11th Cir. 2002); United States *ex rel*. Willhite v. Walls, 241 F. Supp. 2d 882, 888 (E.D. Ill. 2003).

[56] *See, e.g.*, Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011) (noting that "medical conditions, whether physical or psychiatric, can manifest extraordinary circumstances, depending on the facts presented"); Forbess v. Franke, 749 F.3d 837 (9th Cir. 2014) (same); Bolarinwa v. Williams, 593 F.3d 226 (2d Cir. 2010) (same); *see also* Hunter v. Ferrell, 587 F.3d 1304 (11th Cir. 2009) (recognizing that severe mental retardation may be sufficient to warrant equitable tolling).

[57] *See, e.g.*, Holland v. Florida, 560 U.S. 631 (2010). The Supreme Court has made it clear that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Id.* at 651-52 (internal quotations omitted); *see also* Lawrence v. Florida, 549 U.S. 327, 336-37 (2007). It must be a "serious instance[] of attorney misconduct." *Holland*, 560 U.S. at 652. *See also* Luna v. Kernan, 784 F.3d 640, 647 (9th Cir. 2015) ("[A]ffirmatively misleading a petitioner to believe that a timely petition has been or will soon be filed can constitute egregious professional misconduct."); Ross v. Varano, 712 F.3d 784 (3d Cir. 2013) (finding extreme neglect sufficient for equitable tolling when attorney missed deadlines, failed to communicate with client, and gave misleading statements to client); Dillon v. Conway, 642 F.3d 358 (2d Cir. 2011) (finding attorney miscalculation coupled with deeply misleading statements to client sufficient for equitable tolling).

[58] In some circumstances, these external obstacles may lead the federal court to re-start the one-year statute of limitations instead of relying on equitable tolling. *See supra* note 20.

Exhaustion. Citing equitable concerns about fair process, Congress and the federal courts have created procedural mechanisms to permit state prisoners to bypass, or at the very least soften, the total exhaustion requirement. First, AEDPA provides that a state prisoner need not exhaust the remedies available in state court if the state does not provide a realistic and effective procedural mechanism for considering the prisoner's federal claims.[59] The state may not create remedies that are so confusing, numerous, intricate, and ineffective that a state prisoner cannot be expected to comply with them.[60] Nor must a prisoner pursue state remedies that are only theoretically but not actually available to him.[61] For example, excessive state court delay may render a state process ineffective.[62] If pursuing state procedural remedies is pointless, the state has failed to provide a full and fair forum for adjudicating prisoners' federal claims. This process failure leads to an exception to the procedural obstacle to review in federal court.

In addition to this exception, the federal courts have also developed the stay and abeyance procedure, which is grounded in equitable principles, to soften the impact of the exhaustion requirement's "total exhaustion" rule. When a state prisoner files a mixed petition containing some exhausted and at least one unexhausted claim, the stay and abeyance procedure permits the federal court to consider whether the prisoner has "good cause" for his failure to have presented the unexhausted claims to the state courts.[63] If there is good cause, the claims are potentially meritorious, and there is no indication that the prisoner was intentionally delaying consideration of the claims, the federal court need not dismiss the habeas petition under the total exhaustion rule. Instead, the federal court should stay the proceedings, hold the petition with the exhausted claims in abeyance, and permit the state prisoner to go back to exhaust the unexhausted claims in state court.[64] Upon his return, the federal court will permit the state prisoner to amend the petition to include the previously-unexhausted-but-now-exhausted claims. This procedure prevents the exhaustion process from causing a state prisoner to run afoul of the one-year statute of limitations. Without the stay and abeyance procedure, the entire time that the federal court spent considering the initial mixed petition would count against the

