The Final Countdown: Using Resentencing as Final Judgment in the Post-AEDPA Era

"'[A] claim-by-claim approach is necessary in order to avoid results that we are confident Congress did not want to produce.' . . . [I]f the [Eleventh Circuit] was correct on Congress's intentions in AEDPA, then a 'late-accruing federal habeas claim . . . [would] open the door for'. . . a perverse incentive for potential habeas petitioners with otherwise time-barred constitutional claims to violate the terms of their sentence."[1]

I. INTRODUCTION

Throughout our Nation's history, rights provided for in the Constitution have allowed criminal defendants to petition for a writ of habeas corpus, seeking release from detention following unlawful arrest.[2] Although differing from its original form, the "Great Writ" is continually recognized as a last resort for defendants who believe they were wrongfully convicted.[3] Many laws impacted habeas petitions over the years, but none more so than the Antiterrorism and Effective Death Penalty Act (AEDPA).[4] In 1996, Congress passed AEDPA in an attempt to deter terrorism, provide justice for victims, and create a more effective death penalty.[5] AEDPA also imposed new restrictions on the federal

1. Prendergast v. Clements, 699 F.3d 1182, 1187 (10th Cir. 2012).

2. *See* U.S. CONST. art. I, § 9, cl. 2 (stating habeas corpus privilege shall not be suspended); 28 U.S.C. § 2241 (2018) (explaining Supreme Court's power to grant writs). Alexander Hamilton wrote in the Federalist Papers that "the establishment of the writ of habeas corpus" is one of the "greater securities to liberty" contained in the Constitution. *See* THE FEDERALIST NO. 84, at 444 (Alexander Hamilton) (George W. Carey & James McClellan eds. 2001).

3. *See Ex parte* Watkins, 28 U.S. 193, 201-02 (1830) (noting writ may "liberat[e] . . . those . . . imprisoned without sufficient cause").

4. *See* Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 101 (2012) (detailing decline in habeas petitions' success rates since AEDPA's introduction); *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447-48 (2007) (outlining legislative changes made to habeas law over time). Essentially, AEDPA is the product and codification of unofficial laws created by the judiciary in response to different cases. *See* Kovarsky, *supra*, at 448.

5. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (stating act's purpose to "provide justice for victims, [and] . . . effective death penalty"). In passing AEDPA, Congress hoped the impositions on petitions for habeas corpus would decrease the amount of time inmates were spending on death row by eliminating needless petitions, and therefore creating a more effective death penalty. *See id.*; *see also* William J. Clinton, President of the U.S., Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996) (detailing President Clinton's hopes in passing of AEDPA).

habeas corpus laws, such as a bar upon multiple petitions and a one-year statute of limitations period.[6]

Recently, in *Woodfolk v. Maynard*,[7] the Fourth Circuit acknowledged the split regarding an issue AEDPA does not expressly address: whether resentencing tolls the statute of limitations period.[8] The *Woodfolk* court held that the defendant's petition—which challenged an underlying conviction dating twenty-five years earlier—was timely because of the defendant's earlier resentencing.[9] While the Fourth Circuit joins the Fifth, Sixth, and Eleventh Circuits in holding that resentencing tolls the statute of limitations period, the Tenth Circuit vehemently disagrees.[10] Despite the Supreme Court declaring a sentence is equivalent to a final judgment in criminal cases, courts in line with the Tenth Circuit's reasoning are reluctant to let this definition permit tolling.[11] Whether resentencing is tantamount to a new, final judgment severely impacts a petitioner's right to postconviction review.[12] Even further, the two sides of the split disagree on whether this definition should apply to individual claims or an application for habeas as a whole.[13] Allowing resentencing to toll the statute of

6. *See* Antiterrorism and Effective Death Penalty Act §§ 101-08 (detailing reforms to habeas corpus rights).

7. 857 F.3d 531 (4th Cir. 2017).

8. *See id.* at 542-43 (acknowledging split in decision between Fourth and Tenth Circuits).

