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# THE SACRIFICE OF UNARMED PRISONERS TO GLADIATORS: THE POST-AEDPA ACCESS-TO-THE-COURTS DEMAND FOR A CONSTITUTIONAL RIGHT TO COUNSEL IN FEDERAL HABEAS CORPUS

*Emily Garcia Uhrig*[*]

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*Abstract*

This article argues for a constitutional right to counsel for state inmates in all initial federal habeas corpus proceedings based on access-to-the-courts doctrine. The doctrine guarantees an indigent inmate a constitutional right to meaningful access to the courts in incarceration-related litigation, including postconviction proceedings. The Supreme Court initially articulated the access right, in relevant part, as merely prohibiting states from actively interfering with an indigent inmate's efforts at pursuing postconviction relief from a criminal judgment. Today, though still fairly inscrutable in dimension, the access right has evolved to require states in certain circumstances to provide affirmative assistance to inmates to ensure constitutionally adequate access to the writ.

In *Pennsylvania v. Finley*[1] and *Murray v. Giarratano,*[2] a pair of decisions rendered in 1987 and 1989, respectively, the Supreme Court held that the right of access does not require assistance of counsel in either noncapital or capital state postconviction proceedings, at least insofar as the inmate seeks to raise claims litigated on direct appeal. The primary rationale in *Finley* and *Murray* was that habeas litigants have enjoyed assistance of counsel at trial and on direct appeal, and thus should be able

[1] 481 U.S. 551, 559 (1987).
[2] 492 U.S. 1, 12-13 (1989).

simply to parrot that work product in the federal habeas forum to obtain judicial review of any cognizable claims. The Court analogized to an earlier case, *Ross v. Moffitt*,[3] in which it had held no right to counsel attaches in discretionary appeals. The Court has never addressed the issue whether the access right demands assistance of counsel in federal habeas proceedings. But the lack of such right appeared a foregone conclusion after *Finley* and *Giarratano*.

On April 24, 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which introduced a myriad of exceedingly complex procedural requirements -- most significantly, a one-year statute of limitations -- that a petitioner must satisfy in order to obtain merits review of claims set forth in a federal habeas petition. For the prototypical pro se habeas litigant, these requirements, in particular the statute of limitations, erected an impenetrable wall around federal judicial review of merits claims. Indeed, the effect of AEDPA's enactment has been to stymie many pro se inmates' efforts at obtaining federal habeas review of state court judgments. Yet, to date, the Supreme Court has not recognized a right to counsel in federal habeas corpus. Federal courts, while struggling mightily to make sense of a poorly drafted statute, continue to abide by a literal fiction in assuming that most inmates are sufficiently competent to navigate post-AEDPA federal habeas practice without assistance of counsel.

This article argues that absent constitutionally guaranteed assistance of counsel in federal habeas corpus and a concomitant remedy where that assistance falls short, AEDPA's procedural intricacies function to deny the indigent, pro se state inmate the right to meaningful access to the courts in federal habeas proceedings. As such, absent repeal of AEDPA, the access right requires recognition of a right to assistance of counsel in filing a first federal petition. This right would extend only to navigating and comprehending the procedural complexity of federal habeas under AEDPA, rather than to the articulation and framing of substantive claims and subsequent litigation.

## INTRODUCTION

The impetus for this article derives from my work as a staff attorney with the Ninth Circuit Court of Appeals, where I was responsible for reviewing requests for certificates of appealability, which are required by statute in order to appeal district court denials of federal habeas petitions, and making recommendations to motions panels regarding whether the certificates should issue. This work required my review of federal petitions and the district court rulings. In the more than four years I spent at the court, I reviewed and presented to motions panels over eight hundred petitions. Virtually all of these petitions were prepared pro se, often handwritten on court-issued forms or typed out on old typewriters. As a

[3] 417 U.S. 600 (1974).

lawyer with substantial experience in the federal criminal justice system,[4] by far the most challenging issues for me to unpack were procedural in nature. Difficulties frequently emerged from the thin language of AEDPA and the number of unresolved questions that have resulted. Typically, once – or rather, if – the litigant cleared the procedural hurdles, the appropriate disposition of the merits of a particular petition became readily apparent.

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[4] Prior to working at the Ninth Circuit, I spent a year clerking on that court, two years as an Attorney-Advisor at the Office of Legal Counsel, U.S. Department of Justice, where I provided legal advice to the Executive Branch primarily on criminal procedure issues, and five years as a trial and appellate lawyer with the Federal Public Defender's Office in Los Angeles.

Throughout this work, I never ceased to be astonished by the legal expectation, grounded in the absence of a recognized right to counsel in federal habeas corpus proceedings, that inmates navigate AEDPA's complexity successfully in order to obtain judicial review of the merits of their claims. In the trial context, the Supreme Court has recognized that "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[5] What I witnessed in federal habeas practice for noncapital, pro se litigants is precisely such a slaughter.

Indeed, statistics bear out my experience. A recent study conducted by Vanderbilt Law School found that over ninety percent of non-capital habeas cases involve pro se litigants. Moreover, district courts dismiss as untimely more than one in five non-capital cases, the vast majority of which are uncounseled. In practice, without assistance of counsel, AEDPA has shrouded the Great Writ in an impenetrable fog, leaving merits review of claims that a state inmate raises in a federal petition to little more than the fortuity of access to a competent jailhouse lawyer.

The instant article argues that AEDPA's procedural intricacies, coupled with a lack of a constitutional right to assistance of counsel, function to deny the indigent, pro se state inmate the right to meaningful access to the courts in pursuit of the Great Writ. As such, absent repeal of AEDPA, the access right should require recognition of a right to assistance of counsel for state inmates in filing a first federal petition. Because a right to counsel requires *effective* assistance of counsel, petitioners would have a meaningful remedy should counsel be unavailable or render ineffective assistance in apprehending the procedural strictures of the AEDPA. In this way, we can begin to clear a path through AEDPA's procedural thicket for the indigent habeas petitioner and ensure the constitutional guarantee of meaningful access to judicial review.

In practical consequence, the proposal is a radical one. States have fallen far short in realizing *Gideon v. Wainright*'s[6] decades-old promise of a right to counsel at trial.[7] Thus, to imagine a right to counsel in federal habeas may seem both decadent and unrealistic. But it is precisely *because Gideon*'s dream has not fully materialized that habeas corpus occupies such a crucial role in our criminal justice system. Without an effective, accessible habeas writ, inmates who suffer at the hands of incompetent trial or appellate counsel are at best, lost to the system; at worst, they lose their lives. Beyond the personal cost to those directly affected, we, as a society, are left with the stain of that injustice.

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[5] United States v. Cronic, 466 U.S. 648, 657 (1984) (internal quotation omitted) (reversing Tenth Circuit's presumption of ineffectiveness where young and inexperienced trial counsel had only 25 days to prepare complex, serious case and some witnesses were not easily accessible).

[6] 372 U.S. 335 (1963).

[7] *See* Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 282 (2003); Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1 (2009).

This Article is structured as follows: Part I identifies the problem, i.e., the lack of a constitutional right to counsel in federal habeas corpus and the near impenetrability of post-AEDPA federal habeas practice for pro se litigants. Part II sets forth the access-to-the-courts doctrine as a framework for recognition of a constitutional right to counsel in federal habeas. Part III applies the access doctrine to AEDPA, arguing that the right to meaningful access demands assistance of counsel in navigating AEDPA's procedural thicket. Lastly, Part IV explores different models for implementation of an access-based right to counsel in federal habeas corpus.

## I. THE PROBLEM: THE IMPOSSIBLE TASK OF NAVIGATING AEDPA'S PROCEDURAL MORASS WITHOUT ASSISTANCE OF COUNSEL

### A. *The Lack of a Recognized Constitutional Right to Counsel in Federal Habeas Proceedings.*

To date, the Supreme Court has only recognized a constitutional right to counsel for the criminally accused at trial[8] and on the first direct appeal of right.[9] This right extends to *all* felony defendants as well as misdemeanor defendants who face a potential loss of life or liberty.[10] Moreover, the right to counsel at trial extends to all "'critical' stages of the proceedings" against the defendant, and not merely to the trial itself.[11] But the Court has declined to recognize a constitutional right to counsel in seeking discretionary review before a state's Supreme Court or in filing a petition for writ of certiorari before the U.S. Supreme Court.[12]

Thus far, the Supreme Court has also declined to recognize a constitutional right to counsel in state postconviction proceedings, at least insofar as the petitioner seeks to raise claims previously litigated at trial or on appeal.[13] As I will discuss in greater depth in Part II, *infra*, in *Pennsylvania v. Finley*, decided in 1987, the Court rejected a claim that the constitutional right to meaningful access to the courts requires assistance of

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[8] *See* Powell v. Alabama, 287 U.S. 45 (1932) (recognizing Sixth and Fourteenth Amendment right to counsel for capital defendants); Johnson v. Zerbst, 304 U.S. 458 (1938) (recognizing Sixth Amendment right to counsel for federal criminal defendants facing loss of life or liberty); Gideon v. Wainwright, 372 U.S. 335, 345 (extending *Powell* to noncapital criminal defendants).

[9] *See* Douglas v. California, 372 U.S. 353, 356-68 (1963) (recognizing due process and equal protection right to counsel on first appeal).

[10] *See* Jacob, *supra* note 6; Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (finding that whether an indigent defendant has the right to appointment of counsel under *Gideon* depends on the ultimate sanction imposed); Nichols v. United States, 511 U.S. 738, 743 n.9 (1994) (noting in dicta that, for felony cases, the right to counsel does not depend on potential incarceration); Alabama v. Shelton, 535 U.S. 654, 654 (2002) (recognizing right to counsel in misdemeanor cases even where sentencing court suspends a prison or jail sentence and imposes probation).

[11] United States v. Wade, 388 U.S. 218, 224-25 (1967) (concluding that post-indictment lineup is critical stage of prosecution and thus, right to counsel attaches). *See also* United States v. Gouveia, 467 U.S. 180, 192-93 (1984) (holding right to counsel attaches at preliminary hearing and arraignment only if certain rights are at risk but unconditionally at sentencing).

[12] Ross v. Moffitt, 417 U.S. 600, 601-02 (1974) (concluding due process and equal protection interests underlying right to counsel on direct appeal do not extend to discretionary review by state's high court).

[13] *See* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541 (2009) (arguing for a right to counsel in habeas corpus for claims unique to habeas proceedings, for which the petitioner has not yet had assistance of counsel).

counsel in state, non-capital habeas proceedings.[14] Rather, the Court held that a pro se inmate's access to the trial record and the appellate briefs and opinions suffice to provide meaningful access to the courts for postconviction litigation.[15] Thus, as with discretionary appeals, no constitutional right to counsel attaches during state postconviction proceedings.[16]

Two years later, in *Murray v. Giarratano*, a plurality of the Court affirmed *Finley* and held, in relevant part, that the constitutional guarantee of meaningful access to the courts also does not require assistance of counsel during state postconviction proceedings involving capital defendants.[17] Specifically, in *Murray*, Justice Rehnquist, joined by Justices White, O'Connor, and Scalia, rejected the argument by Virginia death row inmates that assistance of counsel was necessary in order to ensure their constitutional right of access to the courts in state habeas proceedings, as guaranteed by *Bounds v. Smith*.[18] Justice Kennedy, joined by Justice O'Connor, concurred in the judgment, but noted that "[t]he complexity of [Supreme Court] jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[19] Nonetheless, he agreed petitioners had failed to state a claim for relief because, to date, no capital petitioner in Virginia had been unable to obtain counsel to assist in habeas proceedings and state prisons had staff attorneys to assist inmates with preparing their petitions.[20]

Seven years later, in *Lewis v. Casey*, the Court modified its holding in *Bounds* to make clear that the access right does not encompass assistance with investigating claims and litigating them effectively.[21] Rather, the right encompasses only assistance in getting through the courthouse doors, as opposed to a right to substantive assistance with one's case.[22] The Court further held that to show an access violation, a petitioner must demonstrate actual injury, i.e., that the state's failure to provide adequate assistance impeded the petitioner in his efforts to pursue a legal claim in postconviction proceedings.[23]

The Court has not addressed whether a right to counsel attaches in federal habeas proceedings. But federal courts since *Finley*, *Giarratano*, and *Lewis* generally have assumed that both capital and noncapital inmates

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[14] Pennsylvania v. Finley, 481 U.S. 551, 555-557, 559 (1987) (rejecting right to counsel in state postconviction proceedings on both access-to-the-courts and due process, fundamental fairness grounds).

[15] *Id.* at 557.

[16] *Id.*

[17] Murray v. Giarratano, 492 U.S. 1, 11-13 (1989).

[18] *Id.* at 3-4, 12; Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

[19] *Murray*, 492 U.S. at 14 (Kennedy, J., concurring) (citation omitted).

[20] *Id.*

[21] Lewis v. Casey, 518 U.S. 343, 354 (1996).

[22] *Id.*

[23] *Id.* at 351.

do not have a constitutional right to counsel in federal habeas corpus proceedings.[24] This judicial mindset has remained intact despite the dramatic overhaul and inordinate complication of federal habeas practice wrought by the Antiterrorism and Effective Death Penalty Act of 1996. The complexity of post-AEDPA federal habeas practice calls for re-examination of the issue and recognition of a limited right to counsel to ensure the indigent state inmate's constitutional right of access to the courts in federal habeas proceedings.

### B. *The Antiterrorism and Effective Death Penalty Act of 1996*

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which substantially narrowed the legal parameters of federal habeas review.[25] Conservative advocates had been attempting to place limits on capital habeas corpus for decades.[26] Critics identified habeas practice, rather than the many flaws and irregularities that often accompany capital prosecutions, as the source of unacceptable delay between conviction and execution.[27] Efforts at restricting the Great Writ eventually found traction with the domestic terrorist bombing of the Oklahoma City Alfred P. Murrah Federal Building, in which 168 people perished. The emotional aftermath of the bombing, and a concomitant desire to see "swift justice" imposed on the perpetrators, aligned with Republican majorities in Congress to provide the necessary catalyst for statutory change.[28]

In relevant part,[29] AEDPA revised 28 U.S.C. §§ 2244 and 2253-2255, which govern all federal habeas corpus proceedings.[30] AEDPA also created a new Chapter 154 of the Judicial Code for state capital cases that provides for rules favorable to the state if the state meets certain conditions, including providing assistance of counsel in the state postconviction proceedings.[31] The Conference Committee report summarized AEDPA's

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[24] *See, e.g.*, United States v. Pollard, 389 F.3d 101, 111 (4th Cir. 2004); United States v. Perez-Macias, 335 F.3d 421, 428 (5th Cir. 2003).

[25] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[26] *See, e.g.*, 142 Cong. Rec. S4363, 4365 ("Reform of our habeas corpus system has been needed, and needed badly, for several decades now.") (Sen. Abraham) (April 29, 1996).

[27] *See, e.g.*, 142 Cong. Rec. H3599, 3604 (April 18, 1996) (Sen. Hyde) ("Somehow, somewhere we are going to end the charade of endless habeas proceedings, and this bill is going to do it."); 142 Cong. Rec. S3454, 3459 (April 17, 1996) (Sen. Hatch) ("But just look at the highlights of this antiterrorism bill. Capital punishment reform, death penalty reform, something that has been needed for years, decades. It is being abused all over the country. There are better than 3,000 people who have been living on death row for years with the sentences never carried out. . . .").

[28] *See, e.g.*, 142 Cong. Rec. S4363 (April 29, 1996) (Sen. Abraham) ("The Oklahoma City bombing finally provided the clarion call that made it possible for the Republican majority, with President Clinton's reluctant acquiescence, and over stiff resistance by a majority of the Democrats, to enact reforms to this legal quagmire.").

[29] Title I of AEDPA revised the federal habeas statutes; the remaining titles are unrelated. *See* Lindh v. Murphy, 521 U.S. 320, 326-27 n.1 (1997) (noting the other titles address victim restitution, international terrorism, weapons and explosives restrictions, and "miscellaneous items," respectively).

[30] *Lindh*, 521 U.S. at 326-27.