[59] 28 U.S.C. §§ 2254(b)(1)(B)(i) & (ii) (1996).
[60] *See, e.g.*, Marino v. Ragen, 332 U.S. 561 (1947). Nor must a prisoner pursue a state remedy that is already foreclosed by state law. Lynce v. Mathis, 519 U.S. 433, 436 n.4 (1997) (noting that petitioner could bypass the exhaustion requirement because the Florida Supreme Court had previously rejected the very same challenge, and there was no reason to believe that it would have decided petitioner's case differently).
[61] *See, e.g.*, Harris v. DeRobertis, 932 F.2d 619 (7th Cir. 1991) (noting that there was a state statute that permitted untimely filing upon showing that the delay was not due to the prisoner's "culpable negligence," but emphasizing that there was not a single published opinion in which the state had found that standard satisfied in more than forty years).
[62] *See, e.g.*, Phillips v. White, 851 F.3d 567 (6th Cir. 2017); Taylor v. Hargett, 27 F.3d 483 (10th Cir. 1994) (noting that a delay of more than two years in state appellate processes is presumptively sufficient to deem the state remedy futile and excuse exhaustion); Harris v. Champion, 938 F.2d 1062 (10th Cir. 1991).
[63] *See* Rhines v. Weber, 544 U.S. 269 (2005).
[64] *See id.* at 278.

prisoner's statute of limitations.[65] The Supreme Court recognized the importance of the stay and abeyance procedure in *Rhines v. Weber* and noted that it would be unjust to force a state prisoner to "run the risk of forever losing the[] opportunity for any federal review" when there are good reasons why that prisoner did not present the claims earlier to the state courts.[66]

Federal courts have found "good cause" to justify use of the stay and abeyance procedure when an objective factor, not fairly attributable to the petitioner, caused the failure to exhaust.[67] When the state's procedural rules are so complicated that a state prisoner could be reasonably confused about whether a state filing is timely, the Supreme Court has held that there is "good cause" for filing prematurely in federal court to protect the underlying federal claims.[68] Some lower federal courts have held that ineffective assistance of post-conviction counsel qualifies as good cause for filing a stay and abeyance petition.[69] Others have found that a prisoner's severe mental illness may provide good cause for a failure to exhaust.[70]

Procedural Default. There are two exceptions to the procedural default doctrine that are grounded in equitable concepts about ensuring that state prisoners have a real opportunity to present their federal claims in state court. One exception focuses on the adequacy of the state procedures themselves while the other focuses on objective, external factors that might have prevented a particular state prisoner from complying with a state's procedural rules.

As with the exhaustion doctrine, if a state's procedural regime does not give state prisoners a realistic opportunity to present their federal claims in state court, the federal court may deem those state procedures "inadequate" to bar federal consideration of defaulted claims.[71] A state's procedural rules can be inadequate because they violate due process,[72] unduly burden a state prisoner's attempts to raise federal challenges,[73] are inconsistently applied,[74] or are applied in novel and unforeseen ways.[75] Adequacy challenges can be based on the application of one state procedural rule or a combination of different rules. They can be facial challenges to a state procedural rule across cases or as applied challenges that object to the way a facially legitimate state procedural rule was applied in a particular case. They can be predicated on rules that exist

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[65] *See* Duncan v. Walker, 533 U.S. 167 (2001) (holding that the time during which an initial federal habeas petition is pending in federal court does not toll the statute of limitations).
[66] *Rhines*, 544 U.S. at 275.
[67] *See* Whitley v. Ercole, 509 F. Supp. 2d 410, 417-18 (S.D.N.Y. 2007); Riner v. Crawford, 415 F. Supp. 2d 1207, 1209-10 (D. Nev. 2006).
[68] *See* Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005).
[69] *See, e.g.*, Blake v. Baker, 745 F.3d 977, 983-84 (9th Cir. 2014). *But see* Rhines v. Weber, 408 F. Supp. 2d 844, 848 (D.S.D. 2005) (noting that district courts "have split on whether alleged ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust claims in state proceedings").
[70] *See, e.g.*, Shotwell v. Lamarque, 2005 WL 1556296 (E.D. Cal. 2005).
[71] *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002).
[72] *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955).
[73] *See, e.g.*, *Lee*, 534 U.S. at 362.
[74] *See, e.g.*, Barr v. City of Columbia, 378 U.S. 146 (1964).
[75] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

on the books or de facto procedural rules that exist in state practice.[76] Ultimately, adequacy doctrine judges the legitimacy of the state procedures themselves and asks if they provided a realistic, full, and fair opportunity for the state prisoner to have her federal claims considered.