9. *See id.* (holding defendant's resentencing tolled statute of limitations period imposed by AEDPA). The *Woodfolk* court applied an identical definition of "judgment" to the term "resentence" since a defendant "is confined pursuant to a new judgment even if the adjudication of guilt is undisturbed." *Id.* (quoting *In re* Gray, 850 F.3d 139, 142 (4th Cir. 2017)).

10. *Compare* Crangle v. Kelly, 838 F.3d 673, 679-80 (6th Cir. 2016) (holding defendant's worse-than-before sentence restarts statute of limitations under AEDPA), Scott v. Hubert, 635 F.3d 659, 666 (5th Cir. 2011) (applying Supreme Court decision in holding resentencing tolls statute of limitations period), *and* Ferreira v. Sec'y, Dep't of Corr., 494 F.3d 1286, 1292-93 (11th Cir. 2007) (analyzing past decisions to determine sentencing dictates finality), *with* Prendergast v. Clements, 699 F.3d 1182, 1187-88 (10th Cir. 2017) (disagreeing with Fourth Circuit's rationale and arguing for claim-by-claim analysis).

11. *See* Berman v. United States, 302 U.S. 211, 212 (1937) (maintaining criminal cases finalized by sentence rather than judgment); *see also* Burton v. Stewart, 549 U.S. 147, 156-57 (2007) (applying finality definition to AEDPA habeas petition). Despite this Supreme Court precedent, courts still refuse to allow this definition of a sentence to toll the limitations period. *See* Bird v. Wilson, 647 F. App'x 891, 893 (10th Cir. 2016) (denying limitations toll for new claims based on resentencing); Christina M. Frohock, *Sentence Structure: Prohibiting "Second or Successive" Habeas Petitions After* Patterson v. Secretary, 70 U. MIAMI L. REV. 1098, 1104-05 (2016) (explaining criminal judgments include sentence). The Supreme Court itself, though, has permitted resentencing to equate to a new judgment in terms of habeas cases. *See* Magwood v. Patterson, 561 U.S. 320, 339 (2010).

12. *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 568 (opining question of scope of review hinges upon balancing defendant's rights with societal interests). *But see* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 297 (2006) (suggesting AEDPA's impact limited due to Supreme Court's prior decisions).

13. *See Prendergast*, 699 F.3d at 1186-87 (questioning whether sister circuits' reasoning appropriate in circumstances). Regardless of which definition is applied, the two sides of the split also disagree on whether that definition should apply to each individual claim found within a petition for habeas corpus. *Id.*

limitations period, whether for claims or whole applications, may open the floodgates for other issues that, logically, would do the same.[14]

More deeply rooted in the split, though, rests the issue of the underlying conviction upon which relief is being sought.[15] Among other rights, the criminal justice system in the United States—specifically, the Sixth Amendment to the U.S. Constitution—ensures that an accused person shall have the right to assistance of counsel for his or her defense.[16] Many habeas petitions seek relief for ineffective assistance of counsel.[17] Because claims of this nature tend to present themselves in the form of habeas petitions, AEDPA significantly impacts defendants' Sixth Amendment rights.[18] The rules set forth by AEDPA now force federal courts to, first, ensure the ineffective assistance claim is properly in federal court, and then defer to standards set forth by the Supreme Court.[19] With this constitutional right hinging on AEDPA's impositions, a new, more serious issue accompanies habeas petitions.[20]

14. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2, n.47 (7th ed. 2018) (analyzing case law equating judgment and sentence); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 135 (2012) (discussing issues stemming from habeas procedural barrier removals); *see also Prendergast*, 699 F.3d at 1187 (expressing potential for bad-faith resentencing attempts). The *Prendergast* court noted that allowing resentencing to toll the statute of limitations period would provide defendants incentives to violate the terms of their sentence to restart the one-year time constraint. 699 F.3d at 1187.

