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Criminal law - New Evidence in Gateway Claim of Actual Innocence Requires Evidence Not Previously Available at Trail - Kidd v. Norman, 651 F.3D 947 (8th Cir. 2011)

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CRIMINAL LAW—NEW EVIDENCE IN GATEWAY CLAIM OF ACTUAL INNOCENCE REQUIRES EVIDENCE NOT PREVIOUSLY AVAILABLE AT TRIAL—*KIDD V. NORMAN*, 651 F.3D 947 (8TH CIR. 2011)

The writ of habeas corpus is a mechanism that allows prisoners to challenge the legality of their incarcerations.[1] The actual-innocence doctrine, which provides petitioners the ability to obtain review of procedurally defaulted claims, permits limited access to the writ in circumstances where a petitioner can produce new reliable evidence demonstrating probable innocence.[2] In *Kidd v. Norman*,[3] the United States Court of Appeals for the Eighth Circuit considered the meaning of "new" evidence as it pertained to a petitioner's gateway claim of actual innocence.[4] The court held that the petitioner failed to present new reliable evidence that would entitle him to review of his underlying constitutional claim because the evidence he provided could have been discovered at trial.[5]

In 1999, a Missouri state court sentenced Ricky L. Kidd to life in prison after a jury found him guilty of participating in the killing of two

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[1] *See* 28 U.S.C. §§ 2241-2255 (2006) (outlining federal habeas corpus substantive law and procedures). "Habeas corpus" is a Latin phrase that literally means "you have the body." BLACK'S LAW DICTIONARY 778 (9th ed. 2009). The United States Supreme Court has observed, "It is clear . . . from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973); *see also infra* text accompanying notes 15-30 (outlining federal habeas corpus law generally).

[2] *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) (setting forth actual innocence standard as "gateway" for obtaining review of defaulted claims). The standard provides that in order to obtain review of a procedurally defaulted claim of constitutional error, a petitioner must demonstrate that, in light of new reliable evidence that was not presented at trial, it is more likely than not that no reasonable juror would have convicted him. *Id.*

[3] 651 F.3d 947 (8th Cir. 2011).

[4] *See id.* at 952 (noting circuits have disagreed upon meaning of "new" evidence in gateway innocence claims).

[5] *See id.* at 953 (concluding petitioner's evidence could have been discovered through the exercise of due diligence). The court further noted that it was bound by Eighth Circuit precedent. *See id.* (citing Eighth Circuit's prior rulings); United States v. Reynolds, 116 F.3d 328, 329 (8th Cir. 1997) (stating "one panel may not overrule another"); *see also* Amrine v. Bowersox, 238 F.3d 1023, 1029 (8th Cir. 2001) (positing evidence is new only if undiscoverable at trial through exercise of due diligence).

men.[6] Kidd filed a direct appeal, which the court denied.[7] Kidd subsequently filed a motion for post-conviction relief, alleging that his direct appeal counsel was ineffective for failing to argue that Kidd should not have been sentenced as a prior offender.[8] The Missouri Court of Appeals concluded that Kidd suffered no prejudice from his appellate counsel's failure to challenge Kidd's prior offender status, and affirmed the denial of his motion for post-conviction relief.[9]

Following the court's denial, Kidd filed a habeas petition in federal district court raising five new claims alleging the ineffectiveness of his trial counsel.[10] Kidd conceded that his claims had been procedurally defaulted by failing to raise them in his state court post-conviction proceeding, but claimed that he could overcome the default by introducing new evidence demonstrating his innocence.[11] The federal district court held an

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[6] *See* State v. Kidd, 990 S.W.2d 175, 177 (Mo. Ct. App. 1999) (explaining specific offenses of which Kidd was convicted). At the conclusion of Kidd's trial, the jury found that on February 6, 1996, Kidd and a co-defendant, Marcus Merrill, shot and killed George Bryant and Oscar Bridges in Bryant's home in Kansas City, Missouri. *Id.* at 177-78. The evidence against Kidd included testimony from the victim's daughter, a four-year-old, and from the victim's neighbor, both of whom identified Kidd as one of the perpetrators. *Id.* The jury convicted Kidd of two counts of class A felony murder and two counts of armed criminal action. *Id.*; *see also* MO. REV. STAT. § 565.020 (1994) (mandating that persons under sixteen convicted of murder receive life in prison without parole); MO. REV. STAT. § 571.015 (1994) (providing armed criminal action consists of using deadly weapon to commit felony).

[7] *See Kidd*, 990 S.W.2d at 180-86 (explaining court's reasoning for denying Kidd's appeal). In his appeal, Kidd alleged that the trial court committed three distinct errors: (1) it admitted hearsay statements not within any exception; (2) it abused its discretion by denying Kidd's request for severance from his co-defendant; and (3) it allowed unduly prejudicial testimony referring to Kidd as the "Terminator." *Id.* at 177. The appellate court rejected each of these arguments in turn, ruling that if there were errors, they were not unfairly prejudicial. *Id.* at 181, 184, 186.