Cause and prejudice, on the other hand, is an equitable exception that focuses on the state prisoner and asks whether she had a legitimate excuse for failing to comply with the state procedures.[77] A state prisoner who failed to comply with state procedural rules can still have her federal claims considered on the merits in federal court if she can show cause (meaning an objective factor external to the prisoner) for failing to comply with the state's procedural regime and prejudice to the outcome of her case.

The Supreme Court has recognized a number of cause grounds including interference by state officials that made compliance with the state procedural rules impracticable,[78] the discovery of a factual or legal basis for a claim that was not reasonably available at the time of the default,[79] ineffective assistance of counsel in violation of the Sixth Amendment,[80] ineffective assistance of initial post-conviction counsel for failing to raise a substantial ineffective-assistance-of-trial-counsel ("IATC") claim in a jurisdiction that requires such claims to be raised in post-conviction proceedings,[81] the failure of a state to provide its prisoners with post-conviction counsel to raise substantial IATC claims when those claims must be raised in post-conviction proceedings,[82] and constructive or actual abandonment by a post-conviction attorney.[83] In *Martinez v. Ryan*,[84] the Supreme Court emphasized the equitable concerns that animate these cause categories. It noted that ineffective performance by trial, appellate, and some state post-conviction counsel can be cause to excuse a default, because "if the attorney appointed by the State … is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."[85]

In short, when a state prisoner is prevented from presenting her federal claims fully in state court—either because of state misconduct or the intervention of some external factor that she could not control, the federal courts are often willing to rely on equitable concepts of fairness to bypass the procedural restrictions and permit the petitioner to raise her federal claims.

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[76] *See* Primus, *supra* note 9 (describing the history of and different approaches to adequacy doctrine).
[77] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).
[78] *See* Brown v. Allen, 344 U.S. 443 (1953).
[79] *See* Reed v. Ross, 468 U.S. 1 (1984).
[80] *See* Murray v. Carrier, 477 U.S. 478, 488 (1986).
[81] *See* Martinez v. Ryan, 566 U.S. 1 (2012).
[82] *See id.*
[83] *See* Maples v. Thomas, 565 U.S. 266 (2012).
[84] *Martinez*, 566 U.S. at 13-14.
[85] *Id.* at 11.

2. Obtaining More Rigorous and Less Deferential Merits Review

Many of the limits on the scope of federal habeas review and the deference shown to state court judgments in federal habeas proceedings may disappear when there was no full and fair adjudication of a state prisoner's claims in state court proceedings.

Expansion in Cognizable Claims. Even as the Supreme Court was removing Fourth Amendment search and seizure claims from federal habeas review in *Stone v. Powell*,[86] it was careful to note that only those Fourth Amendment claims that had been fully and fairly litigated in state courts would not be re-adjudicated in federal habeas proceedings. If a petitioner can show that his search and seizure rights were violated and that the state courts did not provide an adequate forum for litigating the Fourth Amendment challenge, the federal court will consider the claim on habeas.

Federal courts have deemed state court processes inadequate to bar federal review of Fourth Amendment claims when the state prisoner had a constitutionally ineffective trial or appellate attorney who failed to properly present the claim[87] or when the state provided no realistic opportunity to raise a Fourth Amendment challenge.[88] The inquiry into whether there was a full and fair opportunity to litigate a Fourth Amendment claim in state court resembles the equitable inquiries that animate the exceptions to the procedural barriers to review. If the reason why a prisoner could not present a Fourth Amendment claim in the state courts would satisfy the cause standard under procedural default, the prisoner probably did not have a full and fair opportunity to present the claim. And if the state procedures would fail an adequacy review under the exhaustion and procedural default doctrines, they will probably also be inadequate to bar federal consideration of a Fourth Amendment challenge.

Evidentiary Hearings. In *Michael Williams v. Taylor*,[89] the Supreme Court held that AEPDA's restrictions on the availability of evidentiary hearings only apply when a state prisoner is at fault for failing to develop a record in state court. The Court noted that a state prisoner "is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance."[90] This fault-based inquiry relies on reasoning similar to that underlying the equitable exceptions to procedural barriers to review. If the state processes are inadequate or some unforeseen factor external to the state prisoner prevented him from having an opportunity to fully and fairly develop the record in state court, AEDPA should not stand in the way of a federal evidentiary hearing. And once a state prisoner walks through the equitable