15. *See* Woodfolk v. Maynard, 857 F.3d 531, 543 (4th Cir. 2017) (stating habeas courts must review petitions to decide whether underlying claim properly barred). Whether to toll the limitations period also raises the question of which claim resentencing relates to. *See* Fielder v. Varner, 379 F.3d 113, 116-17 (3d Cir. 2004) (analyzing whether timeliness issue relates to application widely or only to individual claims).

16. *See* U.S. CONST. amend. VI (enumerating rights afforded to criminal defendants); *see also* Brad Reid, *A Legal Introduction to Habeas Corpus*, HUFFPOST (Jan. 11, 2017), http://www.huffingtonpost.com/brad-reid/a-legal-introduction-to-h_b_8955226.html [https://perma.cc/YXP7-RMQR] (providing brief overview of habeas corpus rights and processes).

17. *See* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 8-10 (discussing structure and limitations on postconviction relief for ineffective assistance of counsel).

18. *See infra* Section II.D (reviewing AEDPA's impact on ineffective assistance claims).

19. *See* Katherine A. McAllister, Comment, *Deferential Dilemmas:* Pinholster v. Ayers *and Federal Habeas Claims of Ineffective Assistance of Counsel After AEDPA*, 52 B.C. L. REV. E. SUPP. 121, 127 (2011), http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/11 [https://perma.cc/GM2L-JZMS] (explaining AEDPA requires courts to defer to Supreme Court's ineffective assistance standard); *see also infra* notes 89-90 and accompanying text (discussing ineffective assistance standard after AEDPA).

20. *See Woodfolk*, 857 F.3d at 543 (noting defendant must overcome procedural hurdle in addition to time bar). Before a court may even address the underlying petition's merits, AEDPA requires that the federal court look to the findings of the state court and determine whether there was an abuse of discretion. *See id.* First, a court must look at whether the petitioner exhausted all possible remedies and whether there was a finding contrary to well-established law in the state court. *See id.* The habeas court "[is] obliged to ensure that the procedural rule applied by the state courts is adequate to preclude federal review of the underlying claim" before dismissing a claim. *See id.* After finding proper jurisdiction, the court may then address the claim's merit and whether the petitioner satisfied the burden of proof. *See id.* (noting procedurally faulty claim fails in court). Due to the multiple procedural elements requiring review, AEDPA could potentially prevent a Sixth Amendment claim from being heard. *See* Prendergast v. Clements, 699 F.3d 1182, 1185 (10th Cir. 2012) (dismissing ineffective assistance claim due to failure to follow procedural requirements); *see also* Note, *Suspended Justice: The Case*

This Note analyzes AEDPA's statute of limitations barrier to habeas petitions, synthesizing persuasive arguments from both sides of the circuit split to properly maintain constitutionality.[21] Sections II.A through II.C discuss the history of habeas corpus and how AEDPA's enactment changed the law.[22] Next, Section II.D outlines the history of the Sixth Amendment right to effective assistance of counsel and how AEDPA impacted that right.[23] Section II.E assesses relevant cases and arguments on each side of the circuit split.[24] Then, Part III of this Note analyzes the opinions among the disagreeing courts, as well as the constitutional impact on ineffective assistance claims.[25] Finally, Part IV argues for a more lenient review of tolling when resentencing involves an ineffective assistance claim to support the constitutional right to counsel and avoid an inappropriately high deference to state courts when reviewing federal claims for habeas corpus.[26]

II. HISTORY

A. Origin of the Writ

The writ of habeas corpus acts as a vehicle into the courtroom for detainees who choose to challenge the legality of their imprisonment.[27] Latin for "produce the body," the writ directly compels the agent holding a prisoner to bring him or her in front of the court.[28] Upon a successful petition, the detainee is brought before the court and the agent holding him or her must explain how the confinement is lawful.[29] Thus, the longstanding "[safeguard of] individual freedom against arbitrary and lawless state action," portrays the writ to be one of the last chances to protect infringements upon personal liberty.[30] Although a

Against 28 U.S.C. § 2255's Statute of Limitations, 129 HARV. L. REV. 1090, 1098 (2016) [hereinafter *Suspended Justice*] (arguing AEDPA statute of limitations potentially violates constitutional rights).