[31] *Lindh*, 521 U.S. at 327 (citing chapter 154, 110 Stat. 1221-1226), *amended by* the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (March 9, 2006). To date, no state has been able to satisfy these heightened requirements, which include provision of competent counsel. *See* I James S. Liebman & Randy Hertz, I Federal Habeas Corpus Practice and Procedure § 3.3[a] at 147-152 (6th ed.

purpose in revising federal habeas practice as follows: "This title incorporates reforms 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."[32] Similarly, President Clinton's signing statement to AEDPA declared the statute's intent as being to "streamline Federal appeals for convicted criminals sentenced to the death penalty," though not to alter substantively the standards for issuance of the writ.[33]

Despite its stated target of capital cases, AEDPA, as enacted, fundamentally changed longstanding provisions governing *all* federal habeas corpus practice.[34] Most significantly, the statute introduced a one-year statute of limitations to filing any federal habeas petition, introduced a ban on filing second or successive petitions, and limited the scope of substantive review. At the same time, AEDPA left intact the pre-existing doctrines of exhaustion and procedural default. Federal courts have devoted substantial energy since 1996 attempting to understand the intricate mechanics of the statute of limitations as applied, as well as its interplay with the remaining procedural doctrines. The resulting doctrine is inordinately complex and vexing to even the most experienced of jurists.

This article does not attempt a thorough exposition of these procedural doctrines.[35] Rather, what follows is merely a general overview of the doctrines that function, at times in concert, to block access to the courts for the pro se habeas litigant.

### C. *Expecting the Impossible: The Introduction of a One-Year Statute of Limitations*

Until 1996, there was no fixed time limit for filing a federal habeas petition challenging a state conviction. The only constraint was a flexible rule of "prejudicial delay," which resembled in effect the equitable doctrine of laches.[36] AEDPA introduced a one-year statute of limitations for filing § 2254 petitions challenging a state criminal judgment[37] and § 2255 motions

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2011). Hence, this article does not address the implications of those provisions.

[32] H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.). *See also* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 3.2 at 112 (5th ed. 2005).

[33] Statement of the President of the United States upon Signing the Antiterrorism Bill (available in LEXIS Public Papers of the Presidents, 32 Weekly Comp. Pres. Doc. 719 (White House, Apr. 24, 1996).

[34] *See* Rhines v. Weber, 544 U.S. 269, 274 (2005) ("The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas petitions.").

[35] For the authoritative treatise on the nuances, intricacies, and history of federal habeas corpus, see I & II James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice And Procedure (6th ed. 2011).

[36] *See* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2 at 249 (6th ed. 2011).

[37] Under AEDPA, for state inmates who seek federal habeas relief under 28 U.S.C. § 2254, section 2244(d) of that title now provides:

(1) 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. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

attacking a federal criminal judgment.[38] To understand the dramatic impact of AEDPA's statute of limitations requires an examination of its complex mechanics.

Under §§ 2244(d) and 2255, the one-year statute of limitations does not start to run until the challenged state or federal judgment becomes final, any state-created impediments to filing are removed, and the factual or legal bases for a claim become available.[39] For state inmates, the time during which state habeas proceedings pertinent to the judgment the inmate seeks to challenge in federal court are pending tolls the one-year statute of limitations. In light of these myriad triggering and tolling dates, calculation of the statute of limitations, particularly under section 2244(d), has proven extremely challenging. Indeed, at virtually every analytical juncture, difficult issues have emerged. Successfully navigating these hurdles requires both legal skill and, where judicial precedent is lacking, the ability to anticipate accurately AEDPA's contours. Absent the fortuity of an available and competent "jailhouse lawyer" -- i.e., a fellow inmate self-educated in the legal process who assists other inmates in litigating claims and cases[40] -- pro se state habeas petitioners are stymied first by the lack of sufficient legal skills to calculate the filing requirements. Second, even where some assistance is provided, legal missteps are not uncommon by even highly competent counsel. But absent a right to counsel in the first

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(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) 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.

[38] For federal inmates seeking habeas relief under 28 U.S.C. § 2255, the revised statute provides:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

[39] 28 U.S.C. § 2244(1)(B)-(D).

[40] *See* Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming their Law Libraries*, 24 YALE L. & POL'Y REV. 91 (2006).

instance, the petitioner is left without a remedy to correct any mistake, including those that function to slam the courthouse door shut on substantive merits review of federal habeas claims.

1. The Challenge Of Figuring Out Even Where To Begin: Calculating The Elusive Triggering Date For The Statute Of Limitations.

The statute of limitations does not start to run until the judgment an inmate seeks to challenge "becomes final."[41] But what does this mean? That is, how does an inmate translate these two words into practice in his own case? As with many of the most difficult issues posed under AEDPA, the statute itself is silent on the issue.[42]

As an initial matter, the inmate must determine whether to look to state or federal law in assessing finality. Federal appellate courts disagree to some extent as to the role of state law in defining "finality" under § 2244(d)(1)(A).[43] Thus, the burden will be on the petitioner to determine whether his jurisdiction honors state law in assessing finality. As with all of AEDPA's statute of limitations intricacies, an error in calculation can doom a federal petition to dismissal as untimely.

But federal courts have generally agreed on several triggering principles. First, when the petitioner pursues all available direct appeals within the state or federal system, including discretionary appeals, the triggering event is either the completion of certiorari proceedings in the U.S. Supreme Court or the expiration of time within which to file a petition for writ of certiorari.[44] Second, if no direct appeal is filed, the conviction becomes final at the expiration of the time for filing such appeal.[45] The same rule obtains where a petitioner files an untimely notice of appeal.[46] Thus, if state law permits a defendant thirty days to file a notice of appeal of a conviction by trial or guilty plea, but instead he or she waits a year to do so, AEDPA's statute of limitations will start to run after thirty days. As a result, only one month will remain to file a federal habeas petition by the

[41] 28 U.S.C. § 2244(d)(2).

[42] The Supreme Court has noted finality under § 2244(d) "is a concept that has been 'variously defined . . . [and] like many legal terms, its precise meaning depends on context.'" Jimenez v. Quarterman, 129 S.Ct. 681, 685 (2009).

[43] *Compare* Roberts v. Cockrell, 319 F.3d 690, 693-95 (5th Cir. 2003) (refusing to consider state law that set date of finality of judgment with court of appeals' issuance of mandate), *and* Wixom v. Washington, 264 F.3d 894, 897-98 & n.4 (9th Cir. 2001) (despite state courts' use of date of issuance of mandate as point of finality of judgment, finding conviction became "final" under § 2244(d)(1)(A) when state appellate court denied motion to modify ruling), *with* Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (finding judgment becomes final on date of issuance of mandate, as provided by Florida state law).

[44] *See, e.g.,* Jimenez v. Quarterman, 129 S. Ct. at 685; Clay v. United States, 537 U.S. 522, 524-25, 527 (2003); Robinson v. United States, 416 F.3d 645, 647 (7th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006); Nix v. Secretary, Dep't of Corr., 393 F.3d 1235, 1236-37 (11th Cir. 2004) (per curiam), *cert. denied,* 545 U.S. 1114 (2005); *see also* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b] at 269-271 & n. 485 (6th ed. 2011).

[45] *See* United States v. Plascencia, 537 F.3d 385, 388 (5th Cir. 2008); Moshier v. United States, 402 F.3d 116, 118 (2d Cir. 2005) (per curiam); Sanchez-Castellano v. United States, 358 F.3d 424, 428 (6th Cir. 2004); Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999); *see also* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b][i] at 272 & n. 48 (6th ed. 2011).

[46] *See* Randle v. Crawford, 578 F.3d 1177, 1183-1184 (9th Cir. 2009); Bethea v. Girdich, 293 F.3d 577, 578 -79 (2d Cir. 2002).

time the state notice of appeal is filed. Similarly, where a petitioner files a first direct appeal to the state intermediate appellate court but does not pursue a direct appeal as of right to a higher state court, the triggering event becomes the date of expiration for filing the appeal to the higher appellate court.[47] The result is that AEDPA's trigger date, i.e., when the sand begins to slip through the proverbial hour glass for federal habeas review, is a moving target, dependent on what relief a petitioner seeks, or fails to seek, on direct review. Yet the calculation is critical for it is obvious that only in knowing when the one-year statute of limitations starts to run can a petitioner have a chance at determining when it ends.

2. Impediments To Filing: Once The Clock Has Started To Tick, What, If Anything, Will Cause It To Stop?

Regardless of when a conviction becomes final, thus triggering the start of the one-year period of time to file a federal petition, the statute of limitations will not run under § 2244(d) during any period in which a state or government-created "impediment" prevents the petitioner from filing the petition or motion.[48] Such impediments can exist prior to the conviction becoming final, thus forestalling the start of the statute of limitations. Or an impediment can arise once the statute of limitations has already started to run, thus stopping the clock until such time as the state clears the path to filing by removing the impediment. But once again, AEDPA does not delineate what constitutes a state or government-created impediment.[49] To make matters even more difficult, circuit case law grappling with the doctrine is relatively sparse.

At minimum, courts appear to exempt the role of judiciary from "state action," instead requiring the actor be an arm of either the prosecutor or penalogical institution charged with the petitioner's detention.[50] Thus, a change in state law that provides a new basis for relief will not qualify as an impediment because, notwithstanding the prior adverse precedent, the petitioner was still free to raise such claim in a federal petition "at any time."[51] In other words, a pro se petitioner is expected to anticipate future changes in the law that will inure to his favor, and seek habeas relief on a

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[47] *See, e.g.,* Roberts v. Cockrell, 319 F.3d 690, 693-95 (5th Cir. 2003); Wixom v. Washington, 264 F.2d 894, 898 (9th Cir. 2001), *cert. denied*, 534 U.S. 1143 (2002); Gendron v. United States, 154 F.3d 672, 674-75 nn. 1-2 (7th Cir. 1998) (per curiam), *cert. denied,* 526 U.S. 1113 (1999); *see also* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b][i] at 272-273 & n. 49 (6th ed. 2011).

[48] 28 U.S.C. §§ 2244(d)(1)(B); 2255(f)(2). *See also* Bryant v. Shriro, 499 F.3d 1056, 1060 (9th Cir. 2007) ("To obtain relief under § 2244(d)(1)(B), the petitioner must show a causal connection between the unlawful impediment and his failure to file a timely habeas petition."); *see also* Broom v. Strickland, 579 F.3d 553, 556-57 (6th Cir. 2009) (rejecting relief based on impediment for lack of causation).

[49] *See* Wood v. Spencer, 487 F.3d 1, 6 (1st Cir. 2007) (noting that the word "impediment" "is not defined in the statute itself, nor is it self-elucidating").

[50] *Compare* Minter v. Beck, 230 F.3d 663, 665-66 (4th Cir. 2000) (negative caselaw rendering futile raising of claim in state court did not constitute state-created "impediment" under § 2244(d)(1)(B), *with* Critchley v. Thaler, 586 F.3d 318, 321 (5th Cir. 2009) (failure of county clerk's office to timely file petitioners for post-conviction relief constitutes "impediment" under § 2244(d)(1)(B).

[51] *See* Shannon v. Newland, 410 F.3d 1083, 1087-88 (9th Cir. 2005); *Minter*, 230 F.3d at 665-66.

ground for which no legal support exists.[52]

To date, some circuits have recognized as a possible impediment the state's failure to make available to inmates legal material pertaining to AEDPA, i.e., a copy of the statute itself, where the absence of that material prevented the petitioner from learning of the one-year statute of limitations.[53] On the other hand, even in a capital case, errors attributed to postconviction counsel, as opposed to a state or government actor, do not constitute "impediments" under § 2244(d)(1)(B).[54] In addition, the First Circuit has rejected an argument that the state's withholding of exculpatory evidence in violation of *Brady v. Maryland*[55] constitutes an impediment on the ground that the petitioner could have obtained the same evidence elsewhere prior to trial in the exercise of due diligence.[56]

In light of the underdeveloped state of the law on the definition of "impediment," the lack of assistance of counsel may have a profound effect. That is, by exploring the many interstices of this procedural doctrine, a skilled advocate may succeed in securing a broader definition from a particular court. In contrast, for the pro se litigant, the doctrine will likely lie fallow and useless in his efforts to obtain federal review of otherwise untimely filed habeas claims.

### 3. Necessary Efforts At Identifying Other Statute Of Limitations Triggers

#### *a. Newly Recognized Constitutional Right*

AEDPA's one-year period of time to file a federal petition is also triggered anew under § 2244(d) when the Supreme Court recognizes a new constitutional right that is made expressly retroactive to cases on collateral review.[57] It is an open question whether the Supreme Court itself must determine retroactivity, or whether lower federal courts are also authorized under AEDPA to do so.[58] Every circuit to consider the issue has concluded that lower federal courts, as well as the Supreme Court, can make the retroactivity assessment.[59] Again, the fact that lower courts, at least for

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[52] Unless the Supreme Court makes a change to the substantive law underlying a constitutional claim retroactive, even if the prior state of the law were deemed an "impediment," the inmate would be denied relief on the merits. *See* Teague v. Lane, 489 U.S. 288 (1989); § 2254(d).

[53] *See* Whalem/Hunt v. Early, 233 F.3d 1146, 1147-1148 (9th Cir. 2000) (en banc); *see also* Moore v. Battaglia, 476 F.3d 504 (7th Cir. 2007) (remanding for development of factual record regarding claim that inadequate prison law library constituted a state-created impediment). *But cf.,* Finch v. Miller, 491 F.3d 424, (8th Cir. 2007) (rejecting on causation ground argument that inadequate library facilities or legal assistance qualified as impediment).

[54] *Cf.* Johnson v. Fla. Dep't. Corr., 513 F.3d 1328, 1331 (11th Cir. 2008) (basing conclusion on the lack of a constitutional right to post-conviction counsel), *with* Finch v. Miller, 491 F.3d 424, (8th Cir. 2007) (basing same conclusion on ground that counsel's conduct does not constitute "state action" under § 2244(d)(1)(B)); Lawrence v. Florida, 421 F.3d 1221, (11th Cir. 2005) (incompetent assistance of counsel in capital postconviction proceedings "is not the type of State impediment envisioned in § 2244(d)(1)(B)").

[55] 373 U.S. 83, 87 (1963).

[56] *See* Wood v. Spencer, 487 F.3d 1, 6-8 (1st Cir. 2007) (noting "petitioner had the power to blunt the effect of any state-created impediment").

[57] 28 U.S.C. §§ 2244(d)(1)(C).

[58] I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b][i] at 275 & n. 55 (6th ed. 2011).

[59] Dodd v. United States, 545 U.S. 353, 364 n.4 (2005) (Stevens, J., dissenting).

now, can determine whether a newly recognized right should apply retroactively leaves ample room for effective advocacy on the part of the petitioner. Thus, the unrepresented petitioner is at a distinct disadvantage in convincing a court of relief from AEDPA's timeliness bar based on a newly recognized constitutional right.

### *b. Discovery of Factual Predicate*

The statute of limitations is also triggered under §§ 2244(d), regardless of the above events, on the date on which the petitioner could have discovered the factual predicate for the claim or claims raised in the petition in the exercise of due diligence.[60] The language of § 2244(d)(1)(D) is ambiguous as to whether the statute of limitations applies to the petition or to independent claims.[61] Federal courts appear to endorse the former interpretation, though will permit amendment of a pending petition to add a claim derived from newly discovered facts that the inmate was unable through due diligence to uncover at the time of filing.[62] But the petitioner must make the case for why he failed to discover the claim or claims earlier. Without more, his pro se status, which encompasses the fact that he is incarcerated without outside legal and investigative assistance to uncover facts that might support a claim for habeas relief, will not suffice.[63] Once again, courts engage in mythical thinking in assuming that the average incarcerated inmate is as able to litigate and conduct factual investigations as the professional attorney.

### 4. Unpacking the Doctrine of Statutory Tolling

Calculating the start date for the statute of limitations is only the beginning of the pro se inmate's daunting procedural challenge of ensuring his federal petition is timely filed. The second major hurdle in determining the actual filing deadline is accurately calculating the effects of AEDPA's doctrine of statutory tolling. As a nod to the principles of federalism that permeate federal habeas corpus and the accompanying requirement that inmates exhaust all federal claims in state court,[64] AEDPA provides that, regardless of the date on which the statute of limitations *starts* to run, for inmates challenging state convictions under § 2254, the clock will stop – i.e., AEDPA's one-year filing period is tolled – while "a properly filed

[60] 28 U.S.C. §§ 2244(d)(1)(D).

[61] I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b][i] at 280-81 & n. 64 (6th ed. 2011).

[62] *Id.* at 260-61 & n. 52-55 (internal citations omitted).