[86] 428 U.S. 465 (1976).
[87] *See* Kimmelman v. Morrison, 477 U.S. 365 (1986).
[88] *See, e.g.*, Monroe v. Davis, 712 F.3d 1106, 1114 (7th Cir. 2013).
[89] 529 U.S. 420 (2000).
[90] *Id.* at 432.

opening created by *Michael Williams* and the AEDPA restrictions on evidentiary hearings no longer apply, Supreme Court precedent often *requires* federal evidentiary hearings.[91]

Deferential Standards of Review and the Presumption of Correctness. The deferential standards of review in AEDPA are only triggered when the underlying federal claim at issue "was adjudicated on the merits in State court proceedings."[92] If there was no prior state court adjudication of the claim, and the state prisoner is able to overcome any procedural obstacles to federal habeas review, the federal court's review of the claim will be *de novo*.[93] The difference between *de novo* review and the deferential review of section 2254(d) is vast. To obtain relief under section 2254(d), a habeas petitioner must often show that the state court decision was so unreasonable that "no fairminded jurist" could have reached the conclusion that the state reached.[94] That is a tough standard to meet. As a result, a lot hinges on whether the federal courts think that a claim was adjudicated on the merits in state court proceedings.

Similarly, the deference given to a state court's factual findings in section 2254(e)(1), which contains the presumption of correctness, only applies when the state court has made a "determination of a factual issue."[95] Thus, it is important to consider when the state court has made a factual determination that is entitled to deference.

The federal courts have uniformly held that a state court decision is not an "adjudication on the merits" deserving of 2254(d) deference when the state court decision (a) rested on procedural grounds, (b) failed to address the federal claim because it was not presented to the state court, or (c) failed to address a particular aspect of the federal claim because the state court resolved the claim on other grounds.[96] In short, if the state never considered a claim, and habeas is the prisoner's first real opportunity to present a federal claim, 2254(d) deference will not apply.

Even when the state addressed a prisoner's federal claim, if the state's factfinding procedures were inadequate (meaning that the state prisoner did not have a full and fair opportunity to develop the facts to support his claim), some federal courts will not defer to the state's decision. Instead, they will deem the inadequate procedures sufficient to overcome AEDPA's

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[91] When AEDPA does not apply because the prisoner is not at fault for the failure to develop the record in state court, *Townsend v. Sain*, 372 U.S. 293, 312 (1963), requires a federal evidentiary hearing if**:** "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure [in] the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence . . . or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

[92] 28 U.S.C. § 2254(d) (1996).

[93] *See* Cone v. Bell, 556 U.S. 449, 472 (2009).

[94] *See* Harrington v. Richter, 562 U.S. 86, 103 (2011).

[95] 28 U.S.C. § 2254(e)(1) (1996).

[96] *See* RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.2 (7th ed. 2017) (collecting cases). Of course, if a state prisoner never presented the claim to the state courts, she will likely have to overcome an exhaustion or procedural default problem in federal court.

presumption that the state factfinding was correct, and analyze the prisoner's federal claims under a *de novo* standard rather than a deferential one.

For example, some federal courts have held that there has been no actual adjudication of a claim on the merits when the state prisoner has not had a full and fair opportunity to develop evidence in support of his claim.[97] As the Fourth Circuit has explained, when the state courts refuse to give a prisoner an evidentiary hearing when such a hearing is necessary to develop the facts of his claim, and the state then denies his claim summarily without addressing serious factual issues raised in his pleadings, that is tantamount to never having adjudicated the claim in the first instance.[98] Without an adjudication on the merits, the deferential standards of section 2254(d) no longer apply, and the federal court will review the prisoner's claim *de novo*.

Other federal courts have deemed state factfinding predicated on inadequate state procedures patently unreasonable under section 2254(d)(2).[99] The Ninth Circuit has noted that "where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference."[100] Having determined that the state court's determinations of fact were unreasonable, the federal court considers the prisoner's federal claims *de novo*, supplementing the state court record through a federal evidentiary hearing when appropriate.