21. *See supra* notes 10-11 (discussing different analyses by circuits and proposed definition of final judgment for criminal cases).

22. *See infra* Sections II.A-C.

23. *See infra* Section II.D.

24. *See infra* Section II.E.

25. *See infra* Part III.

26. *See infra* Part IV; *see also* Jonathan M. Kirshbaum, *Habeas Corpus - Undeserved Deference*, HABEAS CORPUS BLOG (Feb. 21, 2013), http://habeascorpusblog.typepad.com/habeas_corpus_blog/2013/02/habeas-corpus-undeserved-deference.html [https://perma.cc/C4LP-ZLDH] (questioning extremely high deference given to state courts for federal claims).

27. *See* Jonathan Kim, *Habeas Corpus*, LEGAL INFO. INST. (June 2017), https://www.law.cornell.edu/wex/habeas_corpus [https://perma.cc/2ACR-GAXT] (stating usage of writ challenges detention's validity).

28. *See id*. (explaining requirement for petition before grant of writ).

29. *See* 28 U.S.C. § 2241 (2018) (outlining general rules regarding prisoners' writ applications). It is important to note that the right associated with habeas corpus is the right to *petition* for a writ, not the right to a writ itself. *See id*; Kim, *supra* note 27 (emphasizing justification required by agent holding detainee).

30. Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991) (quoting Harris v. Nelson, 394 U.S. 286 (1969)) (observing Supreme Court's recognition of writ's protection against constitutional violations). Even though habeas corpus law protects constitutional rights, there are multiple different opinions as to where the writ actually originated. *See* Gregory J. O'Meara, *"You Can't Get There from Here?": Ineffective Assistance Claims in*

well-settled doctrine, what exists today differs drastically from the early years of habeas law.[31]

Habeas petitions date back to the very beginning of the United States.[32] In the seventeenth century, American colonists merged and then adopted two English common law doctrines to form the basis of modern-day writs.[33] Originally, writs in the United States acted solely as a way to get a prisoner into court rather than as a determination of the detainee's guilt or innocence.[34] By simply ordering an agent to physically bring a defendant before the court, the only issue presented was an analysis of the detainee's confinement.[35] As habeas law evolved, though, the ancient doctrine expanded from this restricted application and began to stand as "a bulwark against convictions that violate[d] 'fundamental fairness,'" creating a possibility of justice for wrongfully convicted prisoners.[36]

With a new school of thought driving habeas petitions, Congress eventually extended the writ privilege to prisoners in state detention.[37] The Habeas Corpus Act of 1867 (1867 Act) broadened the scope of who could petition for a writ to

Federal Circuit Courts After AEDPA, 93 MARQ. L. REV. 545, 559 (2009) (noting different sources cited for writ's origin); Kim, *supra* note 27 (indicating multiple sources create habeas corpus law).

31. *See* Kim, *supra* note 27 (outlining general history of writ); *see also* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1079-80 (1995) (acknowledging judicial analyses of habeas corpus over 190 years). Supreme Court Justices often debate the intent behind habeas statutes, which leads to continually changing jurisprudence on the matter. *See* Forsythe, *supra*, at 1079-80.

32. *See* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 672 (2008) (observing use of writ dates back to original colonies). Detailed studies on habeas corpus law found evidence of the writ being used—albeit rarely—in all thirteen founding colonies of the United States. *Id.*

33. *See* Forsythe, *supra* note 31, at 1090 (explaining aggregation of *habeas corpus cum causa*). Two separate writs—habeas corpus and one relating to validity of detentions—existed at English common law. *Id.* However, the creation of *habeas corpus cum causa* sparked the emergence of the modern writ. *Id.* Following the merge, English courts used the writ to resolve jurisdictional discrepancies among themselves, bringing the detainee to court in both civil and criminal proceedings. *Id.* Eventually, as lower courts began to argue with higher courts over jurisdiction, the writ became "the only means [a] subject ha[d] to obtain his liberty." *Id.* at 1092 (quoting Darnel's Case, 3 State Trials 1-59 (K.B. 1627)). Following this observation, English Parliament began to craft legislation that began to analyze the validity of detentions. *See id.* at 1093-94.