[8] State v. Kidd, 75 S.W.3d 804, 806 (Mo. Ct. App. 2002) (outlining basis of Kidd's appeal). Kidd pointed out that the information did not charge that he was a prior offender and that he had no notice of the State's intention to prove prior offender status. *Id.*

[9] *See id.* (noting Kidd would have received life without parole independent of counsel's error). Notably, Kidd did not challenge the effectiveness of his *trial* counsel in his post-conviction action. *See id.* at 808-09 (explaining basis of Kidd's appeal).

[10] *See Kidd*, 651 F.3d at 949 (enumerating Kidd's claims). Kidd's ineffective assistance of counsel claims relied primarily on the assumption that his trial counsel failed to present evidence that would have proved his innocence. *Id.* at 951. Specifically, Kidd alleged that his trial counsel failed to present the evidence that would impeach the eyewitness, Richard Harris; neglected to present evidence that would have placed Kidd in downtown Kansas City thirty minutes before the shooting; and overlooked evidence that would have implicated other individuals in the murders. *Id. See generally* Strickland v. Washington, 466 U.S. 668, 687 (1984) (articulating standards governing ineffective assistance of counsel claims). To establish a claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. *See id.* (stating strong presumption that counsel's conduct is professionally reasonable).

[11] *See Kidd*, 651 F.3d at 949 (noting Kidd's admission of procedural default). The procedural

evidentiary hearing and denied Kidd's habeas petition, ruling that most of his evidence was not new and that his only piece of new evidence was unreliable.[12] Kidd appealed the decision, challenging the district court's strict interpretation of new evidence.[13] The Eighth Circuit upheld the district court's ruling, asserting that a petitioner seeking to resurrect procedurally defaulted claims must present new evidence that was not available at trial through the exercise of due diligence.[14]

The common law writ of habeas corpus allows a prisoner or detainee to come before a court for inquiries into the lawfulness of the detainment.[15] By requiring that there be sufficient legal cause to detain a person, the writ safeguards the integrity of the criminal justice process, and thus came to be regarded in the United States as the "symbol and guardian of individual liberty."[16] The Constitution protects the writ, providing that

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default rule posits that a state prisoner may be barred from seeking federal review of his federal constitutional claims denied by the state court for failure to comply with a state procedural requirement, including the timing of a post-trial motion. *See* Coleman v. Thompson, 501 U.S. 722, 731-32 (1991) (reaffirming procedural default rule). Missouri Supreme Court Rule 29.15 allows convicted felons held in detention in violation of the United States Constitution or the constitution or laws of that state to pursue post-conviction relief. *See* MO. SUP. CT. R. 29.15(a) (providing relief for those claiming ineffective assistance of counsel). These post-conviction proceedings compel a defendant to raise all claims known to the defendant. *See id.* at 29.15(b) ("Failure to file a motion within the time provided by this Rule . . . shall constitute a complete waiver of any right to proceed . . . and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15."); *see also* Wiglesworth v. Wyrick, 531 S.W.2d 713, 715-16 (Mo. 1976) (en banc) (compelling defendants to raise claims or lose them). Failure to raise a claim constitutes waiver, and a defendant cannot raise such claims in a subsequent petition for habeas corpus relief. *See* Smith v. State, 887 S.W.2d 601, 602-03 (Mo. 1994) (en banc). *But cf. infra* text accompanying note 25 (explaining federal courts' exceptions allowing review of procedurally defaulted claims).

[12] *See Kidd*, 651 F.3d at 950 (explaining district court's ruling). The district court found Kidd's only new evidence—testimony from Merrill—unreliable because it was likely offered to further Merrill's own interests. *Id.* Because Kidd's other evidence was available to him at trial, it was not new, and could not be considered by the court. *Id.*

[13] *Id.* Kidd argued that "new evidence in support of a *Schlup* claim of actual innocence should include any evidence not *presented* at the original trial." *Id.* (emphasis added).

[14] *See id.* at 953 (concluding district court properly applied Eighth Circuit precedent).

[15] *See* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 58 (Eng.) (codifying law of habeas corpus in England). The act states, "[W]hensoever any person . . . shall bring any habeas corpus [claim]" before a court, the court shall "certify the true causes of his detainer or imprisonment." *Id.* The common law writ of habeas corpus accompanied the British settlers to America. *See* Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2109 (2002) (observing early history of the writ).

[16] *See* Peyton v. Rowe, 391 U.S. 54, 58 (1968) (stating writ ensures petitioner may require his jailor to justify the detention). The Court has commented that "[a]lthough in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." Fay v. Noia, 372

"[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[17] The Constitution, however, neither authorizes the federal courts to issue writs, nor defines the scope of federal habeas corpus review.[18] Recognizing the importance of safeguarding individual liberties, Congress enacted various pieces of legislation establishing the power of the federal courts to issue such writs.[19] Although such legislation unambiguously provided federal courts the power to issue writs, it failed to prompt the judiciary to expand the scope of habeas review beyond its original parameters; for years, federal courts continued to limit the scope of the writ as performing only the narrow function of testing the jurisdiction of the sentencing court.[20]

U.S. 391, 401-02 (1963). Courts have invoked habeas corpus to protect individual liberties from a variety of abuses. *See, e.g.*, Smith v. O'Grady, 312 U.S. 329, 333 (1941) (affording habeas relief where defendant convicted without benefit of counsel); *Ex parte* Wilson, 114 U.S. 417, 429 (1885) (granting writ because defendant prosecuted without grand jury indictment); *Ex parte* Lange, 85 U.S. 163, 176-78 (1873) (holding lower court lacked jurisdiction in sentencing defendant twice for the same offense).

