

No. 08-15943

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE A. SOULIOTES,

Petitioner-Appellant,

v.

ANTHONY HEDGPETH, Warden, *et al.*,

Respondents-Appellees.

On Appeal From the United States District Court
for the Eastern District of California
Case No. 06-CV-0667 OWW WMW HC
The Honorable Oliver W. Wanger

**BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER-APPELLANT'S
PETITION FOR REHEARING AND REHEARING EN BANC**

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I. STATEMENT OF INTEREST

The Innocence Network (the “Network”) is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners whose actual innocence may be proved through post-conviction evidence.¹ The Network and its members are dedicated to improving the reliability of the criminal justice system and preventing wrongful convictions by researching their causes and pursuing legislative and administrative reforms to enhance the truth-seeking functions of the criminal justice system. The scores of members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.

¹ All parties in this case consent to the filing of this *amicus curiae* brief. See Fed. R. App. P. 29(a).

II. INTRODUCTION

The panel decision presents questions of exceptional importance requiring en banc resolution by this Court. The decision construes the statute of limitations for federal habeas petitions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). The panel majority misreads AEDPA’s statute of limitations in two ways that unduly restrict the relief available to habeas petitioners who have diligently uncovered evidence of their actual innocence.

First, as argued by the dissent, the *Souliotes* majority mistakenly held that diligence in uncovering evidence of actual innocence cannot overcome procedural mistakes, such as Souliotes’s five-day belated filing in this case. The panel decision conflicts with governing Supreme Court case law, such as *Schlup v. Delo* and *House v. Bell*, which hold that an actual innocence showing provides a “gateway” for the petitioner to pursue his constitutional claims despite a procedural bar.

Second, the panel mistakenly held that courts must carve up a petitioner’s application on a claim-by-claim basis. The plain meaning of AEDPA’s statute of limitations, however, requires that the statute of limitations be analyzed with respect to the “application” as a whole, as the

Eleventh Circuit held in *Walker v. Crosby*, not to individual “claims” within the application. Thus, if a petitioner can show diligence sufficient to meet 28 U.S.C. § 2244(d)(1)(D), then his entire application must be heard.

If left to stand, the panel’s decision would provide strong incentives to multiply and fragment habeas petitions, precisely the opposite of the result intended by Congress in enacting the statute of limitations. The panel’s elimination of the *Schlup* actual innocence gateway for first habeas petitions would simply multiply the number of second or successive habeas petitions. Likewise, the panel’s statutory construction provides strong incentives for petitioners to fragment their requests for habeas relief into multiple petitions or bring claims before they are fully developed.

Accordingly, *amicus curiae* The Innocence Network respectfully requests that the Court grant the petition for rehearing en banc.

III. ARGUMENT

A. Overturning the Panel’s Incorrect Statutory Construction Presents an Issue of Exceptional Importance.

1. The panel mistakenly eviscerated the *Schlup* actual innocence gateway for first habeas petitions.

The courts’ equitable discretion plays a vital role in adjudicating habeas petitions. As recently recognized by the Supreme Court in *Holland*, because

“equitable principles have traditionally governed the substantive law of habeas corpus, . . . *we will not construe a statute to displace courts’ traditional equitable authority absent the clearest command.*” *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (internal quotations and citations omitted; emphasis added).

Nothing in AEDPA provides the “clear[] command” necessary to limit application of the *Schlup* actual innocence gateway. *Schlup v. Delo* was decided before the passage of AEDPA and reiterates the courts’ equitable discretion in adjudicating habeas petitions. 513 U.S. 298, 319 (1995) (“[T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy.”). Under *Schlup*, a showing of actual innocence provides “a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Id.* at 315. Thus, if a petitioner meets the strict actual innocence threshold, he has the right to proceed on his otherwise barred claims. Congress enacted AEDPA fully aware of *Schlup* and did not restrict the application of the actual innocence gateway to time-related defaults.

House v. Bell, 547 U.S. 518 (2006), decided long after the enactment of AEDPA, confirmed the continued vitality of the *Schlup* actual innocence

gateway. As explained by *House*, the principles supporting procedural bars, such as finality and comity, “must yield to the imperative of correcting a fundamentally unjust incarceration” in extraordinary circumstances. *Id.* at 536 (internal quotation and citation omitted). The *Schlup* actual innocence gateway provided the “specific rule to implement this general principle.” *Id.*

Indeed, *House* expressly rejected the argument that AEDPA superseded the *Schlup* actual innocence gateway. The respondent argued that AEDPA’s imposition of a clear-and-convincing standard of proof “replaced” the *Schlup* more-likely-than-not standard. *Id.* at 539-40. The Court disagreed, concluding that the two AEDPA provisions addressing actual innocence—which relate to second or successive petitions and evidentiary hearings—were inapposite outside their limited scope: “Neither provision addresses the type of petition at issue here—a *first federal habeas petition* seeking consideration of defaulted claims based on a showing of actual innocence.” *Id.* at 539 (emphasis added).