34. *See id.* at 1100-01 (emphasizing competent court's jurisdiction to determine guilt or innocence not disturbed by habeas corpus).

35. *See* Reid, *supra* note 16 (detailing function of writ of habeas corpus amounting to court order).

36. Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)) (noting habeas roots in English common law and importance in jurisprudence today); *see* Price v. Johnston, 334 U.S. 266, 283 (1948) (expressing most important use of writ provides imperative relief against "restraint[s] upon personal liberty"). *But see* Forsythe, *supra* note 31, at 1100 (contrasting common law use with modern writ application). The original common law function was to find a sufficient legal cause to prevent detention. *Id.* Forsythe argues the historical background of habeas corpus does not provide a basis for the postconviction protection provided for today. *See id.*

37. *See* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (amending prior habeas corpus law and allowing writs to state defendants); Forsythe, *supra* note 31, at 1081 (stating Habeas Corpus Act of 1867 first award writ to state courts).

encompass state prisoners, as well as federal detainees.[38] In passing the 1867 Act, Congress did not intend to change any aspect of habeas law except for the class of people who could petition the courts for habeas relief.[39] Unfortunately for Congress, though, an additional fact determination provision included in the 1867 Act that ordered courts to reexamine and make new findings led petitioners toward a prospect of postconviction relief.[40]

Even further to Congress's dismay, adding a factual determination generated more than just a last-resort hope for defendants.[41] In addition to embodying individual freedom, habeas corpus began to represent a due process right for defendants to contest factual findings of their original convictions.[42] Employing the federal courts as fact finders allowed defendants to reargue issues that had already been assessed at the state level.[43] Consequently, the ability to petition came to protect anyone who had been "'restrained of his or her liberty in violation of the [C]onstitution' . . . thereby extending the writ to *state* prisoners claiming that their detention violated a *federal* right."[44] The writ of habeas corpus—having been extended to federal review of state convictions—truly became a prisoner's right to postconviction relief.[45] Thus, a "Hail Mary pass" for defendants to fight for their innocence after conviction was born.[46]

38. *See* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (detailing expansion of rights to state prisoners). The 1867 Act's language provides only for the application of the writ to those being held by state agents in addition to federal agents. *Id.*; Forsythe, *supra* note 31, at 1104-05 (noting changes relate solely to state application of writ). *But see Jurisdiction: Habeas Corpus*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus [https://perma.cc/3BRN-5HMC] (stating 1867 Act marks origination of writ of habeas corpus as postconviction relief). Despite disagreement as to whether the 1867 Act triggered the belief that habeas corpus was a tool of personal freedom, the expansion to state prisoners marked "the most dramatic expansion of habeas corpus in the nation's history." *Id.*

39. *See* Forsythe, *supra* note 31, at 1104 (suggesting change in nature of writ not intended by 1867 Act).

40. *See id.* at 1105 (analyzing text of 1867 Act). Forsythe suggests that no reading of the 1867 Act and the cases analyzing it can support the contention that it applied in postconviction circumstances. *Id.* But, expanding the privilege to state prisoners with the possibility of factual determinations effectively allowed detainees to use habeas corpus as a last resort. *See Jurisdiction: Habeas Corpus*, *supra* note 38 (stating 1867 Act originated connection between habeas petition and postconviction relief).

41. *See Jurisdiction: Habeas Corpus*, *supra* note 38 (discussing multiple implications created by 1867 Act).