[17] U.S. CONST. art. 1, § 9, cl. 2. At the time of drafting the Constitution, there was considerable historical basis demonstrating the need for the suspension clause: the English Parliament had frequently suspended the writ during the seventeenth and eighteenth centuries, permitting confinement without judicial process. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 339 (1952) (noting further suspensions in eighteenth century, including one prompted by American Revolution); *see also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980) (providing in-depth history of habeas corpus).

[18] *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80 (1807) (holding power to issue writ stems from common law, not Constitution); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1081 (1995) (stating habeas corpus has never been considered constitutional right); Zheng, *supra* note 15, at 2109 (reiterating common-law origins of habeas corpus).

[19] *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789) (making habeas corpus available to federal prisoners). Commentators suggest that concerns about the government suspending habeas corpus over federal prisoners, which prompted the suspension clause in the Constitution, led to the enactment of section 14 of the Judiciary Act of 1789. *See* Collings, *supra* note 17, at 339 (citing delegate Charles Pinkney as example of politician concerned with suspension of writ). Congress amended habeas corpus legislation less than a century later. *See* Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385 (1867) (expanding federal courts' habeas jurisdiction to state prisoners). The Habeas Corpus Act of 1867 permitted federal courts to grant writs "in all cases where any person may be restrained . . . in violation of the constitution, or of any treaty or law of the United States." § 1, 14 Stat. at 385. It was of "well known origin" that the purpose of expanding the purview of habeas was to protect freedmen and loyal unionists in the Confederate states. *See* Forsythe, *supra* note 18, at 1116-17 (suggesting Habeas Corpus Act of 1867 was promulgated to enforce Reconstructionist measures); *see also* Act of June 25, 1948, ch. 646, § 1, Pub. L. No. 80-773, 62 Stat. 869, 964-67 (1948) (codifying federal habeas corpus statutes and judicial habeas practice in 28 U.S.C. §§ 2241-2255).

[20] *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371, 375 (1879) ("[A] conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment . . . ."); *In re* Metzger, 46 U.S. (5 How.) 176, 191 (1847) (declining to grant habeas review, "[h]owever erroneous the judgment", if

In the mid-twentieth century, as concerns over individual liberties gave traction to the concept of due process, the Court began to broaden the scope of habeas review.[21] Through several important decisions, the Court abandoned the limitation of habeas review to jurisdictional challenges.[22] This decision to broaden the scope of habeas review produced unintended consequences, however, as petitioners once limited in their ability to bring habeas claims began filing claims en masse, flooding the federal judiciary.[23] Specifically, repetitious and successive claims not only overwhelmed the federal courts, but also created a threat to the finality of

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jurisdiction was proper); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (stating judgment of court of competent jurisdiction sufficient to refuse writ); *see also* Schlup v. Delo, 513 U.S. 298, 317 (1995) (acknowledging Court's early application of writ as testing solely for jurisdiction); McCleskey v. Zant, 499 U.S. 467, 478 (1991) (noting Court's limited use of writ originally); Stone v. Powell, 428 U.S. 465, 474-82 (1976) (affirming habeas originally available only to remedy jurisdictional defects in legal process). The test of jurisdiction was rooted in the trust and respect higher courts held for the decisions of lower courts of competent jurisdiction. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 257 (1980). *See generally* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459-68 (1966) (observing that until early twentieth century, habeas courts confined to considering jurisdiction of sentencing court).

[21] *See McCleskey*, 499 U.S. at 478-79 (noting scope of review expanded to encompass claims of constitutional error); Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (observing broadening application of writ); Townsend v. Sain, 372 U.S. 293, 307-09 (1963) (granting federal courts broad authority to review constitutional issues arising in state criminal convictions), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). *See generally* Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 343-44 (1983) (portraying Warren Court era as "zenith" of writ's expansion). Rosenn explains that during this era, federal habeas corpus acquired enormous flexibility and power. *See id.* at 353 (attributing power of writ to Court's expanded interpretation of due process rights); *see also infra* note 22 and accompanying text (discussing broadening scope of writ through abandonment of jurisdiction limitation); *cf.* Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 387 (1997) (noting Warren Court used writ "as its enforcement arm for the provisions of the Bill of Rights").