[63] Rich v. Dep't of Corr. State of Fla., 317 F. App'x 881 (11th Cir. 2008) (holding that pro se status is not an extraordinary circumstance that entitled petitioner to tolling of the one-year time limit); Rasberry v. Garcia, 448 F.3d 1150 (9th Cir. 2006) (pro se petitioner's inability to calculate the limitations period correctly is not an extraordinary circumstance and did not allow amendment to relate back to the date the original petition was filed); United States v. Hale, 2010 WL 2105141 (S.D. Ala. 2010) (holding that pro se status was not extraordinary circumstance to allow petition to be amended after the filing deadline had passed).

[64] *See* exhaustion discussion, *infra*.

application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[65] But again, the statutory language of § 2244(d)(2) raises at least as many questions as it answers. For example, what does "properly filed" mean? Does "or other collateral review" include federal habeas petitions? How should federal courts interpret "with respect to the pertinent judgment or claim"? What does it mean to be "pending"? The federal judiciary has devoted substantial energy since AEDPA's enactment to each of these issues. As a result, some rules are now clear through case law; others remain uncertain. The pro se inmate must discern these nuances and distinctions, with consequences potentially fatal to habeas review.

*a. The meaning of "properly filed"*

For purposes of § 2244(d)(2), "an application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," such as, "for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee."[66] Thus, the Supreme Court has concluded, at least insofar as state law on timeliness is firmly established and consistently applied,[67] an untimely state petition is not "properly filed."[68] Mundane as these assessments may be, the unrepresented habeas petitioner again confronts the task of identifying, understanding, and complying with state law governing collateral review in order to qualify for AEDPA's statutory tolling. Absent assistance from a competent jailhouse lawyer or law librarian, the process can stall here, with the inmate unable to figure out how to "properly file" a state petition, a step that in turn is essential to exhaust claims a petitioner seeks to raise in a federal petition.

*b. Figuring out what qualifies for statutory tolling: The scope of "or other collateral review"*

In 2001, the Supreme Court held that "application for State post-conviction or other collateral review" does not contemplate *federal* habeas petitions.[69] Rather, the Court held, the phrase refers only to state applications, and includes all state procedures available for review of a

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[65] 28 U.S.C. § 2244(d)(2).

[66] Artuz v. Bennett, 531 U.S. 4, 8 (2000).

[67] *See* I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 5.2[b][ii] at 289-90 n. 68 (6th ed. 2011) (noting *Pace*'s holding "glossed over some complicating factors that were not at issue in *Pace* and that may require additional analysis on the part of a reviewing federal habeas corpus court:" situations in which (1) the statute of limitations at issue is not a jurisdictional time bar, as in *Pace*, but rather functions as an affirmative defense subject to waiver; and (2) there was no clear "state law" on timeliness at the relevant stage of the proceedings because the timing rule to which the state points – and upon which a state court ultimately relied in deeming a state postconviction petition to have been untimely – had not yet been announced or was not firmly established and consistently followed at the time the prisoner filed the state postconviction petition."); *see also* Walker v. Martin, -- S. Ct. -- (2011) (finding California's timeliness bar independent and consistently applied).

[68] Pace v. DiGuglielmo, 544 U.S. 408, 412 (2005).

[69] Duncan v. Walker, 533 U.S. 167 (2001).

criminal conviction.[70] Thus, no tolling applies -- i.e., the statute of limitations continues to run -- during the time in which a federal habeas petition is pending.[71]

While the Court's interpretation of § 2244(d)(2) makes sense as an intellectual matter, due to the length of time federal courts take to resolve federal petitions, the lack of tolling for federal petitions has generated enormous headaches for pro se inmates attempting to comply with the one-year statute of limitations.[72] Even where a pro se inmate manages to negotiate the myriad landmines of AEDPA's statute of limitations and timely file his § 2254 petition, it is the rare case in which the one-year period will not have expired by the time the federal courts have ruled on the petition. Thus, a petition dismissed for procedural reasons may be forever barred on the merits simply because the statute of limitations expired while the petition was pending before the federal court.[73] This reality hits pro se litigants particularly hard for two reasons. First, it is axiomatic that such petitioners are more likely to commit procedural missteps and hence, confront this scenario than those represented by counsel. Second, where a petition is at least partially unexhausted, i.e., the inmate has not yet presented each claim raised therein to the highest available state court of review, a district court will give the inmate the choice between dismissing the entire petition "without prejudice" or staying the exhausted portion of the petition and holding it in abeyance while the inmate returns to state court to finish exhausting.[74] The court is *not* required, however, to advise the inmate that if he opts to dismiss the petition in its entirety, the "without prejudice" language is illusory in that any subsequent petition in fact will be time-barred.[75] Hence, a pro se petitioner, well-intentioned but unschooled in AEDPA's intricacies is more likely to opt for dismissal. He will do so with the misguided intention of refiling after exhausting the claims at issue without realizing that the statute of limitations has expired and thus, any future petition will be time-barred.[76]

### c. *Interpreting "with respect to the pertinent judgment or claim"*

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[70] *Id.* at 176.

[71] *Duncan*, 533 U.S. 167.

[72] Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts (2007), available at http:// www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf at 42 (as of 2006, federal habeas cases filed in 2002 and 2003 had been pending for an average of 5.3 years for capital cases); Judge Arthur L. Alarcon, *Remedies for California's Death Row Deadlock,* 80 S. CAL. L. REV. 697, 699, 708 (in 1989, the average delay for a federal habeas corpus case was eight years; as of 2006, a California inmate who filed a habeas appeal and had his sentence vacated by a federal court waited an average of 16.75 years); Limin Zheng, *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) (the average time from date of conviction to the filing of a federal habeas petition was a year and a half, by 1995 it had increased to five years).

[73] The harshness of this consequence has spawned the "relation back" doctrine and, in some cases, has provided a basis for equitable tolling. These doctrines will be addressed, *supra*.

[74] Rhines v. Webber, 544 U.S. 269 (2005).

[75] Pliler v. Ford, 542 U.S. 225 (2004) (federal district judges are not obligated to warn petitioner that subsequently raised federal claims would be time-barred); Brambles v. Duncan, 412 F.3d 1066 (9th Cir. 2005) (court is not obligated to inform petitioner of what he must do to invoke stay and abey procedure or that federal claims would be time-barred when he returns to federal court).

[76] *See id.*

State attorneys have argued that § 2244(d)(2) should not apply if the "State post-conviction or other collateral review" application did not raise any federally cognizable claims or did not involve at least one claim later raised in the § 2254 petition.[77] Under this argument, if a petitioner files a state petition only raising state claims or federally cognizable claims that he later abandons before filing for federal habeas relief, no tolling under § 2244(d)(2) would apply. Given the likelihood that, untolled, AEDPA's statute of limitations would expire while such state application is pending, such an interpretation would likely be a death warrant for any future federal habeas review. To avoid this consequence, a petitioner would have to anticipate and contemplate the contours of federal habeas review even before filing for any state collateral review. Not only might this limit the utility of the state collateral review process,[78] but again, the pro se litigant, less able to identify all potential claims, state and federal, from the beginning and thus, more prone to piecemeal litigation, may find himself time-barred from federal review.

Thus far, every circuit court to address this issue has rejected the state attorneys' argument for such a strict interpretation of "pertinent judgment or claim."[79] Rather, the federal appeals courts have held that tolling applies regardless of the particular claims raised in the state postconviction petition, as long as the state and federal petition attack the same criminal judgment.[80] But the Supreme Court has not yet addressed the issue. Hence, the pro se litigant remains vulnerable to a future Supreme Court ruling to the contrary.

*d. Figuring out the meaning of "pending"*

Lastly, federal courts have grappled with the meaning of "pending" as used in § 2244(d)(2). What does it mean for a petition to be pending in state court? Does this mean that in order to stop AEDPA's clock, a state petition must literally be pending before a state court? Or does the word also contemplate the necessary time gaps between filings in lower and appellate state courts? Again, AEDPA, itself is silent on the issue.

In 2002, in *Carey v. Saffold*, the Supreme Court concluded as a threshold matter that "the statutory word 'pending' . . . cover[s] the time between a lower state court's decision and the filing of a [timely] notice of appeal to a higher state court."[81] Thus, statutory tolling applies during the intervals between a lower court's denial of a state petition and the filing of a

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[77] *See, e.g.,* Cowherd v. Million, 380 F.3d 909, 912, 913-14 (6th Cir. 2004) (en banc); Ford v. Moore, 296 F.3d 1035, 1040 (11th Cir. 2002) (per curiam); Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002), *cert. denied*, 538 U.S. 1002 (2003); Carter v. Litscher, 275 F.3d 663, 665 (7th Cir. 2001).

[78] Arguably, a state petition for collateral review filed merely as a formality for exhaustion purposes will not explore the parameters of relief under state law as fully as one focused primarily on the state process.

[79] *See, e.g.,* Cowherd v. Million, 380 F.3d 909, 912, 913-14 (6th Cir. 2004) (en banc); Ford v. Moore, 296 F.3d 1035, 1040 (11th Cir. 2002) (per curiam); Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002), *cert. denied*, 538 U.S. 1002 (2003); Carter v. Litscher, 275 F.3d 663, 665 (7th Cir. 2001).

[80] *See* note 75.

[81] Carey v. Saffold, 536 U.S. 214, 217 (2002).

timely appeal. But *Saffold* was a California case, which complicated matters in that the state uses a unique system of collateral review in which each court – trial, appellate, and supreme – has original jurisdiction to consider an inmate's postconviction petition.[82] Although in practice, most petitioners ascend the courts as in other states, state law does not require that they do so. And each petition an inmate files challenging a conviction is considered "original," rather than an appeal of a lower court's denial.[83] Thus, it was unclear whether a petitioner was entitled to tolling under § 2244(d)(2) for the intervals that elapse between a state court's denial of one petition and the filing of a subsequent one in a higher state court.[84] The Court in *Saffold* concluded, albeit somewhat opaquely, that interval tolling does apply at least insofar as the petitioner timely files his subsequent petition.[85] But in so ruling, the Court acknowledged that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (i.e., a filing in a higher court) comes too late."[86] Indeed, the Court remanded the case, in part, for the Ninth Circuit to consider whether a four and a half-month gap between petitions filed in the California Court of Appeal and California Supreme Court rendered the latter untimely.[87]

Four years later, in *Evans v. Chavis*, the Supreme Court again attempted to clarify the tolling doctrine as applied in California.[88] In *Evans*, approximately three years had elapsed between the Court of Appeal's denial of a petition and the petitioner's filing in the California Supreme Court.[89] The state supreme court denied the latter petition without comment in a summary order.[90] In concluding that the collateral review application was "pending" during the three-year period and thus, that the petitioner was entitled to tolling under § 2244(d)(2), the Ninth Circuit treated the denial "without comment or citation" as a "decision on the merits," rather than a dismissal as untimely.[91]

On review, the Supreme Court summarized its decision in *Saffold* as holding: "(1) only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse ruling and the filing of a notice of appeal in the higher court; (2) in California, "unreasonable" delays are not timely; and (3) (most pertinently) a California Supreme Court order denying a petition "on the merits" does not "automatically" indicate that the

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[82] *See* Carey v. Saffold, 536 U.S. 214, 221-223 (2002) (describing California's collateral review system); Gaston v. Palmer, 417 F.3d 1030, 1036 (9th Cir. 2005) (acknowledging difficulty in applying tolling provisions to the California habeas process because each of the three levels of state courts has original jurisdiction in habeas proceedings); Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003) (noting that a habeas petitioner is entitled to "one full round of collateral review" in the state courts before the federal statute of limitations begins to run).

[83] Each state court determines the timeliness of a petition based on an indeterminate, "reasonableness" standard, rather than a notice of appeal. *See* Carey, 536 U.S. at 221.

[84] *Id.*

[85] *Id.* at 222-23.

[86] *Id.* at 223.

[87] *Id.* at 226-27.

[88] 546 U.S. 189 (2006).

[89] *Id.* at 195-96.

[90] *Id.* at 195.

[91] Chavis v. LeMarque, 382 F.3d 921, 926 (9th Cir. 2004).

petition was timely filed."[92] The Court observed that, for at least six months of the time elapsed between petitions, petitioner had access to the prison law library to work on his petition.[93] Additionally, the Court "found no authority suggesting, nor found any convincing reason to believe, that California would consider an unjustified or unexplained six-month filing delay 'reasonable.'"[94] The Court therefore concluded the petition was not "pending" within the meaning of § 2244(d)(2) during the interval between denial of the Court of Appeal's petition and petitioner's filing in the state supreme court.[95] Thus, the Court reversed and remanded the case to the Ninth Circuit for further proceedings. In so doing, as in *Saffold*, the Court did not define "reasonableness" with any precision, instead deferred to state law and a petitioner's particular circumstances to inform that determination.[96]

For the California litigant, the legal contours of statutory tolling after *Saffold* and *Evans* are far from clear. In both cases, the Supreme Court demurred on telling the lower courts – and hence, habeas petitioners – what exactly constitutes a reasonable interval between state petitions to qualify for interval tolling under § 2244(d)(2). Thus, petitioners must make their best guess at how much is too much time to take in preparing a subsequent petition. Where that guess is wrong, such as in *Saffold* and *Evans*, the petitioner will be time-barred from federal habeas review under AEDPA. As with the other intricacies of procedural calculations under AEDPA, the pro se litigant is particularly vulnerable to this consequence as a result of simple miscalculation or simply requiring more time than deemed "reasonable" to investigate, research, and present habeas claims from behind bars. Indeed, it is profoundly unfair to expect accuracy in calculation from a pro se inmate on a topic that neither the Supreme Court nor the Ninth Circuit has succeeded at clarifying.

There exists an additional aspect of statutory tolling calculation that may prove particularly challenging to a pro se litigant in California: Lower federal courts have applied statutory tolling to any second or successive state postconviction petition that is "properly filed" pursuant to state procedural law.[97] But tolling is unavailable for the intervals *between* successive rounds of state habeas petitions.[98]

Again, California is the problem child, as federal courts have struggled to identify the point at which one "round" of postconviction petitions ends and the next begins.[99] For example, because each court has original jurisdiction, a California petitioner can file three consecutive petitions in

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[92] 546 U.S. 189, 197 (2006).

[93] *Id.* at 201.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See, e.g.,* Drew v. Department of Corr., 297 F.3d 1278, 1284-85 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999); Lovasz v. Vaugn, 134 F.3d 146, 148-49 (3d Cir. 1998).

[98] Banjo v. Ayers, 614 F.3d 964 (9th Cir. 2010).

[99] *See, e.g.,* Gaston v. Palmer, 417 F.3d 1030, 1040-45 (9th Cir. 2005).

superior court, two petitions in the court of appeal, and a third in the state supreme court, and not necessarily in ascending order.[100] Or a petitioner can skip over the lower courts altogether and file directly in the state supreme court.[101] How then to define the parameters of "one round" of habeas petitions? The Ninth Circuit has attempted to do so by assessing the claims raised in each individual petition to determine similarity or distinctiveness.[102] But petitions involving overlapping claims – some repeat, and some new – defy easy categorization.[103] If a pro se litigant wrongly assumes he is pursuing a continuous "round" of habeas petitions, and calculates his one-year period under AEDPA accordingly, he may be ineligible for continuous tolling under § 2244(d)(2) and hence, face dismissal of his § 2254 petition as time-barred.

5. Mining the Indeterminate Doctrine of Equitable Tolling

Yet another source of perplexity in calculating the time to file a federal petition under AEDPA is the doctrine of equitable tolling. This doctrine is a creature of common law, rather than the statute itself, with federal courts importing it from other statutory contexts. Founded on principles of equity – that is, what is "fair" under particular circumstances – the doctrine is necessarily flexible and resists ready categorization.[104] Instead, courts inquire whether extraordinary circumstances, apart from the inmate's lack of due diligence, prevented him from filing his petition on time.[105] Courts define "due diligence," in turn, as "reasonable diligence," rather than "maximum feasible diligence."[106]

Until very recently, a majority of the Supreme Court had not embraced the doctrine in the context of AEDPA.[107] In *Holland v. Florida.*, however, decided in June 2010, the Court agreed with every circuit to address the issue that the doctrine is in fact a viable one under AEDPA.[108] To qualify for equitable tolling, a petitioner must identify an "extraordinary" circumstance that prevented his filing *and* show that he exercised reasonable diligence despite that circumstance. Both tasks require legal and analytical skills on the part of the advocate.