Finally, some federal courts will recast the prisoner's claim as a new claim supported by new evidence that has not been raised before in the state.[101] If a state prisoner had no real opportunity to present evidence in support of her claim in state court (either because the state court processes would not permit it or because the prisoner had an ineffective lawyer who

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[97] *See, e.g.*, Gordon v. Braxton, 780 F.3d 196 (4th Cir. 2015); *see also* Morva v. Zook, 821 F.3d 517, 527 (4th Cir. 2016) (noting that "[a] claim is not adjudicated on the merits when the state court makes it decision on a materially incomplete record" and emphasizing that "[a] record may be materially incomplete when a state court unreasonably refuses to permit further development of the facts of a claim" (internal quotations omitted; first alteration in original). *But see* Ballinger v. Prelesnik, 709 F.3d 558, 560-62 (6th Cir. 2013) (holding that the state court's failure to grant an evidentiary hearing did not mean that the state court had failed to adjudicate the claim on the merits and noting that "[i]t is now clear that a state-court adjudication, even when unaccompanied by an explanation, is presumed to be on the merits" (citing Harrington v. Richter, 562 U.S. 86, 98-99 (2011))).

[98] *See id.* at 202-04; *see also* Winston v. Pearson, 683 F.3d 489, 497 (4th Cir. 2012) (holding that the state court had not adjudicated petitioner's claims when it "deni[ed] . . . discovery and an evidentiary hearing[,] produc[ing] an adjudication of 'a claim that was materially incomplete'" (citation omitted)).

[99] *See, e.g.*, Hurles v. Ryan, 752 F.3d 768, 790-91 (9th Cir. 2014); *see also* Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 984-86 (2012). *But see* Valdez v. Cockrell, 274 F.3d 941, 942 (5th Cir. 2001) (holding that a full and fair hearing in the state is not a prerequisite for section 2254(d) deference).

[100] *Hurles*, 752 F.3d at 790 (internal quotations omitted).

[101] *See, e.g.*, Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (relying on cases relating to exhaustion doctrine to hold that new evidence will render a claim unexhausted and therefore "new" if it "fundamentally alter[s]" the previously exhausted claim). *But see* Escamilla v. Stephens, 749 F.3d 380, 394-95 (5th Cir. 2014) (agreeing with that standard but noting that new evidence does not "fundamentally alter" a claim if it "merely provided additional evidentiary support for [a] claim that was already presented and adjudicated in the state court proceedings").

failed to try), Justice Breyer has suggested that the federal courts should deem the claim a new claim not previously adjudicated on the merits in the state. As he put it, "[a] claim without any evidence to support it might as well be no claim at all."[102] Even if some evidence was presented in the state courts to support the claim, if the state prisoner later discovers a substantial amount of new evidence, it might be enough to "fundamentally alter" the nature of the claim and cause a federal court to characterize the claim as new.[103] The new claim, not having been raised in state court, will be procedurally defaulted, but deficient state procedures may make the state procedural default inadequate to bar federal review. Alternatively, the ineffectiveness of state post-conviction counsel in failing to develop record evidence in the state courts may be "cause" to excuse the prisoner's procedural default.[104] Either way, after bypassing the procedural default, the prisoner will then get *de novo* review of her claims in federal court.

These are three approaches lower federal courts have taken to bypass the deferential standards of review in AEDPA and review state prisoners' claims *de novo*, because the state's merits determination was based on an inadequate state process. Each of these approaches is motivated by an equitable concern about ensuring that state prisoners have a full and fair opportunity to present and develop their federal claims in state court.

B. Innocence

If a state prisoner convinces the federal court that he is probably innocent of the crime he was convicted of, the court will bypass all of the procedural obstacles to federal habeas review. In *Schlup v. Delo*,[105] the Supreme Court swept aside a procedural default after the prisoner presented new evidence leading the Court to conclude that it is more likely than not that no reasonable juror would have convicted him.[106] In *McQuiggin v. Perkins*,[107] the Supreme Court established a similar innocence bypass for the statute of limitations. Noting that "equitable principles have traditionally governed the substantive law of habeas corpus," the Court explained the innocence bypass as "grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[108] In short, federal courts will entertain defaulted claims if a state prisoner credibly asserts innocence.