[22] *See* Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (expressly abandoning jurisdiction limitation on scope of habeas corpus claims). The Court held that "the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court." *Id.*; *see also, e.g.*, Sanders v. United States, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."); Brown v. Allen, 344 U.S. 443, 463-65 (1953) (holding all constitutional claims were grounds for federal habeas corpus relief); Frank v. Mangum, 237 U.S. 309, 335 (1915) (recognizing habeas corpus relief would be available to prisoners convicted after inadequate court proceedings).

[23] *See Brown*, 344 U.S. at 536 (Jackson, J., concurring) (expressing concern over "flood of stale, frivolous and repetitious petitions" on courts' dockets); S. REP. NO. 89-1797, at 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3663, 3663-64 (citing steady increase in habeas petitions starting in 1941 through fiscal year 1966); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 143-44 (1970) (discussing increase in habeas corpus petitions filed by state prisoners over five-year period).

state court judgments and to the principles of comity and federalism.[24] Recognizing the need to curb such abuse, both Congress and the federal courts set forth a variety of procedural barriers in an effort to once again limit access to federal habeas corpus review.[25]

Procedural barriers restored the number of habeas claims to a manageable level by barring the majority of frivolous habeas claims; however, they did so to the exclusion of legitimate habeas claims as well.[26]

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[24] *See McCleskey*, 499 U.S. at 492 (noting adverse effect of repetitious filings on administration of justice in federal courts); Murray v. Carrier, 477 U.S. 478, 487 (1986) (observing federal habeas review detracts from states' ability to review and adjudicate state claims), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Engle v. Isaac, 456 U.S. 107, 128 (1982) (stating "Great Writ imposes special costs on our federal system"). The *Engle* Court posited that federal intrusion into state criminal trials frustrates both the state's sovereign power to punish offenders and its good-faith attempts to honor constitutional rights. *Engle*, 456 U.S. at 128.

[25] *See* 28 U.S.C. § 2244(b) (2006) (authorizing federal district courts to dismiss second or successive petitions in most circumstances); S. REP. NO. 89-1797, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3663, 3664 (amending section 2244 to introduce "a greater degree of finality of judgments in habeas corpus proceedings"). Responding to Congress's attempt to ensure the finality of judgments, the Court identified several rules restricting petitioners' access to habeas review. *See* Schlup v. Delo, 513 U.S. 298, 318 (1995) (discussing case law limiting petitioners' access to the writ). Under the procedural default rule, the Court barred habeas claims raising issues that were not properly raised in state court. *See McCleskey*, 499 U.S. at 490 (discussing purpose of procedural default rule to achieve procedural regularity); Coleman v. Thompson, 501 U.S. 722, 730 (1991) (barring habeas relief where prisoner failed to meet state procedural requirement); Francis v. Henderson, 425 U.S. 536, 542 (1976) (excluding petitioner's claim for failure to make timely objection in state court); *see also* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 1403, 1535 (6th ed. 2011) (providing detailed analysis of procedural default rule). The Court also identified two categories of abusive petitions that warrant dismissal: petitions that raise identical grounds to those raised and dismissed on the merits in a prior habeas corpus petitions (successive petitions), and petitions that raise grounds that were previously available but not relied upon in previous habeas petitions (second petitions). *See* Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (identifying categories of petitions warranting dismissal). Until 1986, petitioners who had run afoul of either the second petition rule or the procedural default rule could only obtain review if they could show cause for failing to raise their claims in earlier proceedings, and prejudice resulting therefrom. *See Carrier*, 477 U.S. at 485 (applying cause-and-prejudice exception to procedurally defaulted claims); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (invoking cause-and-prejudice exception to procedurally defaulted claim); *McCleskey*, 499 U.S. at 490-91 (stating admission of second petition subject to cause-and-prejudice exception). Cause requires the petitioner to demonstrate an external factor that impeded counsel's efforts to raise a claim, while prejudice requires a petitioner to show that trial error worked to his *actual*, as opposed to *possible*, disadvantage. *See Carrier*, 477 U.S. at 488 (defining "cause"); United States v. Frady, 456 U.S. 152, 170 (1982) (discussing prejudice).

[26] *See, e.g.*, *Engle*, 456 U.S. at 133-34 (denying relief because counsel's failure to raise claim did not constitute cause for procedural default); Stone v. Powell, 428 U.S. 465, 494 (1976) (denying habeas relief despite evidence at trial showing unconstitutional search and seizure); Francis v. Henderson, 425 U.S. 536, 542 (1976) (denying habeas relief because petitioner could not demonstrate prejudice); *cf.* Zheng, *supra* note 15, at 2122-23 ("The cause-and-prejudice standard creates a nominal exception to the procedural barriers. . . . The Court's stringent application of the

Aware that such barriers would unduly prejudice some wrongly convicted prisoners, the Court, in a trio of 1986 decisions, once again broadened the scope of permissible habeas claims by creating an "actual innocence" exception that would allow petitioners who could demonstrate probable innocence to obtain review of otherwise procedurally-barred claims.[27] However, in issuing these decisions, the Court failed to clearly articulate the evidentiary burden placed on petitioners making gateway claims of actual innocence, which resulted in diverging approaches.[28] In 1995, the Court clarified its evidentiary standard for actual innocence claims, positing that in order to obtain review of procedurally defaulted claims, a petitioner must present "new reliable evidence" in light of which it is more likely than not that no reasonable juror would have convicted him.[29] Once again, the Court was unsuccessful in establishing clear precedent because it

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cause-and-prejudice exception is consistent with its view that the rule is premised on concerns for comity and finality rather than on concerns for the petitioner's constitutional rights.").