Courts have endorsed equitable tolling where delay that prevents timely

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[100] *See* Cal. Const., Art. VI, § 10; Walker v. Martin, -- S. Ct. – (2011) (noting that where the superior court denies a petition, the petitioner can obtain review of the claims raised therein only by filing a new petition in the court of appeal, confined to claims raised in the initial petition).

[101] *Id.*

[102] Gaston v. Palmer, 417 F.3d 1030 (9th Cir. 2005) (comparing claims in multiple applications and granting tolling because some claims overlapped).

[103] Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003) (holding that a petitioner is not entitled to tolling when he abandons *all* initial claims from a first application in a subsequent application); In re Clark, 5 Cal. 4th 750, 770 (1993) ("A successive petition presenting additional claims that could have been presented in an earlier attack on the judgment is, of necessity, a delayed petition," requiring a "persuasive reason for routinely permitting consideration of the merits of such claims.").

[104] Holland v. Fla., 130 S. Ct. 2549, 2563 (2010).

[105] *Id.* at 2553 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[106] *Id.* at 2565.

[107] *Id.* at 2560.

[108] *Id.*

filing results from judicial action or omission;[109] certain actions or omissions of petitioner's counsel;[110] the prisoner's mental incompetence;[111] and failure to provide petitioner notice of AEDPA's filing deadline, either through adequate law library or legal assistance facilities or court notification.[112] But prior to *Holland*, lower courts generally assumed a lack of postconviction counsel or postconviction counsel's miscalculation of the statute of limitations does not provide a basis for equitable tolling because such circumstance is not "extraordinary" given the lack of a constitutional right to postconviction counsel.[113] Indeed, in *Holland*, the majority seems to affirm this approach, acknowledging 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."[114] But at the same time, the Court observes that sufficiently egregious attorney error may qualify as an "extraordinary" circumstance justifying equitable tolling.[115] Thus, the Court remanded the case to the Eleventh Circuit for further findings and possible proceedings on the issue.[116]

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[109] Pliler v. Ford, 124 S. Ct. 241, 2447 (2004) (remanding to Ninth Circuit on issue whether magistrate judge "affirmatively misled" petitioner, resulting in subsequent filing of time-barred petition, thus warranting equitable tolling); *see, e.g.,* Keenan v. Bagley, 400 F.3d 417, 421 (6th Cir. 2005) (remanding for evidentiary hearing on whether Ohio Supreme Court's order extending state statute of limitations justified equitable tolling of federal statute of limitations); Knight v. Schofield, 292 F.3d 709, 709-10 (11th Cir. 2002) (per curiam) (petitioner entitled to equitable tolling where state supreme court sent notice of decision to wrong person, thus denying petitioner timely notice).

[110] Fonesca v. Hall, 486 F. Supp. 2d 1119 (C.D. Cal. 2007) (petitioner entitled to equitable tolling because of the "egregious misconduct" of habeas counsel); Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (petitioner entitled to equitable tolling because of counsel's "sufficiently egregious" misconduct); Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) (remanding for evidentiary hearing to decide whether petitioner was entitled to equitable tolling because of egregious conduct by counsel).

[111] Calderon v. U.S. Dist. Court for Cent. Dist. of Cal., 163 F.3d 530 (9th Cir. 1998) (holding that equitable tolling was warranted because of petitioner's mental incompetency); Laws v. Lamarque, 351 F.3d 919 (9th Cir. 2003) (remanding for determination of whether petitioner's mental illness constitutes an "extraordinary circumstance" which would justify equitable tolling).

[112] Roy v. Lampert, 465 F.3d 964 (9th Cir. 2006) (remanding for evidentiary hearing to decide whether petitioner was entitled to equitable tolling because of insufficient legal resources in prison law library); Phillips v. Donnelly, 216 F.3d 508 (5th Cir. 2000) (finding equitable tolling warranted due to four-month delay in notifying petitioner of denial of habeas petition); Espinoza-Matthews v. California, 432 F.3d 1021 (9th Cir. 2005) (equitable tolling appropriate where petitioner was not allowed access to his legal files for eleven months); Litt v. Mueller, 304 F.3d 918 (9th Cir. 2002) (remanding to determine if equitable tolling was warranted because petitioner was deprived of access to his legal files for eighty-two days).

[113] Lovato v. Suthers, 42 F. App'x 400 (10th Cir. 2002) (equitable tolling not warranted even when petitioner missed the filing deadline because a public defender advised him to wait until after a proportionality review); Beery v. Ault, 312 F.3d 948 (8th Cir. 2002) (equitable tolling not warranted when counsel took six months to inform petitioner that motion for appointment of postconviction counsel had been denied); Kreutzer v. Bowersox, 231 F.3d 460 (8th Cir. 2000) (counsel's failure to understand the one-year statute of limitations under AEDPA did not warrant equitable tolling); Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005) (equitable tolling was not appropriate even though counsel filed a state petition for postconviction relief two months after the federal deadline); Frye v. Hickman, 273 F.3d 1144 (9th Cir. 2001) (equitable tolling not available for miscalculation by counsel of the limitations period).

[114] *Holland v. Fla.*, 130 S. Ct. 2549, 2564 (internal quotations omitted).

[115] *Id.* at 2564 (noting that counsel not only failed to file Holland's petition on time and appeared unaware of the deadline to do so -- factors which, alone, "suggest simple negligence" -- but also failed to file on time despite Holland's many letters emphasizing the importance of doing so; failed to research the proper filing date despite Holland's letters identifying the correct authority for determining that date; failed to inform Holland in a timely manner that the Florida Supreme Court had denied his petition, thus restarting the AEDPA's one-year clock, despite Holland's repeated requests for this information; and failed to communicate with Holland over a period of years, despite Holland's repeated attempts to do so).

[116] *Id.* at 2565 (noting the Eleventh Circuit erroneously concluded equitable tolling was per se inapplicable based on attorney error and the district court erroneously concluded that Holland had failed to exercise due diligence).

This decision opens the door to further litigation regarding the effect of attorney error – or perhaps even the denial of counsel altogether in an unusually complicated case – on the availability of equitable tolling in a particular case. Again, these are arguments that a typical pro se inmate is ill equipped to make on his own behalf, but that could ultimately make the difference between dismissal of a petition as untimely and judicial review on the merits.

Due – or reasonable – diligence, on the other hand, at least until *Holland*, requires more than identifying an objective circumstance that impeded a pro se litigant's preparation of his federal petition. For example, some courts have held that a potentially extraordinary circumstance – such as a six-week prison lockdown that precludes law library access – that arises at the start of the one-year limitations period does not justify tolling because a diligent petitioner still has an opportunity to make up for the lost time.[117] By contrast, the same six-week lockdown that occurs one month *before* the filing deadline may justify six weeks of equitable tolling.[118] Thus, again, a pro se inmate seeking equitable tolling based on a circumstance beyond his control must take care to demonstrate adequate causation, which is an inherently legal showing and one he may be hard-pressed to plead sufficiently without assistance of counsel. Again, the consequence of failing to plead adequately will be dismissal of a petition as untimely, regardless of the merits of the claims raised therein.

### D. *The Delicate Interplay Between AEDPA's Statute Of Limitations And Other Procedural Doctrines*

The complexity of calculating AEDPA's statute of limitations multiplies exponentially in light of other procedural requirements under the statute. For the typical pro se inmate, the interplay between these procedural doctrines can convert an otherwise herculean task to a literally impossible one. The primary culprits are the exhaustion requirement, prohibition on second or successive petitions, and, to a lesser extent, the procedural default doctrine.

#### 1. The Exhaustion Requirement

The exhaustion requirement, which is founded on principles of federalism, requires state inmates to present each habeas claim to the

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[117] *See, e.g.*, Hizbullahankhamon v. Walker, 255 F.3d 65, 67, 75-76 (2d Cir. 2001) (no equitable tolling for 22 days spent in solitary confinement, and without access to legal materials, at outset of one-year limitations period); Pfeil v. Everett, 9 F. App'x 973 (10th Cir. 2001) (equitable tolling not warranted for lockdown because petitioner had eight months after the lockdown ended to pursue his claims). *But cf.* Giraldes v. Ramirez-Palmer, 1998 WL 775085 (N.D. Cal. 1998) (a lockdown over eleven months into his one-year deadline did not warrant equitable tolling because petitioner had time prior to the lockdown to work on his petition).

[118] United States ex rel Strong v. Hulick, 530 F. Supp. 2d 1034 (N.D. Ill., Eastern Div. 2008) (equitable tolling warranted because petitioner was incorrectly informed of deadline, was in lockdown for fifteen of the twenty-three weeks immediately preceding his filing deadline, and was not given priority access to the law library when lockdown ended).

highest state court before filing in federal court. The doctrine predates AEDPA and AEDPA did little to change it.[119] But AEDPA's statute of limitations significantly complicates the potential consequences of the exhaustion requirement. Some problems are simply a matter of statutory mechanics. Under the pre-AEDPA decision in *Rose v. Lundy*,[120] federal courts were required to dismiss "without prejudice" a mixed petition, i.e., one that contains both exhausted and unexhausted claims. In theory, the petitioner then is able to return to state court to finish exhausting the claims and then, assuming the state court provides no relief, re-file the federal petition.[121] The dilemma, post-AEDPA is that, as discussed, the statute of limitations is not tolled during the period of time in which a federal petition is pending in federal court.[122] Thus, by the time a district court decides to dismiss a petition as mixed under *Rose v. Lundy* because some of the claims are unexhausted, or as entirely unexhausted, the statute of limitations often has run. As a result, the petitioner will be time-barred from re-filing the federal petition after exhausting all of the claims. In *Rhines v. Weber*, the Supreme Court noted:

> The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.[123]

In attempt to address this dilemma, the Court in *Rhines* unanimously embraced a stay-and-abeyance procedure.[124] This procedure allows the district court to stay a mixed petition and hold it in abeyance while the petitioner returns to state court to finish exhausting.[125] Once the petitioner has finished exhausting his claims in state court, the district court will lift the stay and consider the entire petition.[126] But, while the district court must give a petitioner the option to stay and hold in abeyance his petition before dismissing it, the court is under no obligation to advise the petitioner

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[119] Post-AEDPA, if a federal habeas petition contains an unexhausted claim that the court would otherwise be required to dismiss for failure to exhaust, the court may nonetheless deny the petition on the merits if it determines the claim has no merit. 28 U.S.C. § 2254(b)(2). The court's authority to consider an unexhausted claim is also subject to an express waiver by the state of the exhaustion requirement. 28 U.S.C. § 2254(b)(3).

[120] 455 U.S. 509 (1982).

[121] *Id.*; *see* Rhines v. Weber, 544 U.S. 269, 274 (2005) (noting *Rose* "imposed a requirement of 'total exhaustion' and directed federal courts to effectuate that requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. . . . [P]etitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitioners with relative ease. *See* Slack v. McDaniel, 529 U.S. 473, 486 (2000) (dismissal without prejudice under *Lundy* 'contemplated that the prisoner could return to federal court after the requisite exhaustion.')"); I James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice And Procedure § 5.2[b][v] at 317-318, n. 97 (6th ed. 2011).

[122] *See* Duncan v. Walker, 533 U.S. 167 (2001).

[123] Rhines, 544 U.S. at 275.

[124] *Id.* at 277-79.

[125] *Id.*

[126] *Id.*

that a failure to accept its stay-and-abeyance offer will likely foreclose later habeas review on timeliness grounds.[127] Tellingly, the Supreme Court concluded it unfair to impose the burden of making that difficult determination on the district court.[128] Thus, a petitioner may opt to dismiss the petition in its entirety without realizing that, in so doing, he is forever closing the courthouse doors on himself. The pro se petitioner, unschooled in the complexities of the statute of limitations mechanics, is particularly vulnerable to such poor decision-making.

Nor does the stay-and-abeyance procedure offer any relief to a petitioner who has filed an entirely unexhausted, rather than mixed, petition.[129] In that case, the district court has no choice but to dismiss the petition in its entirety, regardless of whether the petitioner will subsequently be time-barred from re-filing.[130] Thus, the pro se petitioner unfamiliar with the exhaustion requirement who acts diligently in filing a timely federal petition will be barred from federal review because the statute of limitations will have expired. AEDPA's statutory tolling provision for state collateral proceedings, discussed *supra*, will be useless to him because it is impossible to toll an already-expired limitations period.

The statute of limitations complicates the exhaustion requirement for the pro se litigant in yet another manner, one for which the Supreme Court has not attempted to craft a remedy. As discussed, AEDPA's statutory tolling provision set forth under § 2244(d)(1) stops the one-year clock while the petitioner is exhausting potential federal claims, i.e., while state postconviction petitions are pending. But the statute of limitations is not tolled until the petitioner actually files a state petition. The clock will continue to run during the time in which the petitioner is researching and preparing that petition. A problem arises in states that provide inmates with more than one year to seek postconviction relief.[131] Unless the inmate is sophisticated enough to realize at the threshold of his incarceration both that (1) the federal deadline is one-year from the date the conviction becomes final; *and* (2) that time period will continue to run *until* the inmate files a *state* post-conviction petition, despite acting diligently and timely filing under state law, he will still unwittingly miss AEDPA's deadline. Self-described "jailhouse lawyer" Thomas O'Bryant, who authored a symposium

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[127] Pliler v. Ford, 542 U.S. 225 (2004) (federal district judges are not obligated to warn petitioner that federal claims would be time-barred); Brambles v. Duncan, 412 F.3d 1066 (9th Cir. 2005) (court is not obligated to inform petitioner of what he must do to invoke stay-and-abey procedure or that federal claims would be time-barred when he returns to federal court).

[128] *See id.*

[129] Jiminez v. Rice, 267 F.3d 478, 481 (9th Cir. 2001) (affirming dismissal of petition on ground that it contained only unexhausted claims); Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (noting that district judges have discretion to grant a stay-and-abeyance while unexhausted claims are exhausted, but declining to extend *Rhines* to situations where the petition contains only unexhausted claims, even where there may be unexhausted claims that could be added).

[130] *Id.*

[131] See, e.g., Florida Rule of Criminal Procedure 3.850 (instructing that postconviction motions are first filed in trial court, within two years of the date the conviction becomes final); New Jersey Rule 3:22-12(a)(1) ("no petition shall be filed pursuant to this rule more than 5 years after the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged"); Maryland Crim. Proc. Code Ann. § 7-103(b) (petitions must be filed within ten years of the sentence imposition).

piece for the Harvard Civil Rights-Civil Liberties Law Journal in 2006 that powerfully describes the virtual impossibility of filing a timely federal petition from within the Florida Department of Corrections and his own experience missing the AEDPA deadline, writes:

> [P]risoners begin preparing for state post-conviction remedies under the mistaken belief that they may use the entire *two-year* period [allotted under state law] before filing their post-conviction motion in the state court without missing any important deadlines.
>
> I have been asked many times by prisoners who are out of time for seeking federal habeas review, "How can I have only one year to file a federal habeas corpus when I can't file it until after I finish my state remedies, and I have two years to file state post-conviction motions? Should my federal time not begin *after* I finish with my state post-conviction remedies?" Such a situation does not seem logical, but it *is* the situation.[132]

2. AEDPA's Proscription on Second or Successive Petitions

A federal petition that attacks the same criminal judgment as had a prior petition that the district court decided on the merits rather than procedural grounds is considered "second or successive."[133] Before AEDPA's enactment, federal courts assessed second or successive petitions in two ways. If the successive petition raised claims distinct from those presented in the first petition and the state objected that the petition was an "abuse of the writ," the inmate had to show "cause" for not raising the claim in the previous petition and that he would suffer "prejudice" or a "fundamental miscarriage of justice" if the court declined to review the claim.[134] If, on the other hand, the petitioner sought to raise a claim brought in a previous petition that the court had decided on the merits, the court would consider the claim only where inmate demonstrated "cause and prejudice" and the "ends of justice" so warranted.[135] But federal courts applied the same cause-and-prejudice exception that applied to new claims analysis.

AEDPA implemented significant changes to both the governing procedures and substantive standards for second or successive petitions. In so doing, the revised statute dramatically restricted a petitioner's ability to file such a petition. First, the statute entirely prohibits filing a successive petition containing the same claims as presented in the initial petition. Procedurally, a petitioner seeking to file a second or successive petition that

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[132] Thomas C. O'Bryant, *The Great Unobtainable Write: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996, Symposium: Pro Se Litigation Ten Years After AEDPA*, 41 HARV. C.R.-C.L. L. REV. 299, 333 (2006).

[133] II James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §28.3[b] at 1574-1575 (6th ed. 2011).