Contrary to *Schlup* and *House*, the panel incorrectly concluded that a showing of actual innocence cannot remedy a failure to meet AEDPA’s statute of limitations. The panel decision rests on three grounds, none of which supports this conclusion.

First, the panel held that the *Schlup* actual innocence gateway applies only to “second or successive habeas petitions and to state procedural requirements.” *Souliotes*, slip op. at 15958-59. The panel’s attempt to limit the scope of the actual innocence gateway should be rejected. The gateway arises from the equitable nature of the habeas remedy, and the equities weigh even more strongly in favor of hearing petitions like *Souliotes*’s than the examples cited by the panel. Applying the gateway to first petitions promotes finality and conserves judicial resources. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still.”).

Indeed, if a petitioner shows actual innocence, the panel’s reasoning paradoxically would require the courts to deny a first petition but hear a second or successive petition based on the same facts. Likewise, applying the gateway to procedural defaults based on federal requirements—like AEDPA’s statute of limitations—avoids the comity concerns that apply to state procedural defaults. *See also Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (applying miscarriage of justice exception to untimely habeas petition).

Second, the panel held that section 2244(d)(1) provides an exclusive list of “very specific exceptions” to the general rule that the statute runs from the date of judgment. *Souliotes*, slip op. at 15959 (internal quotation omitted). The panel applied the canon of “*inclusion unius est exclusion alterius*,” holding that because the *Schlup* actual innocence gateway was not specifically enumerated as an exception, congressional intent to preclude courts from applying *Schlup* must be inferred.

The panel misapplied the canon and misconstrued the statute. The statute does not provide for a general rule with a limited set of exceptions. Rather, as the Supreme Court recently recognized, the statute provided “multiple provisions related to the events that trigger its running.” *Holland*, 130 S. Ct. at 2561. Because the statute does not include any exceptions, let alone an exclusive list of exceptions, the canon of “*inclusion unius est exclusion alterius*” does not apply. Likewise, the panel misconstrued the nature of the actual innocence gateway, which is more properly viewed as an equitable mechanism for *excusing* a procedural default, rather than an *exception* to the rule providing the procedural default. *Cf. McCleskey*, 499 U.S. at 494-95 (a procedural default “may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure

to entertain the claim”). Thus, even if a procedural default has occurred and no statutory exception exists, a court may exercise its equitable authority to apply the *Schlup* actual innocence gateway and excuse the procedural default.

Third, even assuming that *Lee* was correctly decided—which it was not²—*Lee* does not apply to the facts of this case. As persuasively shown by the dissent and the petitioner in his rehearing petition, *Lee* did not address or foreclose “affiliated gateway claims,” *i.e.*, claims that are presented in the same petition as a claim for which the petitioner has shown due diligence. *See generally Souliotes*, slip op. at 15961-69 (Zilly, J., dissenting). (Petitioner-Appellant’s Petition for Panel Rehearing and Rehearing En Banc at 11-17 (Nov. 8, 2010) (Dkt. No. 50).)

In short, Congress’s silence may not be construed as a rejection of the equitable principles governing the writ. *See Holland*, 130 S. Ct. at 2560. As recognized in *House*, nothing in AEDPA eliminates the *Schlup* actual

² For a more detailed discussion of the reasons regarding why *Lee* should be overturned, see the briefing regarding Petitioner-Appellee’s currently pending rehearing petition in the *Lee* case. (Petitioner-Appellee’s Petition for Panel Rehearing and Rehearing En Banc, *Lee v. Lampert*, No. 09-35276 (9th Cir. Aug. 30, 2010) (Dkt. No. 40); Brief of The Innocence Network as *Amicus Curiae* in Support of Petitioner-Appellee’s Petition for Rehearing and Rehearing En Banc, No. 09-35276 (9th Cir. Sept. 9, 2010) (Dkt. No. 41).)

innocence gateway for first habeas petitions. The Court should rehear this case en banc and overturn the panel's contrary decision.

2. The panel incorrectly limited the scope of § 2244(d)(1)(D)'s diligence provision.

The panel also incorrectly construed AEDPA's statute of limitations to require a claim-by-claim timeliness analysis. As recognized by the Eleventh Circuit, the plain language of section 2244(d)(1) indicates that AEDPA's statute of limitations "applies to the application as a whole" such that "individual claims within an application cannot be reviewed separately for timeliness." *Walker v. Crosby*, 341 F.3d 1240, 1245 (11th Cir. 2003). This Court has previously cited to *Walker* approvingly in an opinion interpreting AEDPA so as to avoid "multiple rounds of habeas review." *United States v. LaFromboise*, 427 F.3d 680, 684 & n.5 (9th Cir. 2005). Despite *Walker* and *LaFromboise*, the panel simply "adopt[ed] the reasoning in *Fielder*," a contrary decision by the Third Circuit. *Souliotes*, slip op. at 15956.