[27] *See Carrier*, 477 U.S. at 495 ("'[I]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" (quoting *Engle*, 456 U.S. at 135)). The *Carrier* Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default" to prevent a miscarriage of justice. *Id.* at 496. The Court noted that the question of whether an incarceration is "fundamentally unjust" almost always centers on the innocence or guilt of the prisoner. *Id.* at 495-96; *see also* Smith v. Murray, 477 U.S. 527, 537 (1986) (approving review if constitutional violation likely resulted in conviction of one who is actually innocent); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (noting "ends of justice" require federal courts to hear successive petitions if factual innocence shown). Five years later, the Court affirmed its actual innocence exception. *See* McCleskey v. Zant, 499 U.S. 467, 494-95 (1991) (approving actual innocence exception to circumvent bar against second petition). *See generally* Friendly, *supra* note 23, at 150 (advocating innocence standard as principle for courts to "screen out . . . applications not deserving their attention").

[28] *Compare* Sawyer v. Whitley, 505 U.S. 333, 350 (1992) (requiring habeas petitioner show innocence by *clear and convincing* evidence), *with Carrier* 477 U.S. at 496 (requiring showing that constitutional error *probably* resulted in wrongful conviction), *and Kuhlmann*, 477 U.S. at 454 (requiring petitioner to make "colorable claim of factual innocence"). The petitioner in *Sawyer* claimed he was not deserving of the punishment, as opposed to claiming innocence of the crime; a fact that likely contributed to the Court's more stringent evidentiary requirement. *See Sawyer*, 505 U.S. at 336 (outlining petitioner's claim of innocence). The Eighth Circuit subsequently applied the *Sawyer* standard in a case where the petitioner claimed innocence of the crime. *See* Schlup v. Delo, 11 F.3d 738, 740 (1993) (adopting *Sawyer* standard), *vacated*, 513 U.S. 298, 332 (1995).

[29] *See* Schlup v. Delo, 513 U.S. 298, 324, 329 (1995) (holding *Carrier* probable innocence standard applied when petitioner claimed innocence of the crime). In *Schlup*, the petitioner claimed that the ineffectiveness of his counsel, and the withholding of evidence by the prosecution, denied him the "full panoply of protections" afforded to criminal defendants by the Constitution. *Id.* at 314. Accordingly, Schlup's claim of innocence was not "'itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

did not precisely define what it meant by "new" evidence; consequently, courts have split as to what "new" evidence should require.[30]

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[30] *Compare* Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003) (positing evidence is new so long as it was not presented at trial), *and* Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003) (asserting evidence not presented at trial is new), *and* Garcia v. Portuondo, 334 F. Supp. 2d 446, 454 (S.D.N.Y. 2004) (holding evidence may be new so long as original fact finder never considered it), *with* Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004) (maintaining evidence only new if it was not available at trial), *and* Bannister v. Delo, 100 F.3d 610, 618 (8th Cir. 1996) ("[p]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in *Schlup*." (quoting Bannister v. Delo, 904 F. Supp. 998, 1004 (W.D. Mo. 1995))). One of the reasons for the split in the circuit courts is because the Supreme Court, in articulating the *Schlup* standard, has never had the opportunity to consider newly-presented evidence. *See Schlup*, 513 U.S. at 306-07 (considering newly-discovered testimonial evidence); *see also* House v. Bell, 547 U.S. 518, 557 (2006) (evaluating claim in light of previously unavailable evidence including new DNA evidence). As evidence that the Court meant to include newly-presented evidence in its definition of new evidence, jurists cite the Court's use of the word "presented," as well as its favorable reference to Judge Henry J. Friendly's article stating habeas courts should consider "all evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongfully excluded or to have become available only after the trial." Friendly, *supra* note 23, at 160; *see Gomez*, 350 F.3d at 679 (opining absence of word "discovered" was not "mere oversight"). Other courts, including the Eighth Circuit, have formulated bright-line tests without reference to the precise verbiage used by the majority in *Schlup*. *See* Amrine v. Bowersox, 238 F.3d 1023, 1028 (8th Cir. 2001) ("'[E]vidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence.'" (quoting Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997))). In *Amrine*, the petitioner attempted to revive numerous procedurally defaulted claims alleging ineffective assistance of trial counsel, asserting specifically that trial counsel was ineffective for failing to: (1) investigate Amrine's social, family, and medical history; (2) request jury instructions regarding the credibility of inmate snitches; (3) take appropriate steps to prevent him from being tried by an all white jury; (4) object to the prosecutor's improper closing arguments, and for allowing Amrine to walk past the venire panel in full restraints, as well as asserting Amrine's privilege against self-incrimination in the presence of the jury. *Amrine*, 238 F.3d at 1029 n.3. Amrine also raised non-procedurally defaulted claims of ineffective assistance of counsel, alleging that counsel failed to elicit exculpatory evidence. *See id.* at 1030 (enumerating Amrine's non-procedurally defaulted claims). The court declined to consider claims which were procedurally barred on the basis that petitioner failed to present new evidence, and rejected petitioner's non-procedurally defaulted claims alleging ineffective assistance of counsel because petitioner was not prejudiced by counsel's performance. *See id.* at 1030-31 (concluding Amrine failed to show prejudice resulting from attorney's deficient performance). *See generally* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing strong presumption that counsel's conduct is within parameters of professional requirements). *Amrine*'s bright-line rule on new evidence subsequently became precedent, as Eighth Circuit courts invoked its holding to all procedurally defaulted claims of ineffective assistance of counsel. *See* Osborne v. Purkett, 411 F.3d 911, 919-20 (8th Cir. 2005) (applying *Amrine* rule to claim of ineffective counsel for failure to present exculpatory evidence); Nance v. Norris, 392 F.3d 284, 290-91 (8th Cir. 2004) (applying *Amrine* where counsel allegedly failed to present evidence that would have proved petitioner's innocence). One court noted that it generally approved of *Amrine*'s narrower definition of new evidence, except where the underlying claim was ineffective assistance of trial counsel for failure to present exculpatory evidence. *See* Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010) (articulating unfairness of *Amrine* if applied too broadly). Commentators have also joined the debate, and like the federal courts, have failed to reach consensus regarding what constitutes "new" evidence. *Compare* Jay Nelson, Note, *Facing up to Wrongful Convictions:*