[134] *See* McCleskey v. Zant, 499 U.S. 467 (1991); II James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §28.2[a], [b] at 1572-1573 (6th ed. 2011).

[135] *See* Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (citation omitted); II James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §28.2[b] at 1567-1571 (6th ed. 2011).

presents new claims beyond those raised in the first petition must first obtain authorization from a three-judge circuit panel by showing that the petition satisfies AEDPA's substantive criteria.[136] The court of appeals must act on the application for authorization within thirty days and its decision is not appealable, i.e., cannot be the basis for a petition for rehearing or petition for certiorari.[137]

Substantively, AEDPA's standards for issuance of an order authorizing a second or successive petition are very high: The petitioner must show either:

> (A) . . . that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense [i.e., actual innocence].[138]

By significantly restricting the availability of successive petitions, AEDPA puts substantial pressure on the petitioner to include all viable claims in the initial petition to ensure federal judicial review. This task is a daunting one in light of the one-year time period within which the petitioner must file. Prior to AEDPA, a petitioner was able to file an initial petition containing claims that he litigated on direct appeal – i.e., claims that required only copying from one pleading to another – but then take the time needed to investigate and develop new claims that required expansion of the factual record. Post-AEDPA, such petitioner must make the tactical decision whether to file the petition quickly, with hopes to amend it before the court rules on it to add additional claims, or take the extra time required to prepare the additional claims and hope still to comply with the statute of limitations strictures. Again, expecting this level of legal sophistication from the average pro se litigant is naïve at best.

3. Procedural Default

The doctrine of procedural default also predates AEDPA and was unchanged by the statute: If a claim raised in a federal petition is exhausted, but the state court denied it on an independent and adequate

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[136] 28 U.S.C. § 2244(b)(3)(A)-(C).
[137] 28 U.S.C. § 2244(b)(3)(D)-(E).
[138] 28 U.S.C. § 2244(b)(3).

procedural grounds rather than its merits, the federal court will dismiss it as procedurally defaulted, absent a showing of cause and prejudice or actual innocence.[139] If the petitioner did *not* properly exhaust the claim but is now procedurally barred under state law from doing so, the claim is also considered procedurally defaulted and will be dismissed with prejudice, again, absent a showing of cause and prejudice or actual innocence.[140] But a federal court will not honor a state procedural rule unless it is considered "independent and adequate."[141] To be "independent," a state rule cannot be interwoven with federal law.[142] To be "adequate," the rule must have been firmly established and consistently applied at the time it was invoked by the state court.[143] "State rules that are too inconsistently or arbitrarily applied to bar federal review 'generally fall into two categories: (1) rules that have been selectively applied to bar the claims of certain litigants . . . and (2) rules that are so unsettled due to ambiguous or changing state authority that applying them to bar a litigant's claim is unfair.'"[144]

Assessment of whether a state procedural rule is independent and adequate is often very involved and the governing principles far from clear.[145] Again, for the average pro se habeas petitioner, the challenge of understanding this doctrine and effectively countering claims of default, all within the one year allotted by the AEDPA, is an exceedingly difficult, if not impossible one.

### E. *The Prototypical Inmate*

The procedural complexity of AEDPA litigation, daunting for any layperson, is all the more impenetrable for many pro se litigants in light of the high rates of illiteracy and mental health problems that plague the U.S. prison and jail populations. The Supreme Court, itself, has taken as axiomatic the fact that the inmate population suffers from disproportionately high rates of illiteracy and mental health problems.[146] Empirical data bears out this assumption.

The U.S. Department of Education's most recent study of inmate literacy rates, based on data collected in 2003, measured three types of literacy: prose, document, and quantitative literacy.[147] "Prose literacy"

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[139] *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wainright v. Sykes, 372 U.S. 391 (1963).

[140] Bousley v. U.S., 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'").

[141] *See* Martin v. Walker, 131 S. Ct. 1120, 1127 (2011); Ake v. Oklahoma, 470 U.S. 68, 74 (1980).

[142] *Martin*, 131 S. Ct. at 1127; *Ake*, 470 U.S. at 75.

[143] *See Martin*, 131 S. Ct. at 1127 ; Ford v. Georgia, 498 U.S. 411 (1991); Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc).

[144] Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003), *quoting* Wood v. Hall, 130 F.3d 373, 376 (9th Cir. 1997)).

[145] *See, e.g.,* Martin v. Walker, 131 S. Ct. 1120 (concluding California's timeliness bar was independent and adequate as applied and thus, a basis for procedural default of claims litigant sought to raise in federal petition).

[146] *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 496 (1969) (J. Douglas, concurring).

[147] *See* U.S. DEPT OF ED., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY (2003), *available at* http://nces.ed.gov/pubs2007/2007473.pdf.

describes ""[t]he knowledge and skills needed to search, comprehend, and use information from continuous texts[, which would] include editorials, news stories, brochures, and instructional materials."[148] "Document literacy" reflects "[t]he knowledge and skills needed to search, comprehend, and use information from noncontinuous texts [and would] include job applications, payroll forms, transportation schedules, maps, tables, and drug or food labels."[149] Lastly, "quantitative literacy" encompasses "[t]he knowledge and skills needed to identify and perform computations using numbers that are embedded in printed materials[, such as] balancing a checkbook, computing a tip, completing an order form, or determining the amount of interest on a loan from an advertisement.[150] There were four categories of literacy: below basic, basic, intermediate, and proficient.[151]

The report did not explicitly evaluate the ability of an inmate to read and comprehend complex legal documents, statutes, or caselaw, let alone to understand the intricacies of federal habeas filing requirements. But based on the above definitions, such ability would implicate primarily prose and, to a lesser extent, quantitative and document literacy skills. Moreover, comprehending and effectively wielding federal habeas corpus doctrine would require, at minimum, a proficient level of literacy. The results from the study suggest very few individuals behind bars would possess this capacity in that only 2% showed proficient levels of document and quantitative literacy and 3% tested proficient in prose literacy.[152] For the remainder of inmates, even assuming sufficient access to an up-to-date prison law library,[153] legal materials pertaining to habeas corpus practice lie far beyond the reasonable comprehension of those who need to understand it most: inmates who are required to function as their own legal counsel in

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[148] *Id.* at iv.

[149] *Id.*

[150] *Id.*

[151] "Below Basic" reflects "an adult [who] has no more than the most simple and concrete literacy skills." "Basic" means "that an adult has the skills necessary to perform simple and everyday literacy activities." "Intermediate" indicates that an adult is able "to perform moderately challenging literacy activities." "Proficient" signifies "that an adult has the skills necessary to perform more complex and challenging literacy activities. The separate category, "nonliterate in English," applies to individuals unable to complete a minimum number of basic literacy questions or unable to communicate in English or Spanish. *Id.*

[152] *Id.* at 13, Figure 2-2. Forty-one percent had intermediate prose literacy, with fifty-six percent at basic or below basic. Forty-eight percent tested at intermediate document literacy, with fifty percent showing basic or below basic. And only twenty percent revealed intermediate quantitative literacy, while seventy-eight percent tested at basic or below basic. The study also excludes altogether persons unable to communicate in English or Spanish and those with cognitive or mental disabilities that prevented literacy testing. Thus, the results may overstate the overall inmate literacy rates.

[153] *See* Comment, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PENN. J. OF CONST. L. 819, 830-831 (2008) (arguing that constitutional right of access to courts requires internet access for legal research, in so doing citing states' dramatic cuts to prison law libraries post-*Lewis v. Casey* and lack of internet access in all such libraries); Thomas C. O'Bryant, *The Great Unobtainable Write: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996, Symposium: Pro Se Litigation Ten Years After AEDPA*, 41 HARV. C.R.-C.L. L. REV. 299, 319-332 (2006) (describing severely limited legal resources available to pro se inmates in Florida, including prison library law clerks generally equipped only with a high school diplomas, a GED, *or* functional literacy and 30 hours of legal training; jailhouse lawyers who are prohibited from, and punished for, possessing other inmates' legal papers; the virtual absence of computers for inmate research; and actual library access limited to once a week).

pursuit of the writ.

Statistics regarding the relative mental health of the inmate population in the United States are similarly bleak. A study released by the U.S. Department of Justice in 2006 indicated that more than half of all individuals incarcerated in this country suffer from mental illness.[154] More specifically, more than two-fifths (43%) of state prisoners and more than half (54%) of jail inmates reported symptoms of mania.[155] Approximately 23% of state inmates and 30% of those in jail reported symptoms of major depression.[156] Insomnia or hypersomnia and persistent anger were the most commonly reported episodes amongst those reporting major depression or mania, with nearly half of jail inmates reporting such symptoms.[157] About 15% of state inmates and 24% of jail inmates reported symptoms of a psychotic disorder.[158] About 74% of state inmates and 76% of those in jail with a mental health condition also met criteria for substance dependence or abuse.[159] Thus, even in the rare event that an inmate is sufficiently equipped educationally to read and understand habeas doctrine, his ability to do so may be profoundly impaired by mental illness.

### F. *The Impact Of AEDPA On The Number Of Federal Habeas Petitions Being Dismissed On Procedural Grounds And Thus, Failing To Reach Merits Review*

Empirical study confirms that, since AEDPA's enactment, for non-capital litigants the Great Writ has lost much of its muscle.[160] A 2007 study conducted at Vanderbilt School of Law revealed that federal habeas petitioners lacked assistance of counsel in 92.3% of non-capital cases.[161] Moreover, under AEDPA, district courts have dismissed as untimely 22% of non-capital federal habeas petitions.[162] Of the time-barred petitioners, only 5.1% had counsel.[163] By contrast, only 4% of capital cases, where

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[154] *See* DORIS J. JAMES AND LAUREN E. GLAZE, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Mental health problems were defined by either a recent history or symptoms of mental illness within the 12 months prior to the study, which was conducted in mid-2005. But inmates in mental hospitals or who were otherwise physically or mentally unable to complete the study surveys were excluded. Thus, again, the above statistics likely under-represent the actual levels of mental illness in prisons and jails. *Id.* at 2.

[155] *Id.* at 3.

[156] *Id.*

[157] *Id.* at 6.

[158] *Id.* A psychotic disorder is shown by signs of delusions or hallucinations during the prior year. *Id.* Delusions are indicated by the inmates' belief that other people were controlling their brain or thoughts, could read their mind, or were spying on them. *Id.* Hallucinations included reports of seeing things or hearing voices that others did not. *Id.*

[159] *Id.*

[160] *See* NANCY J. KING, FRED L. CHEESMAN II, AND BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, *hereinafter* HABEAS LITIGATION TECHNICAL REPORT, at 3.

[161] *Id.* at 23.

[162] EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 46, 57.

[163] HABEAS LITIGATION TECHNICAL REPORT, at 46.

habeas petitioners have a statutory right to assistance of counsel and thus are not required to navigate AEDPA's procedural requirements alone, were dismissed as time-barred.[164] The rates of non-capital petition dismissal as successive (7%) or individual claim dismissal as procedurally defaulted (13%) approximate pre-AEDPA practice.[165] But as with the time-barred cases, the dismissal rate on successive and default grounds in non-capital cases, where petitioners are largely uncounseled, is much higher than in capital cases.[166] Finally, with respect to the effect of assistance of counsel, the report found that the presence of counsel added 11%-49% more time to habeas proceedings than in cases where the petitioner lacked counsel.[167] The presence of counsel reduces the likelihood of early termination of habeas cases,[168] which typically arises with procedural dismissals.

This data illustrates the devastating effect that the statute of limitations, combined with other procedural doctrines, has had on the pro se litigant's ability to obtain federal court review of the merits of claims raised in habeas proceedings.[169] More than one in five litigants are unable to file within AEDPA's designated one year time period.[170] It is unclear what portion of these cases involve litigants who simply miss the deadline due to failure of calculation or those who are literally unable to file within the year allotted to them while also satisfying AEDPA's exhaustion requirement. Regardless, a substantial portion of habeas petitions never clear the courthouse doors for substantive review of the claims raised within them.

As a result of AEDPA's dramatic effect on the efficacy of the Great

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[164] EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 46, 57, 62 (noting "[t]he greater frequency of time-barred cases for non-capital prisoners is expected given that unlike death row inmates in most states, non-capital habeas filers navigate the post-conviction process and its deadlines without counsel"); 28 U.S.C.A. § 2261.

[165] EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 58. Because the study focused only on district court rulings, its authors acknowledge that the calculated rate of petition dismissal as successive may understate the actual dismissal rate in light of the gatekeeping role the court of appeals now play under AEDPA in authorizing the filing of successive petitions. *Id.* The report indicates that the cases involving at least one procedurally defaulted claims are also underreported because in some cases where the court had alternative bases for denying the petition, it would rule on the merits first, and statute of limitations second, and thus never address the procedural default issue. *Id.*

[166] The study indicates all claims were dismissed as unexhausted in over ten percent of non-capital cases, as compared to less than 4% of capital cases. HABEAS LITIGATION TECHNICAL REPORT, at 62. Stays for exhaustion occurred seven times as often in capital cases than in non-capital cases. *Id.* Procedural default, however, was invoked as the basis for dismissing a claim four times as often in capital as in non-capital cases. *Id.* Interestingly, post-AEDPA, fewer courts are dismissing petitions on exhaustion grounds. *Id.* at 57 (reporting that, prior to AEDPA, more than half of all claims raised in non-capital cases were dismissed without prejudice due to the petitioner's failure to exhaust in state court; post-AEDPA, 11% of non-capital cases involve dismissal of claims as unexhausted). This decrease may be attributable to an increasing awareness of the need to exhaust claims – a relatively straightforward requirement that does not involve the complex calculations of AEDPA's statute of limitations – and, to a lesser extent, district courts' post-AEDPA ability to stay and hold in abeyance the exhausted claims in a mixed petition, while the petitioner returns to state court to exhaust the remaining claims. *See id.* at 57-58 (reporting that district courts stayed cases to allow a petitioner to exhaust unexhausted claims in only 2.5% of non-capital cases and that these stays occurred in less than one-quarter of the districts).

[167] HABEAS LITIGATION TECHNICAL REPORT, at 73.

[168] *Id.*

[169] *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice,* 84 N.Y.U. L. Rev. 791 (2009) (citing Vanderbilt study as evidence that federal habeas review of state criminal judgments no longer works and thus advocating for abolition of federal review and reallocation of resources to improve efficacy of trial court representation).

[170] EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 46, 57.

Writ for inmates seeking federal postconviction review of their criminal judgments, some scholars have called for the abolition of federal habeas corpus proceedings altogether, arguing that judicial resources are better spent at the front end, providing defendants with competent trial and appellate counsel.[171] But the dire state of implementation of *Gideon*'s mandate amplifies the critical need for providing counsel in habeas corpus proceedings. With trial and appellate counsel stretched so thin, errors by even the most able and diligent of counsel are inevitable. And the remedy provided in habeas may be the only chance the indigent inmate has at achieving the constitutional mandate of effective assistance of counsel, albeit later in the process than contemplated by the Sixth Amendment. Moreover, even if the judiciary had the resources and motivation to amply animate *Gideon*, it is axiomatic that humans err. There will always be cases in which a lawyer's personal circumstances – physical or emotional issues or even a temporary overextension within his/her caseload -- will prevent him or her from providing competent representation. Affected clients are entitled to a meaningful remedy. Recognition of a right to counsel based on access to the courts would provide that remedy.

## II. *ACCESS-TO-THE-COURTS DOCTRINE*

As discussed in the Introduction and Part I, this article argues for recognition of a limited right to counsel for habeas litigants to ensure their constitutional right of access to the courts. Pre-AEDPA attempts at convincing the Supreme Court to recognize a right to counsel of any dimension in state postconviction proceedings were unsuccessful.[172] But in light of the inordinate complexity AEDPA introduced to federal habeas practice and the negative impact it has had on pro se litigants, this article urges a revisiting of that precedent to the extent federal courts rely on it failing to embrace a right to counsel in federal habeas proceedings. To do so first requires an overview of the contours of access-to-the-courts doctrine.

Justice Harlan once described the access doctrine as fundamental to the rule of law in that the rule of law assumes that (1) the law will be enforced; and (2) individuals who suffer wrongs under the law will be able to have access to the appropriate forum, primarily courts, for enforcement of the law.[173] The access cases, either explicitly or implicitly, incorporate these two assumptions and address measures necessary to ensure that the indigent be able to get into court to enforce their legal rights. The Supreme Court

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[171] *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice,* 84 N.Y.U. L. Rev. 791 (2009) (citing Vanderbilt study as evidence that federal habeas review of state criminal judgments no longer works and thus advocating for abolition of federal review and reallocation of resources to improve efficacy of trial court representation).