Federal courts will also disregard the presumption against the retroactive application of new laws if (1) the new law makes the conduct for which a state prisoner was punished constitutionally unpunishable or the sentence that she received unconstitutional; or (2) the new

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[102] Gallow v. Cooper, 570 U.S. 933, 933 (2013) (statement of Breyer, J. with whom Sotomayor, J. joins respecting the denial of the petition for writ of certiorari).
[103] *See Dickens*, 740 F.3d at 1319.
[104] *See* Martinez v. Ryan, 566 U.S. 1 (2012).
[105] 513 U.S. 298 (1995).
[106] *See also* Sawyer v. Whitley, 505 U.S. 333 (1992) (establishing an actual innocence gateway in capital sentencing hearings).
[107] 569 U.S. 383 (2013).
[108] *McQuiggin*, 569 U.S. at 392 & 397 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

rule is a watershed rule of criminal procedure that is necessary to prevent an impermissibly large risk of an inaccurate conviction.[109] Federal courts deem violations of federal statutes cognizable in state post-conviction habeas cases only if the alleged error qualifies as "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure."[110] And the Supreme Court has left open the possibility of recognizing a freestanding innocence claim that would permit prisoners who can make a truly persuasive demonstration of innocence to obtain habeas relief independent of any other constitutional violation.[111]

Additionally, state prisoners who can show that they are actually innocent may often expand the factual record through evidentiary hearings in federal court. Even under AEDPA's stricter standards, a clear and convincing showing of actual innocence coupled with new evidence that couldn't have been discovered before will entitle a state prisoner to an evidentiary hearing.[112]

These procedural inroads and substantive avenues to relief show that the federal courts care about actual innocence in habeas and are willing to use equitable principles to pave the way for habeas relief when they believe that an actually innocent person has been unjustly convicted.

III. Expanding Equitable Gateways

Federal courts, including the United States Supreme Court, should be more explicit about their willingness to pierce the red tape of habeas doctrine and grant relief when they believe there has been a serious process failure or when they believe that an innocent person has been wrongly convicted. And habeas petitioners arguing for broader procedural bypasses and more expansive merits review should explicitly cast arguments in fair process or innocence terms.

Currently, state prisoners who never had their federal claims fully and fairly considered in state court often fail to paint a complete picture of the systemic state process failures that stood in their way. This should not be surprising. Right now, there is no constitutional right to federal habeas counsel.[113] Most state prisoners are indigent and cannot afford to hire federal habeas counsel.[114] They either must proceed *pro se* or rely on pro bono assistance that typically comes from large law firms or legal institutions that do not focus on criminal cases.[115] The attorneys

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[109] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 728 (2016); Whorton v. Bockting, 549 U.S. 406, 418 (2007).
[110] Reed v. Farley, 512 U.S. 339, 348 (1994) (alteration in original).
[111] Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"); *see also* District Atty's Off. For Third Jud. Dist. v. Osborne, 557 U.S. 52, 71 (2009) (noting that "[w]hether such a federal right exists is an open question").
[112] *See* 28 U.S.C. § 2254(e)(2) (1996).
[113] *See supra* note 28.
[114] See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000) (noting that more than 80% of American criminal defendants are indigent).
[115] *See* Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 860 (2013) (explaining how prisoners "must petition non-profit organizations, law school clinics, or law firms to take their cases pro bono").

who take on these cases are typically good generalist lawyers, but habeas litigation is often not their area of expertise, and they typically lack any deep experience with state post-conviction regimes.[116] As a result, they might not understand the varied ways in which states create and implement post-conviction review systems that routinely and effectively prevent state prisoners from having their federal claims fully considered. The state prisoners who proceed *pro se* certainly do not have access to this information.

Not knowing about the systemic procedural failures in the state, most state prisoners focus on their individual circumstances when trying to get around procedural and substantive obstacles to review.[117] They offer excuses for why they did not comply with procedural rules or why they were not at fault for failing to develop a sufficient factual record in state court. These more localized excuses are known to the petitioners and their pro bono counsel and are easier to raise, but they are less likely to motivate a federal court to grant relief, because they do not demonstrate an extraordinary or far-reaching procedural problem. They also are not as effective at catalyzing change, because they provide only indirect feedback to the offending states.