In *Kidd v. Norman*, the Eighth Circuit considered whether the petitioner met the actual innocence exception as a gateway to resurrecting procedurally defaulted claims of constitutional error that occurred in the underlying trial.[31] The court noted that under *Schlup v. Delo*, a petitioner making an actual innocence claim must submit new reliable evidence that was not presented at trial.[32] The court acknowledged that the circuits disagreed as to what the Supreme Court meant by "new" evidence, commenting that both interpretations were subject to criticism.[33] In a relatively brief opinion, the court relied on Eighth Circuit precedent in holding that Kidd failed to present new evidence, reasoning that the evidence was not new because although it was not presented at trial, it was available at trial through the exercise of due diligence.[34] The court implied that its narrower interpretation of "new" might not be equitable where the underlying constitutional claim is ineffective assistance of counsel for failure to raise exculpatory evidence, but nevertheless concluded that it was

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Broadly Defining "New" Evidence at the Actual Innocence Gateway, 59 HASTINGS L.J. 711, 720-29 (2008) (arguing evidence should be considered new so long as not presented at trial), *with* Jennifer Gwynne Case, Note, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 673 (2008) (arguing for narrower newly-discovered standard in gateway claims of innocence). Regardless of which position one supports, it seems that as of 2006, the result for petitioners is much the same; most fail to satisfy the *Schlup* standard and do not obtain review of their underlying claims. *See* Brief for Former Prosecutors and Professors of Criminal Justice as Amici Curiae Supporting Petitioner at 10, House v. Bell, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 2367033, at *10 [hereinafter House Amicus Brief] (observing less than ten percent of petitioners successfully raise *Schlup* gateway claims); David R. Dow et al., *Is It Constitutional to Execute Someone Who Is Innocent (And If It Isn't, How Can It Be Stopped Following* House v. Bell*)?*, 42 TULSA L. REV. 277, 289, 399-400 (2006) (showing as of October 9, 2006, every gateway petitioner since *House* failed *Schlup* standard).

[31] *See* Kidd v. Norman, 651 F.3d 947, 947-48 (8th Cir. 2011) (stating issue in case). *See generally supra* text accompanying note 29 (describing nature of gateway claim of actual innocence).

[32] *See Kidd*, 651 F.3d at 951-52 (discussing *Schlup* standard). Under the *Schlup* analysis, an actual innocence claim requires a petitioner "to support his allegation of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324.

[33] *See Kidd*, 651 F.3d at 952 ("The more restrictive definition . . . has been criticized when the procedurally defaulted claim . . . is an ineffective-assistance-of-counsel claim . . . for not discovering and presenting . . . exculpatory evidence . . . ."); *see also Gomez*, 350 F.3d at 679-80 (criticizing restrictive approach where underlying claim is ineffective counsel for failure to present exculpatory evidence). Conversely, the Third Circuit stated that the broader definition of "new" evidence espoused by the Seventh Circuit is flawed because "it is not anchored to a claim that there had been ineffective assistance of counsel by reason of counsel's failure to present evidence of the petitioner's innocence." *Houck*, 625 F.3d at 94.