[172] *See* Pennsylvania v. Finley, 481 U.S. 551; Murray v, Giarratano, 492 U.S. 1.

[173] Boddie v. Connecticut, 401 U.S. 371, 374-375 (1971) (holding due process of law prohibited state from denying indigent access to court for divorce proceedings based on inability to pay court fees and costs). *See also* Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973) (describing the right to access the courts as "*the* fundamental right") (emphasis in original).

has recognized an inmate's constitutional right to gain access to the courts to litigate post-conviction and civil rights proceedings.[174]

The right of access derives from both equal protection and due process jurisprudence, though the Court has not clearly articulated the nature of this origin.[175] The right, itself emerged from both constitutional challenges to procedural requirements that prevent inmates from pursuing post-conviction litigation as well as right-to-counsel jurisprudence.[176] Today, though still fairly ill-defined, the access right requires more than mere passivity on the states' part. Rather, in certain circumstances the right requires states to take affirmative measures to ensure meaningful access to the indigent. "Meaningful access to the courts is the touchstone" of the right.[177] The right has evolved in several stages.

### A. *Early Access Cases*

The Supreme Court first invoked the access-to-the-courts doctrine in 1941, in *Ex Parte Hull*,[178] to prohibit state action that directly obstructs a pro se inmate's ability to file a postconviction petition. In *Hull*, the Court held unconstitutional a state prison regulation that authorized prison officials to intercept inmate habeas corpus petitions that were thought to be improperly prepared.[179] The Court concluded:

> [T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.[180]

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[174] *See* Bounds v. Smith, 430 U.S. 817 (1977); Lewis v. Casey, 518 U.S. 343 (1996).

[175] *See* Murray v. Giarratano, 492 U.S. 1, 11, n. 6 (1989) ("The prisoner's right of access has been described as a consequence of the right to due process of law, *see* Procunier v. Martinez, 416 U.S. 396 . . . (1974), and as an aspect of equal protection, *see* Pennsylvania v. Finley, 481 U.S. 551, 557 . . . (1987)). The Court invokes equal protection principles in evaluating whether state laws or policies discriminate between the indigent and the financially able, *see, e.g.,* Smith v. Bennett, 365 U.S. 708, 709 (1961) (holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws"), and due process doctrine in assessing whether state action functions to preclude an individual from seeking relief in a judicial forum, *see, e.g. Procunier*, 416 U.S. at 419 (declaring invalid "[r]egulations and practices that unjustifiably obstruct the availability of professional representation" as violating the corollary to "[t]he constitutional guarantee of due process of law . . . that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."). Often, challenged laws or policies necessarily implicate both doctrines. *See, e.g.,* Griffin v. Illinois, 351 U.S. 12 (1956) (where states provide for statutory right to appeal a criminal conviction, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit erecting any financial barriers that might prevent the indigent from appealing, e.g., requiring indigent to purchase trial transcripts).

[176] *See, e.g., Boddie*, 401 U.S. at 374-75; Lane v. Brown, 372 U.S. 477, 480-81 (1963); Draper v. Washington, 372 U.S. 487, 494 (1963); Smith v. Bennett, 365 U.S. 708, 708 (1961); Burns v. Ohio, 360 U.S. 252, 253 (1959); Powell v. Alabama, 287 U.S. 45, 68 (1932); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956).

[177] *Bounds*, 430 U.S. at 823 (internal quotation omitted).

[178] 312 U.S. 546 (1941); *see also Bounds*, 430 U.S. at 821-22 (recognizing *Hull* as the advent of the access-to-the-courts doctrine).

[179] *Hull*, 312 U.S. 546.

[180] *Id.* at 549.

Almost 30 years later, the Supreme Court held that the access right guarantees more than merely the literal right to file documents in court.[181] In *Johnson v. Avery*, the petitioner challenged a state prison regulation that barred inmates from assisting one another in preparation of habeas petitions.[182] The Court held that, unless the state or some other source provides legal help to indigent prisoners, the court cannot *indirectly* obstruct access by preventing jailhouse lawyers from preparing habeas petitions for other indigent prisoners.[183] The Court underscored that

> [s]ince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.[184]

Without the assistance of a jailhouse lawyer, the pro se habeas petitioner's possibly valid constitutional claims would never reach a court for consideration.[185] The Court noted that the problem of access is particularly acute for the "high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."[186] In his concurring opinion, Justice Douglas elaborated:

> In a community where illiteracy and mental deficiency is notoriously high, it is not enough to ask the prisoner to be his own lawyer. Without the assistance of fellow prisoners, some meritorious claims would never see the light of a courtroom. In cases where that assistance succeeds, it speaks for itself. And even in cases where it fails, it may provide a necessary medium of expression.[187]

Following *Avery*, the Court in *Younger v. Gilmore* upheld in a two-paragraph per curiam opinion the lower court's judgment requiring California officials to provide indigent inmates with access to a reasonably adequate law library for preparation of legal actions.[188] Several years later, the Court unanimously extended *Avery* to cover assistance by fellow inmates in civil rights actions.[189] The Court rejected the state's attempt to distinguish the relative importance of civil rights actions from habeas petitions, noting that both "both actions serve to protect basic constitutional rights."[190] The Court observed:

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[181] *See* Johnson v. Avery, 393 U.S. 483 (1969).
[182] *Id.* at 484.
[183] *Id.* at 490.
[184] *Id.* at 485-86.
[185] *Id.* at 487.
[186] *Id.*
[187] *Id.* at 496 (J. Douglas, concurring).
[188] 404 U.S. 15 (1971).
[189] Wolff v. McDonnell, 418 U.S. 539, 577-580 (1974).
[190] *Id.* at 579-580.

> The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. . . . The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.[191]

### B. *Right to Counsel Cases*

As the jurisprudence regarding the access-to-the-courts right was evolving, the Supreme Court also began to define the parameters of the indigent criminal defendant's right to assistance of counsel. The right to counsel cases, though initially not analyzed in terms of access to the courts, echoed the same concepts of fairness and access to justice as the access cases. Indeed, recognizing the similarity in constitutional underpinnings, the Supreme Court would eventually fold this jurisprudence into its access-to-the-courts case law. Prior to this doctrinal merger, the right to counsel jurisprudence developed as follows.

#### 1. Right to Counsel at Trial

In *Powell v. Alabama*, the Court held the Fourteenth Amendment's Due Process Clause and Sixth Amendment require assistance of counsel for capital defendants.[192] In so holding, Justice Sutherland observed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[193] Rather, both the "intelligent and educated layman" and the "ignorant and illiterate, or those of feeble intellect" "require[] the guiding hand of counsel at every step in the proceedings against him."[194]

Six years later, in *Johnson v. Zerbst*, the Court held that the Sixth Amendment requires appointment of counsel at government expense for every indigent defendant in federal court who faces loss of life or liberty, unless the defendant waives that right.[195] In so holding, the Court observed that the Sixth Amendment's right to counsel clause

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or

[191] *Wolff*, 418 U.S. at 579.
[192] Powell v. Alabama, 287 U.S. 45 (1932).
[193] *Id.* at 68.
[194] *Id.* at 68-69.
[195] 304 U.S. 458, 462-63 (1938).

> liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious [196]

Similarly, in extending *Powell* to noncapital defendants in *Gideon v. Wainright*, the Court noted:

> [I]n our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[197]

2. Right to Counsel on Appeal

The right to counsel on direct appeal does not find its origin in the Sixth Amendment. In fact, the Supreme Court has repeatedly held that, unlike the Sixth Amendment right to trial, a criminal defendant does not have a constitutional right to appeal his conviction.[198] Instead, the right to direct appellate review is entirely a creature of statute.[199] Nonetheless, where states decide to provide for a statutory right to appeal, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit imposing any financial barriers that might prevent the indigent from appealing.[200]

In *Griffin v. Illinois*, petitioners challenged a state law that required non-capital defendants to purchase their own trial transcripts.[201] In finding the law violated due process and equal protection guarantees, the Court noted that, once a state decides to provide for a right to appeal, it cannot do so in a way that discriminates against convicted defendants who happen to be poor:[202]

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[203]

After *Griffin*, the Court held other financial obstacles to direct appeal to violate the Fourteenth Amendment. These barriers included a state

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[196] *See, e.g.,* Powell v. Alabama, 287 U.S. 45, 68 (1932);

[197] Gideon v. Wainright, 372 U.S. 335, 344 (1963).

[198] Martinez v. Court of Appeal, 528 U.S. 152, 160-61 (2000) (finding no constitutional right to represent oneself on appeal); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (Black, J., plurality opinion); McKane v. Durston, 153 U.S. 684, 688 (1894); *cf.*, McCoy v. Court of Appeals, 486 U.S. 429, 436 (1988) ("If a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel . . . .").

[199] *Martinez*, 528 U.S. at 160.

[200] *Griffin*, 351 U.S. 12, 18-19 (1956) (Black, J., plurality opinion).

[201] *Id.* at 14. Illinois law required appellants who sought to raise non-constitutional errors to pay for their own transcripts. *Id.* To the extent an appellant intended to allege constitutional errors, there was no charge. *Id.*

[202] *Id.* at 18.

[203] *Id.* at 18-19 (footnotes omitted).

law permitting only public defenders to obtain free transcripts of a hearing on a *coram nobis* application,[204] which thus denied indigent appellants transcripts for appeal unless counsel ordered them;[205] a requirement that an indigent defendant satisfy the trial judge that his appeal has merit before obtaining free transcripts;[206] and filing fees to process a state habeas petition[207] or to seek review from the state supreme court.[208]

In 1963, the Supreme Court extended the reasoning of *Griffin* and its progeny[209] to hold that where a state provides for a right to appeal criminal convictions, the Due Process and Equal Protection Clauses require the state also to provide the indigent appellant with assistance of counsel.[210] At issue in *Douglas* was a California law that required appellate courts to make a threshold assessment of the merits of an appeal before deciding to appoint counsel to assist a defendant on direct appeal.[211] The Court held that when an indigent appellant must "run th[e] gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure."[212] In such a case,

> [t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[213]

In 1974, the Supreme Court in *Ross v. Moffitt* declined to extend *Douglas* to discretionary appeals.[214] In so holding, the Court emphasized that an indigent appellant seeking the discretionary review of a supreme court already has the benefit of attorney work-product from the first appeal, which he need only duplicate with a request for high court review.[215] Thus, although undoubtedly helpful, assistance of counsel is not constitutionally required.[216] The Court noted:

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[204] A writ of *coram nobis*, as authorized by the All Writs Act, 28 U.S.C. 1651 (2006), permits defendants to seek correction of purely factual errors in their cases but does not allow review of substantive legal issues. See *United States v. Mayer*, 235 U.S. 55, 67-68 (1914).

[205] Lane v. Brown, 372 U.S. 477, 480-81 (1963).

[206] Draper v. Washington, 372 U.S. 487, 494 (1963).

[207] Smith v. Bennett, 365 U.S. 708, 708 (1961).

[208] Burns v. Ohio, 360 U.S. 252, 253 (1959).

[209] The Court decided *Draper*, *Douglas*, and *Lane* on the same day. *See Draper*, 372 U.S. at 487; *Lane*, 372 U.S. at 477; Douglas v. California, 372 U.S. 353, 353 (1963).

[210] *Douglas*, 372 U.S. at 353.

[211] *Id.* at 354-56 (majority opinion).

[212] *Id.* at 357.

[213] *Id.* at 357-58.

[214] Ross v. Moffitt, 417 U.S. 600 (1974).

[215] *Id.* at 615.

[216] *Id.* 616.

> [The state's constitutional duty] is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.[217]

The Court underscored, however, that states must "assure the indigent defendant an adequate opportunity to present his claims fairly." *Id.*

At its core then, the right-to-counsel cases derive from a judicial conviction that the courthouse doors will not close to judicial review of claims raised by unrepresented inmates simply by virtue of the fact that they lack the requisite legal skills to navigate the legal process. Thus, where counsel is essential either to engage in trial advocacy or to frame new claims on appeal, the right to counsel attaches.

### C. *Bridging Access-to-the-Courts and Right to Counsel Doctrines: Bounds v. Smith*

In 1977, the Supreme Court formally merged the early access-to-the-courts cases with its right to counsel jurisprudence to articulate an access doctrine of broader application. In *Bounds v. Smith*,[218] state inmates filed civil suit against the state arguing their constitutional right of access to the courts required the state to provide adequate prison law library facilities or other legal assistance in habeas litigation.[219] The Court agreed, holding that in some situations the access right places an affirmative obligation on states to develop and implement "remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful."[220] In so concluding, the Court invoked both early access-to-the-courts and right-to-counsel precedent.[221]

The Court identified the core of its prior decisions striking down financial obstacles to the appellate process – including lack of counsel – as essential to ensure the indigent access to a meaningful appeal from their convictions.[222] Justice Marshall, writing for the six-Justice majority,

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[217] *Id.*

[218] 430 U.S. 817.

[219] 430 U.S. 817.

[220] *Id.* at 822.

[221] *Bounds*, 430 U.S. at 822-25.

[222] *See id.* at 822-23 (citing Burns v. Ohio, 360 U.S. 252, 257 (1959) (indigent inmates must be able to file appeals without payment of docket fees); Smith v. Bennett, 365 U.S. 708 (1961) (same, for habeas petitions); Griffin v. Illinois, 351 U.S. 12, 20 (state must supply trial records to indigent inmates seeking appellate review); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (trial transcript provision cannot be conditioned on court approval); Draper v. Washington, 372 U.S. 487 (1963) (same); Lane v. Brown, 372 U.S. 477 (1963) (cannot require public defender's approval to obtain coram nobis transcript); Rinaldi v. Yeager, 384 U.S. 305 (1966) (unconstitutional to require only unsuccessfully imprisoned defendants to reimburse for cost of trial transcripts); Long v. District Court of Iowa, 385 U.S. 192 (1966) (state required to provide transcript of post-conviction proceeding); Roberts v. LaVallee, 389 U.S. 40 (1967) (state required to provide transcript of preliminary hearing); Gardner v. California, 393 U.S. 367 (1969) (state required to provide transcript of habeas corpus transcript); Mayer v. Chicago, 404 U.S. 189 (1971) (state required to provide transcript of non-felony trial); Douglas v.

rejected the state's attempt to limit its reading of *Johnson v. Avery*[223] and *Wolff v. McDonnell*.[224] Rather, the majority observed that at issue in those cases was whether state policies prohibiting inmates from assisting one another in preparing habeas and civil rights actions violated the access rights of "ignorant and illiterate" inmates "without adequate justification."[225] Because in both cases such inmates were unable to present their written claims to the courts, their "constitutional right to help" required at minimum permitting assistance from fellow, literate inmates.[226] The Court noted that *Johnson* and *Wolff* "did not attempt to set forth the full breadth of the right of access."[227] Indeed, neither case precluded requiring "additional measures to assure meaningful access to inmates able to present their own cases."[228]

The Court further noted that it had long imposed affirmative obligations on states to guarantee meaningful court access to all inmates.[229] "[T]he cost of protecting a constitutional right cannot justify its total denial. . . . [T]he inquiry is . . . whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[230]

Justice Marshall observed that "it would verge on incompetence" for an attorney to file an initial pleading without researching relevant procedural and substantive law.[231] And if a lawyer must perform such tasks, so, too must the pro se inmate.[232] Indeed, it is likely even more important that the pro se litigant "set forth a nonfrivolous claim meeting all procedural prerequisites" to avoid early dismissal.[233] Likewise, without an adequate library or legal assistance, the pro se litigant is left defenseless to answer to the respondent's pleadings.[234] The situation is particularly compelling in habeas proceedings, where the petitioner often seeks to raise claims that trial or appellate counsel did not litigate and thus, has no legal work product off of which to work.[235]

But the Court emphasized that states have broad discretion in ensuring constitutionally adequate access to the courts for inmates.[236] Providing a law library is but one means of doing so, and states are encouraged to experiment with alternate approaches.[237] The relevant inquiry is what steps

California, 372 U.S. 353, 358 (1963) (recognizing the right to counsel on direct appeal).

[223] 393 U.S. 483 (1969).

[224] 418 U.S. 539 (1974).

[225] *Bounds*, 430 U.S. at 823-24.

[226] *Id.* (internal quotation omitted)

[227] *Id.* at 824.