Consider the difference between the two equitable exceptions to the procedural default doctrine—cause and prejudice and adequacy. Under a cause and prejudice analysis, the question is whether the petitioner is at fault for the procedural noncompliance. A finding of cause and prejudice to excuse a default does not send any direct message to the offending state. It merely recognizes that the petitioner has an excuse sufficient to justify bypassing an otherwise acceptable state procedural rule. In contrast, a finding that the state's procedures are inadequate begins a dialogue between the federal and state courts about the legitimacy of the state process. If the federal court tells a state directly that its procedures inadequately protect federal rights, it puts the state on notice and gives the state an incentive to fix the problem or face more federal habeas grants in the future.[118]

Habeas petitioners should ask federal courts to consider how state procedural systems are structured and force them to confront the broader questions about whether state prisoners are given a realistic opportunity to have their federal claims considered. And federal courts should use their equitable discretion to bypass procedural and substantive obstacles to review and send a clear message back to the offending state that prisoners from that state will continue to receive more favorable federal habeas review until the state revises its procedures to give prisoners a full and fair opportunity to present federal claims. If the state still refuses to modify

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[116] *See, e.g.*, Maples v. Thomas, 565 U.S. 266 (2012) (describing one such situation). There are, of course, exceptions to this rule. Some law firms have brought experienced public defenders in to create their pro bono programs and train their attorneys. *See* Carol S. Steiker, Keynote Address, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2710 (2013) (describing some of these law firms). And prisoners lucky enough to be represented by law school clinics at good schools often get excellent representation.

[117] *See* Primus, *supra* note 9, at 109.

[118] *See* Primus, *supra* note 9 (discussing the benefits of a structural approach to state procedural problems).

its state procedures, federal courts can issue a stronger, constitutionally-based response by finding systemic violations of due process or the right to counsel in that state.[119]

Petitioners should also try to broaden established equitable inroads by applying procedural bypasses obtained in one area of habeas to other obstacles to habeas relief.[120] Consider the Supreme Court's decisions in *Martinez v. Ryan*[121] and *Trevino v. Thaler*.[122] In these cases, the Supreme Court held that there is cause to excuse a state prisoner's procedural default for failing to raise a substantial IATC claim whenever state law requires prisoners to raise IATC claims in initial state post-conviction proceedings and the state fails to provide prisoners with effective counsel to help them raise the claims at that stage. The equitable principles animating the Supreme Court's holdings in *Martinez* and *Trevino* have potential implications for other habeas doctrines, like equitable tolling. If a state creates a particularly complicated set of procedural requirements about the time periods for filing state post-conviction petitions and then fails to give indigent prisoners counsel to help them navigate those procedural barriers, the prisoners who get trapped in the resulting Catch-22 face the same unfairness that motivated the Supreme Court to find a way around the procedural default doctrine in *Martinez* and *Trevino*.[123]

Martinez and *Trevino* also provide support to state prisoners who want to supplement IATC claims that were previously raised in state post-conviction proceedings but were not adequately supported due to their *pro se* status or the ineffective representation of a post-conviction attorney. If equitable concerns permit state prisoners to bypass a complete failure to raise IATC counsel claims, they certainly should permit prisoners to supplement a claim that was improperly raised by an ineffective post-conviction attorney or a *pro se* prisoner who never supported the claim with factual evidence.[124]

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[119] *See* Alper, *supra* note 115 (arguing that *Martinez* and *Maples* might be first steps toward a constitutional right to post-conviction counsel); Wiseman, *supra* note 99, at 992-1005 (arguing that prisoners who don't get full factual development in the state may have claims under the Suspension or Due Process Clauses).

[120] It is, of course, important to be careful when analogizing between doctrines that litigants do not ratchet up the required showing that petitioners have to make to pass through equitable gateways. For example, some courts have held that "good cause" to justify use of the stay and abeyance procedure requires a lower threshold showing than "cause" would in the procedural default context. *See, e.g.*, Jackson v. Roe, 425 F.3d 654 (9th Cir. 2005).

[121] 566 U.S. 1 (2012).

[122] 569 U.S. 413 (2013).