[34] *See Kidd*, 651 F.3d at 953 (concluding district court correctly interpreted *Amrine* standard on "new" evidence); *Amrine*, 238 F.3d at 1028 (stating evidence only new if not available at trial through exercise of due diligence); *see also supra* text accompanying note 10 (listing "new" evidence Kidd attempted to elicit at initial habeas proceeding).

bound by Eighth Circuit precedent.[35]

The *Kidd* court's decision is in line with precedent that has too broadly restricted habeas corpus claims.[36] Although the Eight Circuit's narrow interpretation of "new" evidence is correctly oriented toward respecting state court judgments, its approach is misguided for a number of reasons.[37] As an initial matter, it is troubling that *Amrine v. Bowersox*, which established Eighth Circuit precedent, failed to consider the majority's specific language in *Schlup* that refers to newly "presented" evidence.[38] Rather, by adopting a newly-discovered rule, the Eighth Circuit requires petitioners to obtain new evidence post-conviction, a somewhat unrealistic expectation, while ignoring the importance of newly presented evidence in showing actual innocence.[39] Moreover, the burden

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[35] *See Kidd*, 651 F.3d at 953 ("Whatever the merits of a modified approach in situations like the one faced by Kidd, our panel is not at liberty to ignore *Amrine* because we have already applied *Amrine* in situations like Kidd's."); *see also Osborne*, 411 F.3d at 920 (invoking *Amrine* in claim of ineffective assistance of counsel for failure to present exculpatory evidence); *Nance*, 392 F.3d at 291 (applying narrow definition of new evidence where underlying claim was ineffective assistance of counsel). The modified approach of which the court spoke referred to a Third Circuit opinion stating, "[o]verall we are inclined to accept the *Amrine* definition of new evidence with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence." *Houck*, 625 F.3d at 94. The court concluded that it was bound to follow precedent according to the principle of stare decisis, which provides that a determination by a court on a point of law will be followed by a court of the same or lower rank if the subsequent case presents the same legal problem. *See Kidd*, 651 F.3d at 953; Hertz v. Woodman, 218 U.S. 205, 212 (1910) (explaining doctrine of stare decisis). For most court systems, stare decisis is not an inexorable command of adherence to the latest decision, yet for federal appellate courts, the law of circuit rule provides that the decision of one panel is binding on future panels unless and until the panel's opinion is reversed or overruled, either by the circuit sitting en banc or by the Supreme Court. *See* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 718-19 (2009) (explaining stare decisis in detail). The Eighth Circuit, like every other circuit, follows the law of circuit rule. *See* United States v. Pollard, 249 F.3d 738, 739 (8th Cir. 2001) (stating circuit follows earlier panel decisions until overturned by court en banc or by Supreme Court).

[36] *See Amrine*, 238 F.3d at 1029 (requiring newly-discovered evidence in gateway claims). Commentators have correctly noted that the newly-discovered evidence standard creates an unnecessary, additional hurdle for petitioners. *See* Nelson, *supra* note 30, at 728 (criticizing newly-discovered evidence approach as inconsistent with purposes of actual innocence standard).

[37] *See generally* Schlup v. Delo, 513 U.S. 298, 324 (1995) (explaining importance of society's interests in finality, comity, and conservation of scarce judicial resources).

[38] *See Amrine*, 238 F.3d at 1029 (elucidating standard without discussing *Schlup*'s use of word "presented" in analysis). The Seventh Circuit opined that it would not consider the absence of a newly "discovered" requirement in *Schlup* as mere oversight in light of the Court's prior holding in *Herrera*, which explicitly required newly-discovered evidence. Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003).

[39] *See* Nelson, *supra* note 30, at 722-24 (identifying various reasons petitioners would be unable to procure new evidence post-conviction). Namely, evidence is subject to degradation and

for proving actual innocence in gateway claims is sufficiently stringent without requiring a petitioner to present newly-discovered evidence.[40] Indeed, two studies examining cases during the ten years subsequent to *Schlup* demonstrated that the vast majority of petitioners failed to satisfy the actual innocence threshold, regardless of which standard was applied, and more recent cases corroborate that the newly-presented rule under *Schlup* remains a high threshold to satisfy.[41]

Even if the Eighth Circuit declines to adopt the newly-presented evidence rule in all circumstances, at a minimum it should apply this standard in cases where the underlying claim is ineffective assistance of counsel for failure to present exculpatory evidence.[42] Even the United States Court of Appeals for the Third Circuit, which generally adopts the more restrictive approach, conceded that it would be inclined to apply the more liberal approach to claims of ineffective assistance of counsel for failure to raise evidence, recognizing that it would be unfair to apply the newly-discovered rule.[43] Furthermore, the United States Court of Appeals for the Seventh Circuit captured the inequity of applying the more narrow rule in such instances when it stated, "[i]f procedurally defaulted

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destruction, witnesses disappear or die, and memories fade. *Id.* at 722-23. In addition, Nelson states that the overwhelming majority of successful gateway petitioners establish innocence through a combination of newly-presented evidence, newly-discovered evidence, and a re-examination of evidence adduced at trial. *Id.* at 723; *see, e.g.*, House v. Bell, 547 U.S. 518, 538 (2006) (considering all evidence, old and new, to determine petitioner's actual innocence); Souter v. Jones, 395 F.3d 577, 596 (6th Cir. 2005) (considering all evidence to find petitioner innocent); Garcia v. Portuondo, 334 F. Supp. 2d 446, 454-55 (S.D.N.Y. 2004) (analyzing all evidence in determining petitioner made credible actual innocence claim).