Fielder does not justify the panel's construction of AEDPA. See generally *Fielder v. Varner*, 379 F.3d 113 (3d Cir. 2004). *Fielder* began by introducing an ambiguity into the statutory language where none existed. See *id.* at 117-18. *Fielder*'s analysis does not correctly account for the unambiguous language of section 2244(d)(1), which provides that "[a] 1-year

period of limitation shall apply to an *application* for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(d)(1) (emphasis added). This language shows that the statute of limitations applies to the “application” as a whole, not individual claims.

Having mistakenly found an ambiguity in AEDPA, *Fielder* next stated that it had “two strong reasons” for concluding that AEDPA’s statute of limitations applies on a claim-by-claim basis. *Fielder*, 379 F.3d at 118. *Fielder* first argued that other statute of limitations have been construed to apply on a claim-by-claim basis. *Id.* at 118-19. *Fielder*’s reference to other statutes, however, provides no basis to ignore the clear language in the statute at issue in this case.

Fielder next claimed that Congress must have intended to adopt a claim-by-claim interpretation of AEDPA’s statute of limitations. *Id.* at 119-20. Again, *Fielder*’s argument fails, because it conflicts with the clear statutory language. Moreover, its conjecture is unsupported by any citations to legislative history. Indeed, Congress had strong reasons to adopt a statute of limitations that applies to the application as a whole, rather than to individual claims. As a prominent treatise makes clear: “Given Congress’ objective of streamlining the habeas corpus process, it seems highly unlikely

that Congress would have opted for a claim-by-claim approach that could require piecemeal habeas corpus litigation on a scale never before imagined.”

1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (Matthew Bender 2009, Lexis) § 5.2b, at 4 n.64 (citing *Rose v. Lundy*, 455 U.S. 509, 520 (1982) (recognizing difficulties created by “piecemeal [habeas corpus] litigation”)).

The panel’s reliance on *Fielder* was misplaced, and the Court should grant rehearing en banc to hold that the AEDPA statute of limitations applies to the application as a whole, not individual claims.³

3. The facts of this case highlight the importance of addressing these issues en banc.

This case provides a stark example demonstrating the need to hear these issues en banc. Souliotes made a strong showing of actual innocence that sufficed for his otherwise procedurally barred claims of error to pass through the *Schlup* gateway. At trial, the prosecution accused Souliotes of arson, asserting to the jury that the existence of MPDs (a class of petroleum compounds) on both Souliotes’s shoes and material from the burned building

³ The panel also included a footnote citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005). *Souliotes*, slip op. at 15956 n.4. As the panel noted, the passage it cited from *Pace* is “Supreme Court dicta” that does not govern this case. *See id.*

presented “conclusive scientific evidence” requiring his conviction. In the prosecution’s words, “[t]he shoes tell the tale.” Several years after Souliotes’s conviction, however, scientific advances in testing showed that the type of MPDs on Souliotes’s shoes did not match the type of MPDs found in the burned building. (MPDs are commonly found in shoes, shoe polishes, and shoe adhesives.)

In addition to providing a strong actual innocence showing, Souliotes presented strong evidence of constitutional error. For example, in his first trial, Souliotes’s counsel called fourteen witnesses who undermined the prosecution’s case to such a degree that the trial resulted in a hung jury. But in Souliotes’s second trial, his counsel called only one witness, a prior prosecution witness, and Souliotes was convicted. As stated by the dissent, “[t]his vastly reduced level of representation has not been explained as somehow strategic or the result of witness unavailability” and, “if allowed to pursue his ineffective assistance of counsel claims, Souliotes could likely show that his conviction was not the product of an error-free trial.” *Souliotes*, slip op. at 15968-69 n.7 (Zilly, J., dissenting).

Equitably balancing Souliotes’s strong showing of innocence and errors resulting in his conviction against the minor procedural error committed by

his attorney (a five-day belated filing based on ambiguous, competing docket entries), “Souliotes presents a compelling case for habeas relief.” *Id.* at 15968 n.7. The panel’s narrow construction of AEDPA’s time-bar provisions, however, would unduly restrict the ability of Souliotes, and the small subset of other inmates who can show actual innocence and diligence, to pursue habeas relief. For this reason, the Court should grant rehearing en banc to rectify the panel’s erroneous decision.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Network respectfully requests that the Court grant rehearing en banc and overturn the panel’s decision.

Dated: November 18, 2010

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By /s/Lori R. Mason

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND CIRCUIT RULE 29-2(c)(2)

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 29-2(c)(2), the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 2,498 words.

Dated: November 18, 2010

COOLEY LLP

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/Lori R. Mason

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