[123] *See* Grissette v. Westbrooks, 2013 WL 494093 (M.D. Tenn. Feb. 8, 2013) (applying *Martinez* and *Maples* to equitable tolling but finding no *Strickland* prejudice to warrant tolling in the instant case); *see also* Harper v. Ercole, 648 F.3d 132 (2d Cir. 2011) (noting that the extraordinary circumstances requirement in equitable tolling doctrine "refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period"); Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2164-68 (2014). *But see* Lombardo v. United States, 860 F.3d 547, 557-58 (7th Cir. 2017) (recognizing the force of the argument that *Martinez* applies to equitable tolling, but refusing to do so because of the tension it would create with the Supreme Court's statements that garden variety claims of neglect do not warrant equitable tolling).

[124] *See, e.g.*, Gregg v. Raemisch, 2018 WL 447351 (D. Colo. 2018) ("It would not serve the equitable rationale of *Martinez* to conclude that the state court's decision that [the defendant's] inartfully pled *pro se* claim was 'vague and conclusory' constituted a decision on the merits."); *see also supra* notes 99-103. Once out of the constraints of section

More generally, when faced with section 2254(d)'s deferential standards of review and section 2254(e)(1)'s presumption of correctness on factual determinations, habeas litigants should try to expand the equitable inroads that some circuits have already created. Litigants should argue that the state processes were sufficiently inadequate that the state court decision should not be considered an adjudication on the merits or the factual findings underlying the state court determination should be deemed unreasonable and the resulting determination not subject to deference. Once out of the constraints of Section 2254(d), petitioners should rely on *Michael Williams v. Taylor*[125] to contend that they were not at fault for failing to develop the facts in state court and argue for federal evidentiary hearings to expand their factual records.

State prisoners who are factually innocent should also rely on federal courts' desire to prevent miscarriages of justice to expand equitable bypasses around the restrictive section 2254(d) standards. Federal courts will be more likely to recast a claim predicated on new evidence as a new claim, not subject to AEDPA deference, when the new claim reveals that an innocent person was wrongly convicted. They might be more likely to say that the state courts never actually adjudicated the claim or that the state factfinding procedures were unreasonable under section 2254(d)(2) if doing so will permit them to redress a miscarriage of justice.

State prisoners should also focus on expanding existing factual innocence gateways to include legal innocence (where the defendant is not guilty of the charged offense even if he might be guilty of some wrongdoing)[126] and non-capital sentencing innocence (where the defendant is not eligible for an enhanced sentence but the state erroneously believed that he was).[127]

These are just a few examples of ways that federal courts and litigants could rely on the equitable strands within the habeas doctrinal morass to open the federal courthouse doors to more state prisoners' claims. If litigants situate their arguments in the language, history, and evolution of equitable doctrines about ensuring fair state process and preventing the conviction of innocents, they are more likely to get robust federal habeas review while simultaneously catalyzing states to provide more realistic opportunities for state prisoners to present their federal claims in state court. It will not solve all the problems with the current structure of federal habeas review of state court criminal convictions, but it is a start.

2254(d), state prisoners with underdeveloped factual records due to ineffective post-conviction counsel should rely on *Martinez* to contend that they are not at fault for the failure to develop the record and thus should get an evidentiary hearing. *See, e.g.*, Jones v. Ryan, 2017 WL 264500, at *19 (D. Ariz. Jan. 20, 2017) (holding that when a state prisoner's "procedural default is excused under *Martinez*, he is by extension not at fault for failing to develop the claim under § 2254(e)(2)").

[125] *Williams*, 529 U.S. at 420.

[126] *See* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018).

[127] *See* Dretke v. Haley, 541 U.S. 386 (2004) (granting certiorari on this question but resolving the case on other grounds).

About the Author

Eve Brensike Primus is professor of law at University of Michigan Law School where she teaches Criminal Law, Criminal Procedure, Evidence, and Habeas Corpus, and writes about structural reform in the criminal justice system. Her scholarship has been cited by the U.S. Supreme Court as well as lower appellate courts. She has won the L. Hart Wright Award for Excellence in Teaching on more than one occasion and is the founder and director of the Law School's MDefenders organization—a group designed to educate and support aspiring public defenders. Before joining the Michigan Law faculty, she worked in the Maryland Office of the Public Defender as a trial attorney and appellate litigator, appearing several times before the state's highest court. Professor Primus has given legislative testimony and helped draft proposed legislation on criminal justice issues. She clerked for the Hon. Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. Professor Primus holds a B.A., *magna cum laude*, from Brown University and a J.D., *summa cum laude,* from Michigan Law.

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