[228] *Id*.

[229] *Id.* (noting it is "indisputable" that states must provide indigent inmates with paper and pen, notary services, and adequate postage to prepare and file legal papers, forgo docket fees and pay for transcripts, and pay for assistance of trial and appellate counsel).

[230] *Id.* at 825.

[231] *Id.* at 825.

[232] *Id.* at 825-26.

[233] *Id.* at 826.

[234] *Id.*

[235] *Id.* at 827.

[236] *Id.* at 830-31.

[237] *Id.* at 830-32.

are necessary "to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[238] Thus, the Court held: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[239]

In so holding, the Court dismissed as "irrelevant" the state practice of appointing counsel in postconviction proceedings where the petitioner's claims survive initial judicial review. Rather, the core concern underlying the access right is "protecting the ability of an inmate to prepare a petition or complaint," that is, securing a foot in the courthouse door in the first place.[240]

In dissent, then-Justice Rehnquist, joined by Chief Justice Burger, accused the majority of creating "the 'fundamental constitutional right of access to the courts' . . . virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."[241] Justice Rehnquist warned that "[i]f 'meaningful access' to the courts is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State."[242] "Just as a library may assist some inmates in filing papers which contain more than the bare factual allegations of injustice," the dissent reasoned, "appointment of counsel would assure that the legal arguments advanced are made with some degree of sophistication."[243]

### D. *The Right of Access, Post-Bounds*

In 1987, the Supreme Court rejected petitioner's claim in *Pennsylvania v. Finley* that the "equal protection guarantee of 'meaningful access'" requires assistance of counsel during state postconviction proceedings.[244] In *Finley*, the petitioner filed a pro se habeas petition in state trial court, raising the issues her appointed counsel had raised on direct appeal to the state supreme court.[245] The trial court denied relief, but the Pennsylvania Supreme Court reversed, ordering that petitioner receive assistance of counsel in her postconviction proceedings.[246] After review of the record,

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[238] *Id.* at 825.
[239] *Id.* at 828 n.17.
[240] *Id.* (internal quotation omitted).
[241] *Id.* at 840 (J. Rehnquist, dissenting) (*quoting* majority opinion, *id.* at 828).
[242] *Id.* at 841.
[243] *Id.*
[244] Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). More precisely, petitioner argued that, notwithstanding a lack of a right to counsel in post-conviction proceedings, once the state appoints counsel, the Due Process Clause of the Fourteenth Amendment requires counsel's actions to comport with *Anders v. California* procedures. *Id.* at 557-558. *Anders* in turn requires that appointed counsel who seeks to withdraw based on a failure to identify any potentially meritorious issues file an accompanying brief that identifies all ostensibly arguable issues. This process ensures judicial review of the proceedings before deciding whether the case is in fact frivolous and thus, protection of the constitutional right to counsel. Anders v. California, 386 U.S. 738, 744-45 (1967).
[245] *Finley*, 481 U.S. at 553.
[246] *Id.* at 554.

petitioner's attorney informed the court that there were no arguable bases for relief and thus asked to be relieved as counsel.[247] The trial court agreed with counsel's assessment and granted the motion to withdraw from representation.[248]

With new appointed counsel, petitioner appealed the trial court's judgment.[249] The state appeals court held that prior counsel had been ineffective in moving to withdraw without briefing potential issues as required by *Anders v. California*,[250] and remanded for further proceedings.[251] The Supreme Court reversed, finding *Anders* inapplicable because it derives from a constitutional right to counsel, which does not exist in state postconviction proceedings.[252] The Court observed that "the right to counsel extends to the first appeal of right, and no further."[253] Moreover, "defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts" for both discretionary appellate review and postconviction proceedings.[254]

Two years after *Finley*, the Supreme Court issued a plurality opinion in *Murray v. Giarratano*, holding that petitioners in capital cases do not have an access-to-the-courts' right to counsel in state postconviction proceedings.[255] In *Giarratano*, Virginia's death row inmates filed a civil rights suit arguing that assistance of counsel was required in order "to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief," as guaranteed by *Bounds v. Smith*.[256] State prison facilities in Virginia provided death row inmates with restricted use of law libraries and appointed a number of staff attorneys to the various penal institutions to assist inmates with incarceration-related litigation.[257]

The district court concluded that several special considerations warranted greater assistance to inmates than outlined in *Bounds*.[258] Specifically, in light of their pending execution, death row inmates have limited time within which to prepare postconviction petitions, their cases are exceptionally complex, and the psychological effect of their death sentences impairs the ability to perform their own legal work.[259] The Fourth Circuit, en banc, affirmed the district court's remedial order.[260] In so

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[247] *Id.* at 553.
[248] *Id.*
[249] *Id.*
[250] 386 U.S. 738, 742-45 (1967).
[251] *Finley,* 481 U.S. at 554. Because the right to assistance of counsel encompasses the right to *effective* assistance of counsel, when counsel renders ineffective assistance, the aggrieved client is entitled to provision of a remedy. *See* Strickland v. Washington, 466 U.S. 668, 684-86 (1984); *see also* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 559-563 (2009).
[252] 481 U.S. at 559.
[253] *Id.* at 555.
[254] *Id.* at 557.
[255] 492 U.S. 1 (1989).
[256] *Giarratano*, 492 U.S. at 3-4; *Bounds*, 430 U.S. at 828.
[257] *Id.* at 5.
[258] *Id.* at 3-6.
[259] *Id.* 492 U.S. at 4-5.
[260] Murray v. Giarratano, 847 F.2d 1118 (1988) (en banc).

holding, the appellate court concluded that *Pennsylvania v. Finley* was not controlling because *Finley* was not a "meaningful access" case, did not address the rule enunciated in *Bounds v. Smith*, and, "most significantly," was not a death penalty case.[261]

The Supreme Court reversed, affirming *Finley*, which, in disagreement with the Fourth Circuit, it characterized as in fact involving meaningful access to the courts:

> The Court of Appeals . . . relied on what it perceived as a tension between the rule in *Finley* and the implication of our decision in *Bounds v. Smith* . . .; we find no such tension. Whether the right of access at issue in *Bounds* is primarily one of due process or equal protection, . . . in either case it rests on a constitutional theory considered in *Finley*.[262]

Thus, the plurality observed that to interpret *Bounds* as requiring the provision of assistance of counsel to capital inmates would require at least partially overruling *Finley* based on the district court's factual conclusions regarding the unique nature of capital cases.[263] Instead, the Court extended *Finley* to capital inmates, in so doing noting that its "holding necessarily imposes limits on *Bounds*."[264]

Justice Kennedy, joined by Justice O'Connor, writing separately, concurred in the judgment.[265] As a threshold matter, he noted:

> It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As Justice Stevens observes [in dissent], a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.[266]

But Justice Kennedy also underscored that states have considerable discretion in implementing measures that secure meaningful access to the courts for its inmates, as required by *Bounds*.[267] And significantly, despite the lack of formal provision for appointment of counsel in capital cases, "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings."[268] Additionally, Virginia's

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[261] *Id.* at 1122.
[262] *Giarratano*, 492 U.S. at 11.
[263] *Id.* at 11-12.
[264] *Id.* at 12.
[265] *Id.* at 14.
[266] *Id.* at 14 (Kennedy, J., concurring) (citation omitted).
[267] *Id.*
[268] *Id.*

penal institutions employ staff attorneys to assist inmates with postconviction pleadings. Thus, Justice Kennedy concluded that he was "not prepared to say that *this* scheme violates the Constitution."[269]

Seven years after *Giarratano*, the Supreme Court modified *Bounds* in *Lewis v. Casey*.[270] In *Casey,* Arizona state inmates brought a civil rights action under *Bounds v. Smith* challenging the adequacy of the state's prison law library and legal assistance program.[271] The district court granted injunctive relief on the ground that the prison system failed to comply with the constitutional standards set forth under *Bounds*.[272] The Ninth Circuit affirmed the *Bounds* violation finding and, for the most part, the terms of the injunction.[273]

The Supreme Court reversed and remanded due to the district court's "failure to identify anything more than isolated instances of actual injury."[274] In so holding, the Court read into *Bounds* an actual-injury requirement. The Court emphasized that *Bounds* did not "create an abstract, freestanding, right to a law library or legal assistance" and thus, "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense."[275] Rather, the Court in *Lewis* held that, to show a violation of the constitutional right to access to the courts, an inmate must demonstrate that the prison's alleged deficient library or legal assistance resources "hindered his efforts to pursue a legal claim."[276]

> He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.[277]

The Court also modified *Bounds*'s apparent expansion of the right of access recognized in earlier cases, "which was a right to bring to court a grievance that the inmate wished to present."[278] Specifically, the Court disclaimed *Bounds*'s suggestion that "the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court."[279] The Court concluded: "To demand the conferral of such sophisticated legal

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[269] *Id.* at 15 (emphasis added).
[270] 518 U.S. 343 (1996).
[271] *Id.*
[272] *Id.* at 346.
[273] *Id.* at 348.
[274] *Id.* at 349-64.
[275] *Id.* at 351.
[276] *Id.*
[277] *Id.*
[278] *Id.* at 354 (citing Ex parte Hull, 312 U.S., at 547-48; Griffin v. Illinois, 351 U.S. at 13-16; and Johnson v. Avery, 393 U.S. at 489).
[279] *Id.*

capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires."[280] In short, *Lewis* made clear that the access right is merely the right to get a foot in the courthouse door, not a right to substantive assistance with one's case.[281] At the same time, the right necessarily implicates a substantive component, which is inherent in the right to have access to a law library or other legal assistance.

After *Lewis*, the precise parameters of the access-to-the-courts right as applied to pro se habeas litigants remain imprecise. At a minimum, before enactment of AEDPA and its concomitant procedural strictures, the Supreme Court had declined to hold that the access right encompasses a right to assistance of counsel.[282] For death row inmates, however, Justice Kennedy, with Justice O'Connor joining, premised his vote on the fact that no Virginia death row inmate had in fact been denied assistance of counsel.[283] Hence, the issue is arguably still an open one.[284] Instead, the Court has adhered to a position that the access right is an inherently flexible one, with states possessing broad discretion as to how to implement it. In *Lewis*, the Court also underscored that the right encompasses only the ability to get one's foot in the courthouse door, rather than in discovering and actually litigating claims in a petition.

But the dramatic change in federal habeas law brought by enactment of AEDPA in 1996 changed the relevant legal landscape, and now calls for re-examination of the issue. Even for non-capital inmates, AEDPA's complex array of procedural requirements -- in particular, the statute's one-year statute of limitations and its interplay with other procedural doctrine -- have placed the Great Writ out of reach for many pro se inmates. Absent repeal of AEDPA, this new landscape, particularly as illuminated by the federal courts since AEDPA's enactment, necessitates recognition of a constitutional right to assistance of counsel in deciphering the myriad filing requirements and thus, gaining access to federal court review.

## III. *THE ACCESS TO THE COURTS DEMAND FOR COUNSEL IN POST-AEDPA LITIGATION*

As discussed, the constitutional right of access to the courts for habeas petitioners is still fairly amorphous in dimension. In the absence of assistance of counsel, the early cases, *Johnson v. Avery*[285] and *Younger v. Gilmore*,[286] note the essential role of jailhouse lawyers and/or adequate law

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[280] *Id.*
[281] *Id.*
[282] *See Finley*, 481 U.S. 551 (1987); *Giarratano*, 492 U.S. 1 (1989).
[283] *See* Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L.R. 1079, 1085-86 (2006).
[284] *Id.*
[285] 393 U.S. 483 (1969).
[286] 404 U.S. 15 (1971).

libraries in ensuring access to the courts for indigent habeas petitioners. But after AEDPA, such alternate resources no longer suffice to protect the indigent inmate's right to access to the courts. Fellow inmates self-taught in federal habeas corpus are generally no match for the rigor and intricacies of AEDPA's procedural demands. Nor will access to a prison law library without legal assistance enable the average pro se inmate to gain adequate insight into AEDPA's myriad procedural requirements in order to fend for himself.

Likewise, the right-to-counsel jurisprudence, as merged with the access right, should not control. This caselaw contemplates the role of counsel in researching and framing the substance of claims in discretionary appeals and state habeas proceedings. The Supreme Court ultimately concluded that where inmates are simply repeating claims previously litigated with counsel's assistance, the U.S. Constitution does not demand assistance of counsel.[287] But none of this jurisprudence considers the barrier to access that AEDPA's inordinate procedural complexity now poses to pro se litigants.

In *Bounds v. Smith*, the Court identified substantive content to the access right, finding its core to be "protecting the ability of an inmate to prepare a petition or complaint."[288] As discussed, with *Lewis v. Casey*, the Supreme Court retreated from this interpretation, holding that "access" signifies only the right to get one's foot in the courthouse door, rather than to possess full litigation capability once inside.[289] The Court underscored the need for states to have flexibility in implementing the right.

While such flexibility may have sufficed constitutionally to protect *Lewis*'s more limited access right in the pre-AEDPA era, the dramatic change to federal habeas practice that AEDPA wrought in 1996 demands conferral of a right to counsel to federal habeas litigants. Indeed, the Court's decision in *Lewis* contemplates the reality of post-AEDPA habeas practice when it posits as an access violation the case where the court dismisses a pro se litigant's petition due to failure to comply with a technical requirement that the litigant could not have known about, or where the inmate is unable to file for relief altogether as a result of inadequate legal resources.[290] In *Lewis*'s era, these hypotheticals bordered on the extreme. But today, federal habeas practice epitomizes these examples in that AEDPA's procedural complexity is all but incomprehensible to the average inmate, *regardless* of the library facilities available to the inmate. The Vanderbilt study finding that 22% of non-capital petitions are dismissed on timeliness grounds alone, with another 7% dismissed as successive and 13% of individual claims procedurally barred, bears this out.[291] A copy of the statute and federal case reporters,

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[287] *See* discussion, *supra*.
[288] 430 U.S. 817, 828 n.17 (1976).
[289] *Id.*
[290] Lewis v. Casey, 518 U.S. 343, 351 (1996).
[291] *See* EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 46, 57.

though perhaps sufficient in pre-AEDPA practice, will not begin to unpack the intricacies of AEDPA's myriad requirements for the average pro se inmate. Indeed, federal courts have devoted substantial energy over the past fifteen years to distilling the actual mechanics of AEDPA's procedural requirements, in particular, its statute of limitations. Notwithstanding the skill and experience of the federal bench, this process remains a daunting one.

Without a lawyer, in sufficient time, an inmate might be able to articulate his core concerns – e.g., "my lawyer didn't talk to my alibi witness" or "the prosecutor didn't give my lawyer all of the evidence," – and the judge, with a law clerk at hand, can typically figure out the underlying constitutional issues presented.[292] But once the procedural barricade of AEDPA was erected, and pro se inmates were required to navigate the intricacies of a short statute of limitations, together with the exhaustion and procedural default doctrines and the new bar on successive petitions, the courthouse doors in effect slammed shut. Most inmates, while perhaps capable of inartfully informing the court why they think they should not be behind bars, are not capable of navigating a very complicated set of procedural rules. For these inmates, AEDPA erected an impenetrable barrier to habeas review.

Nor does removal of restrictions on inmates helping one another suffice, constitutionally.[293] True, in time, some inmates might be able to educate themselves to a point at which their knowledge rivals, if not surpasses, professional counsel.[294] But without systemic provision of competent legal assistance or a remedy for the lack thereof, too many inmates will come up short, with little correlation in case outcome to the actual merits of their cases. Denial of counsel in modern federal habeas practice is akin to denial of access to the jailhouse lawyer and/or an adequate prison law library in the pre-AEDPA world.

*Lewis* seems to hold that a petitioner can show an access violation only *after* the fact, and only where he was denied review of an arguably valid claim.[295] This would preclude relief for inmates who are unable to identify potentially meritorious claims that they would have raised in a procedurally barred habeas petition. It would also preclude any injunctive relief or

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[292] Defense counsel's failure to interview viable alibi witnesses would violate the Sixth Amendment, *see* Strickland v. Washington, 466 U.S. 668 (1984); the prosecutor's failure to turn over to the defense potentially exculpatory evidence would violate the Due Process Clause, *see* Brady v. Maryland, 373 U.S. 83, 91 (1963). Nonetheless, separate due process and equal protection concerns arguably dictate a right to counsel for claims raised in the first instance in habeas corpus. *See* Garcia Uhrig, *supra* note 11, at 559-563 (articulating a substantive, claims-based right to assistance of counsel in habeas corpus for claims raised in the first instance in habeas proceedings).