[40] *See Schlup*, 513 U.S. at 324 (observing rarity of constitutional errors leading to conviction of innocent persons). The *Schlup* standard is met only upon a showing that no reasonable juror would convict in light of the new evidence. *Id.* at 327; *see also House*, 547 U.S. at 538 (reiterating that *Schlup* is demanding, permitting review only in extraordinary case); *Gomez*, 350 F.3d at 680 (commenting on high standard imposed by *Schlup*).

[41] *See* House Amicus Brief, *supra* note 30, at *10 (noting only 9.2% of petitioners successfully raised gateway claims during ten years subsequent to *Schlup*); Dow et al., *supra* note 30, at 399-400 (demonstrating not one successful gateway claim during three months after *House*); *see also, e.g.*, *Gomez*, 350 F.3d at 680 (holding petitioner failed to present reliable evidence satisfying actual innocence burden); Griffin v. Johnson, 350 F.3d 956, 965 (9th Cir. 2003) (finding petitioner's evidence insufficient to support gateway claim); Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000) (rejecting petitioner's actual innocence gateway claim); *cf.* Houck v. Stickman, 625 F.3d 88, 95 (3d Cir. 2010) (stating even if court considered petitioner's evidence, it would fail to demonstrate petitioner's innocence).

[42] *See* Nelson, *supra* note 30, at 723 (positing newly-discovered rule strips miscarriage of justice exception of its purpose—identifying innocent prisoners).

[43] *See* Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010) ("As we have indicated, the rule that *Amrine* sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for *Schlup* purposes.").

ineffective assistance of counsel claims may be heard upon a showing of actual innocence, then it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation."[44] Finally, application of the broader definition of the rule would not present any great threat to comity or federalism, as ineffective assistance of counsel claims must overcome a very onerous barrier.[45]

The court's decision in *Kidd* is unfortunate not only because it perpetuates the wrong standard, but also because the court's hand was forced by previous Eighth Circuit decisions that applied the *Amrine* standard to claims beyond which the *Amrine* court had the opportunity to consider.[46] A thorough examination of *Amrine* reveals that the court never had the opportunity to evaluate the precise issue presented in *Kidd*, because the petitioner in the case, Joseph Amrine, did not attempt to resurrect a procedurally defaulted claim of ineffective assistance of counsel for failure to present exculpatory evidence.[47] Amrine did raise such a claim, however, it was not procedurally defaulted; accordingly the *Amrine* court resolved the issue on the grounds that Amrine was not prejudiced by counsel's flawed performance.[48] Conceivably, then, while the initial forcefulness of *Amrine* to claims like the one made by Kidd may have been tenable, the Eighth Circuit's repeated invocation of *Amrine* in deciding cases similar to Kidd's effectively foreclosed the *Kidd* court's ability to review Kidd's claims.[49]

In a society that would rather free the guilty than convict the innocent, the writ of habeas corpus is an invaluable safeguard protecting the innocent from erroneous incarceration. Indeed, the Supreme Court had

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[44] *Gomez*, 350 F.3d at 680.

[45] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing strong presumption that counsel's conduct is competent).

[46] *See supra* text accompanying note 30 (outlining specific ineffective assistance of counsel claims raised in *Amrine*). *Compare* Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011) (applying newly-discovered evidence rule to claims of ineffective counsel for failure to present evidence), *with* Amrine v. Bowersox, 238 F.3d 1023, 1029 (2001) (establishing newly-discovered evidence rule where petitioner attempted to resurrect other ineffective assistance of counsel claims).

[47] *See Amrine*, 238 F.3d at 1029 n.3 (enumerating Amrine's procedurally barred claims); *see also supra* text accompanying note 30 (indicating slight difference between Amrine and Kidd's claims).

[48] *See id.* at 1030-31 (holding Amrine's claim failed because he was not prejudiced by counsel's performance).

[49] *See* Osborne v. Purkett, 411 F.3d 911, 920 (8th Cir. 2005) (citing *Amrine*'s newly-discovered rule in rejecting petitioner's claim); Nance v. Norris, 392 F.3d 284, 291 (8th Cir. 2004) (applying *Amrine* to claim of ineffective assistance of counsel for failure to present exculpatory evidence); *see also* Sloan, *supra* note 35, at 718 (explaining binding nature of horizontal stare decisis on federal appellate courts).

this tenet in mind when it created the actual innocence exception, allowing review of procedurally defaulted claims of constitutional error. Problematically, however, jurisdictions that unequivocally adopt the newly-discovered evidence rule subvert the actual innocence doctrine's function of protecting individual rights. Where such grave liberty interests are at stake, jurisdictions, such as the Eighth Circuit, should seriously reconsider their position.

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