[293] *See* Johnson v. Avery, 393 U.S. 483 (1969).

[294] *See* Holland v. Florida, 130 S. Ct. 2549 (2010) (remanding for determination whether inmate entitled to equitable tolling of statute of limitations based on counsel's extraordinary incompetence where inmate, himself demonstrated enormous diligence in attempting to file his petition on time despite counsel's failures); Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. 299 (symposium) (2006) (illustrating sophisticated understanding of AEDPA's procedural requirements, yet noting such understanding came too late to assist in his own case, which was dismissed as time-barred for failure to file within the requisite one year).

[295] *Lewis*, 518 U.S. at 351.

provision of counsel *before* dismissal of a habeas petition. The Court has not shed additional light on this aspect of its decision since *Lewis*. But such holding stands in direct conflict with access-to-the-courts jurisprudence. As discussed, *Bounds* merged the decisions that involved literal impediments to indigent filing -- e.g., filing fees, prison official screening of petitions, and unavailability of trial transcripts to pro se litigants – with the right-to-counsel jurisprudence, all of which define the right of access as entirely independent of the merits of the petitioner's case. Rather, the essence of the right is merely the ability to present one's case before the judiciary, regardless of the ultimate outcome. Hence, to the extent *Lewis* requires more, the decision should be overruled as at odds with decades of Supreme Court jurisprudence.

Regardless, after *Lewis*, it is clear that the right of access at best means a right to assistance of counsel in clearing AEDPA's procedural hurdles to federal habeas review. It does not contemplate assistance of counsel in researching and framing those claims.[296] Thus, a right to postconviction counsel based on access doctrine would extend only to penetrating the procedural thicket cultivated by AEDPA, and no farther.

There are a number of methods that could serve to fulfill this constitutional mandate. Specifically, federal courts could (1) provide counsel to assist indigent inmates in navigating AEDPA's procedural requirements and filing the petition within the provided one-year time period as well as a remedy where attorney error causes dismissal of a petition on procedural grounds; (2) where provision of counsel is impractical, simply provide a remedy to petitioners where they fail to satisfy AEDPA'S myriad procedural requirements for reasons other than lack of due diligence; (3) recognize ineffective assistance of counsel or denial of counsel altogether as a basis for statutory or equitable relief from AEDPA's strictures; or (4) enact policy reforms either to reduce the number of inmates pursuing the writ of habeas corpus or to repeal AEDPA's procedural requirements altogether.

### A. *Providing Counsel*

To implement an access right to counsel, the federal government can invoke the ready structure of the federal public defenders' offices and/or federal panels for court-appointed counsel. Indeed, some federal public defenders offices already staff attorneys competent in AEDPA's intricacies and pitfalls as a result of capital defense practice.[297] As a matter of course, inmates whose convictions are affirmed on direct appeal would receive consultation with counsel regarding the postconviction process. If an

[296] *Cf.* Garcia Uhrig, *supra* note 12, at 598 (articulating a substantive, claims-based right to assistance of counsel in habeas corpus for claims raised in the first instance in habeas proceedings).

[297] *See, e.g.*, 21 U.S.C. § 848(q)(4)(B) (providing for right to counsel in federal postconviction proceedings); 18 U.S.C. § 3006A (requiring more stringent experience criteria for counsel appointed in capital postconviction proceedings than noncapital proceedings).

inmate indicates interest in pursuing postconviction relief, counsel would advise him of the procedural requirements under AEDPA. Counsel would also advise state inmates regarding the role state postconviction proceedings play in properly exhausting any claims presented in a federal petition and in tolling AEDPA's statute of limitations. In practice, implementation of the right would mimic the constitutional right to counsel on direct appeal, albeit counsel's role would be a more limited one: to ensure that the inmate is not denied habeas review based on failure to comprehend and navigate AEDPA's procedural requirements.

## B. *Providing a Remedy for Ineffective Assistance of Postconviction Counsel*

### 1. The Constitutional Requirement of Effective Assistance of Counsel

It is well-established that the constitutional rights to counsel at trial and on direct appeal guarantee rights to *effective* assistance of counsel.[298] Where counsel renders ineffective assistance, a defendant may seek relief, usually in postconviction proceedings, from the consequences of that incompetence. In *Strickland v. Washington*, the Supreme Court set forth a two-part test for establishing constitutionally ineffective assistance of trial counsel: First, the defendant must show that defense counsel acted unreasonably, that is, contrary to "prevailing professional norms."[299] Second, the defendant must show prejudice: that there is a "reasonable probability" that the result of the proceeding would have been different if defense counsel had performed competently.[300] In *Evitts v. Lucey*, the Court recognized that the constitutional right to counsel on direct appeal likewise requires effective assistance of counsel, for which the *Strickland* test informs the remedy.[301]

Similarly, recognition of a constitutional right to counsel in filing a first federal habeas petition would require a remedy for procedural errors that are attributable to attorney incompetence or lack of counsel altogether. Thus, where the petitioner demonstrates that counsel's assistance was professionally unreasonable, or altogether denied, and that one or more of AEDPA's procedural hurdles precluded habeas review of his claims as a result, he would be entitled to relief. Such relief could obtain by relieving the inmate from the preclusive strictures of the procedural doctrine at issue. Thus, for example, the district court would review the substantive claims in an otherwise time-barred petition, a procedurally defaulted claim, and/or a second or successive petition, containing claim(s) overlooked or excluded

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[298] *See* United States v. Cronic, 466 U.S. 648, 654 (1984) (describing the Sixth Amendment right to *effective* assistance of counsel); Strickland v. Washington, 466 U.S. 668, 686 (1984) (setting forth test for establishing denial of constitutional right to counsel); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (recognizing due process and equal protection right to counsel on direct appeal requires *effective* assistance of counsel).

[299] 466 U.S. 668, 684-85 (1984).

[300] *Id.* at 692, 694.

[301] 469 U.S. at 396.

in the first petition due to attorney error or failure to provide assistance of counsel altogether.[302]

2. Statutory and equitable relief from AEDPA's strictures

*a. Relief From The Statute Of Limitations*

As discussed, AEDPA's one-year statute of limitations is responsible for the majority of the federal habeas petitions that federal courts deny for procedural reasons, rather than on the merits.[303] Recognition of a right to counsel based on access to the courts would mean that, where counsel fails to advise an inmate accurately regarding the calculation of the one-year period, two doctrines could supply an inmate with relief.

First, the government's failure to provide effective assistance of counsel would constitute an "impediment to filing" and thus, a basis for statutory tolling, under § 2244(d)(1)(B). Indeed, some federal courts have already recognized that a state's failure to provide an inmate with a copy of the federal habeas statute as revised under AEDPA constitutes an impediment and therefore justifies statutory tolling of the statute of limitations for the period during which the impediment existed.[304] Thus, where competent counsel is unavailable to assist an inmate in comprehending and navigating the statute of limitations within the defined year, the statute of limitations would be tolled until the inmate receives this assistance.

Second, a lack of competent post-conviction counsel could provide a basis for equitable tolling of the statute of limitations. The plight of the pro se inmate in filing within the statute of limitations has already found some traction in equitable tolling doctrine. For example, federal courts have applied equitable tolling where counsel fails to return petitioner's file in time to enable petitioner to timely file his federal petition[305] or where the prison library lacks even a copy of AEDPA.[306] Most recently, the Supreme Court held that extraordinary ineffective assistance of court-appointed post-conviction counsel, which resulted in a time-barred federal petition in a

[302] Where attorney error or lack of legal assistance altogether causes omission of a claim from a first § 2254 petition, thus requiring petitioner to file a second or successive petition, the only relief available would apply within an ineffective assistance of counsel framework because the substantive criteria under AEDPA for filing a second or successive petition is limited, in relevant part, to claims showing actual innocence. *See* 28 U.S.C. § 2244(b)(2).

[303] *See* EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 6; HABEAS LITIGATION TECHNICAL REPORT, at 46, 57.

[304] *See* note 51, *supra*. As argued in this article, these cases do not go far enough. Providing a typical inmate with a copy of the revised statutes provides at best superficial exposure to an enormously complicated body of law, one which has evolved primarily through judicial decisions.

[305] *See* Porter v. Ollison, 620 F.3d 952, 957-58 (9th Cir. 2010) (remanding for district court to develop facts to determine whether equitable tolling appropriate based on habeas counsel's failure to return case file in time to enable petitioner to timely file his § 2254 petition); Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (finding equitable tolling appropriate based on habeas counsel's failure to file § 2255 petition or return petitioner's file throughout the duration of the limitations period and two months beyond); *cf.* Ford v. Pliler, 590 F.3d 782, 790 (9th Cir. 2009) (denying equitable tolling based on counsel's failure to return case file because petitioner had not shown failure caused him to miss the one-year deadline).

[306] *See* Whalum/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000).

capital case, may justify equitable tolling.[307] But thus far, courts have declined to apply equitable tolling based on "ordinary" ineffective assistance of counsel.[308] Recognition of an access-based right to counsel would provide a basis for equitable tolling where a petitioner files his petition outside the one-year period of time as a result of misapprehension of the requirements of the statute of limitations, based in turn on denial of counsel or incompetent assistance of counsel.[309]

Recognition of an access right to counsel would not offer relief from the exhaustion requirement. But with statutory and equitable tolling available based on post-conviction counsel's error, a state petitioner who fails to exhaust all federal claims due to incompetent counsel would remain able to return to state court to finish exhausting his claims without being time-barred from re-filing under AEDPA.

*b. Relief From Procedural Default Doctrine*

Similarly, even absent a miscarriage of justice, recognition of an access right to counsel would enable petitioners to pursue claims that are otherwise procedurally defaulted to the extent the default is the result of faulty advice by postconviction counsel and would suffer prejudice from the default.[310] As discussed,[311] under AEDPA, the procedural default doctrine permits review of otherwise defaulted claims where a petitioner can demonstrate cause and prejudice or actual innocence.[312] The Supreme Court has not clearly defined either "cause" or "prejudice."[313] Although the Court has not articulated a comprehensive list of circumstances that qualify as "cause,"[314] such event generally must be some "objective factor" external to the defense.[315] Nonetheless, the Court has recognized as sufficient cause situations in which the state impeded or prevented compliance with the procedural rule in question[316] or where defense counsel error caused the default at a stage where petitioner was constitutionally or statutorily entitled to effective assistance of counsel.[317] Similarly, "cause" to excuse a procedural default arises where the state denied petitioner a constitutional or

[307] *See* Holland v. Florida, 130 S. Ct. 2549 (2010).

[308] *Id.* at 2564.

[309] Inmates who miss the deadline as a result only of their own lack of due diligence would not qualify for equitable tolling. *See* Holland v. Florida,130 S. Ct. 2549, 2562 (2010) (noting equitable tolling applies if petitioner shows "'that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing") (*quoting* Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[310] An exception may apply where the petitioner is able to argue that state postconviction procedures are sufficiently complex that the access right also requires assistance of counsel in navigating those hurdles.

[311] *See* text accompanying notes 137-143, *supra*.

[312] *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wainright v. Sykes, 372 U.S. 391 (1963).

[313] II James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §26.3b-c at 1316-1357 (5th ed. 2005).

[314] *Id.*; Smith v. Murray, 477 U.S. 527, 534 (1986).

[315] *Id.*; Murray v. Carrier, 477 U.S. 478, 488 (1986).

[316] *See* Banks v. Dretke, 540 U.S. 668, 691-98 (2004) (finding state's failure to disclose exculpatory evidence under *Maryland v. Brady* qualified as "cause"); Strickler v. Greene, 527 U.S. 263, 283, 289 (1999) (same).

[317] Coleman v. Thompson, 501 U.S. 722, 754 (1991).

statutory right to counsel altogether, thus forcing him to proceed pro so.[318] As such, assuming prejudice, recognition of an access-to-the courts right to assistance of counsel in federal habeas proceedings would qualify as "cause" to excuse procedural defaults caused by either attorney error or a federal habeas petitioner's pro se status.[319]

### *c. Policy-Based Reforms*

As anyone who does death penalty work can attest, states have failed miserably at providing adequate, effective assistance of counsel to criminal defendants at trial and on direct appeal.[320] The situation has only grown worse with escalating rates of incarceration and nationwide state budget crises. Thus, at least under the criminal justice system as currently configured, providing attorneys in all federal post-conviction proceedings may well be financially untenable. But as Justice Marshall observed in *Bounds v. Smith*, "the cost of protecting a constitutional right cannot justify its total denial."[321] At least several possibilities exist to enable constitutional compliance without public financial ruin.

First, because inmates must still be "in custody" as well as have completed the direct appellate process in order to file a federal habeas petition, federal habeas petitioners are typically those serving long sentences. Thus, a good starting point would be to re-evaluate the state sentencing codes. Specifically, states could choose to incarcerate fewer people and for shorter periods of time by revisiting the misguided policies of the 1980s and 1990s that resulted in the large-scale incarceration of the American people.[322] This approach would free up resources throughout the criminal justice system without compromising its integrity.

Second, states could simply decline to provide counsel to inmates as required under an access doctrine but instead, provide the equitable or statutory relief from AEDPA's procedural strictures as articulated above.

Lastly, and perhaps most simply, Congress could repeal AEDPA. Indeed, I suspect that if the Supreme Court were to recognize an access-based constitutional right to counsel in light of AEDPA's procedural complexities, repeal of AEDPA's statute of limitations would quickly follow.

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[318] *Id.*

[319] *See* Maples v. Thomas, 131 S. Ct. 1718 (Mar. 21, 2011) (granting certiorari on whether capital habeas counsel's abandonment of petitioner, in part, constitutes cause to excuse procedural default).

[320] *See* note 6, *supra*.

[321] *Bounds v. Smith*, 430 U.S. 817, 825 (1976).

[322] *See* Pew Center on the States, One in 100: Behind Bars in America 2008 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/One%20in%2011.pdf (finding one in one hundred -- 2.3 million -- adults in the United States are now behind bars, making the United States the world leader in incarceration rates); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment Proceedings*, 44 LAW & SOC'Y REV. 695, 699 (Sept./Dec. 2010) (discussing Pew Center study's findings). *See also* Michael Tonry, *Why are Incarceration Rates So High?*, 45 CRIME & DELINQ. 419 (1999) (exploring explanations for dramatic increase in U.S. incarceration rates since the 1970s, including the drug war declared in the 1980s and increasing popularity of recidivist statutes such as California's 3 Strikes Law).

## CONCLUSION

In the trial context, the Supreme Court has recognized that "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[323] What has emerged in federal habeas practice for noncapital, pro se litigants is precisely such a slaughter. In the absence of a right to assistance of counsel, the myriad procedural requirements under AEDPA render too many pro se litigants helpless in pursuit of the Great Writ, effectively denying them their right of access to the courts. The effect of denying assistance of counsel in ascertaining and complying with AEDPA's one-year statute of limitations and accompanying procedural rules is no less potent an impediment to judicial review than the obstacles struck down in the access cases. Thus, absent the fortuity of competent jailhouse counsel, the average pro se inmate lacks an "adequate opportunity to present his claims fairly" in federal habeas proceedings.[324] Without assistance of counsel in navigating through AEDPA's procedural thicket, the pro se petitioner must shoot into the dark at what has revealed itself to be an elusive and moving target. When he misapprehends the strictures of AEDPA, the courthouse doors slam shut, with no remedy available to reopen them.

In short, the reality of post-AEDPA habeas practice demands recognition of a right to counsel to ensure the indigent litigant's access to the courts. A right to counsel based on access-to-the-courts doctrine is an inherently limited one in that, after *Lewis v. Casey*, the right of access guarantees nothing more than gaining literal entrance through the courthouse door.[325] Hence, if recognized, such a right would require competent legal assistance for indigent inmates in navigating and comprehending AEDPA's procedural requirements, but nothing more. This right, combined with the equal protection and due process right outlined in my first article, which would attach to all claims for which habeas corpus functions as a first appeal of right, combine to provide the indigent litigant with a meaningful opportunity to pursue the Great Writ.

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[323] United States v. Cronic, 466 U.S. 648, 657 (1984) (reversing Tenth Circuit's presumption of ineffectiveness where young and inexperienced trial counsel had only 25 days to prepare complex, serious case and some witnesses were not easily accessible) (internal quotation omitted).

[324] *Id.*

[325] Lewis v. Casey, 518 U.S. 343 (1996).