42. *See* Artemio Rivera, *The Consideration of Factual Issues in Extradition Habeas*, 83 U. CIN. L. REV. 809, 839 (2015) (comparing intent behind factual determination provision and due process of law); *Jurisdiction: Habeas Corpus*, *supra* note 38 (explaining new focus on providing due process to criminal defendants).

43. *See Jurisdiction: Habeas Corpus*, *supra* note 38 (noting change to state habeas petitions throughout 1940s).

44. *Id.* (emphasis added) (observing federal courts' new power to provide relief to individuals tried in state courts).

45. *See id.* (asserting postconviction relief view of habeas corpus began with 1867 Act). *But see* Forsythe, *supra* note 31, at 1105 (arguing language and legislative intent of 1867 Act contravenes association with postconviction relief).

46. Reid, *supra* note 16 (comparing habeas petition to last-ditch effort for justice); *see* Forsythe, *supra* note 31, at 1082 (stating habeas corpus used by prisoners to relitigate constitutional violations occurring throughout justice process).

B. Modern Day Writs

Because contemporary habeas corpus law drastically evolved from the English common-law doctrine, what exists today stems from the Constitution, statutory law, and case law.[47] Section 2241 of the United States Code bestows upon federal judges at all levels the power to grant or deny habeas petitions.[48] Although given this great power, justices and judges may only grant the writ in certain instances.[49] Essentially, a judge's ability to grant a writ is limited to instances where the petitioner's detention violates either federal law or the Constitution.[50]

On the opposite side of the bench, petitioners have filing limitations just as the judges granting writs do.[51] Arguably one of the more significant restrictions is the one-year statute of limitations period prisoners have to file a petition.[52] The statute's language expressly notes instances that will activate the period and start the defendant's time to file.[53] Yet, despite express examples of triggering events in the statute, many courts continue to struggle with determining when the period actually begins to run.[54]

Despite these restrictions, the Constitution provides that the right to petition cannot be suspended except in serious cases of rebellion, invasion, or public safety.[55] Reading the Suspension Clause in this manner leads one to believe

47. *See* Kim, *supra* note 27 (discussing modern-day habeas corpus law). *See generally* 28 U.S.C. §§ 2241, 2244 (2018) (governing different aspects of habeas writs).

48. *See* 28 U.S.C. § 2241(a)-(b) (outlining powers of judges and Supreme Court Justices to grant writ).

49. *See id.* § 2241(c) (providing instances where judges may grant or deny petitions).

50. *See id.* (providing instances where writ may be granted). Section 2241 provides five instances where a petitioner may receive a writ of habeas corpus:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
> (5) It is necessary to bring him into court to testify or for trial.

Id.

51. *See id.* § 2244(b)-(d) (underscoring guidelines for filing habeas petitions).

52. *See* 28 U.S.C. § 2244(d)(1)(A) (instituting one-year statute of limitations period following finality of judgment). The one-year time limit currently in force did not exist prior to AEDPA, but governs petition filing today. *See infra* note 62 and accompanying text (discussing lack of limitations period before AEDPA's passing).

53. *See* 28 U.S.C. § 2244(d)(1)(A) (articulating events marking outset of statute of limitations period). Four separate instances are outlined as trigger points for the statute of limitations period: finality of judgment; date of constitutional violation; date of Supreme Court recognition of the constitutional right; or the date of which a missing material fact could have been discovered. *See id.* § 2244(d)(1)(A)-(D).

54. *Infra* Section II.E (discussing circuit split regarding impact of resentencing on conviction finality).

55. *See* U.S. CONST. art. I, § 9, cl. 2 (outlining Suspension Clause in U.S. Constitution).

Congress holds the writ to the utmost importance.[56] Analyzing the Suspension Clause also shows that the right to petition extends to foreign nationals as well as natural citizens, further highlighting the significance of habeas petitions.[57] However, the constitutional protection does not extend to crimes committed in foreign jurisdictions.[58] Although some argue this lack of protection violates the Constitution, case law reveals judges have yet to extend the writ to cases of foreign extradition.[59]

C. The Passing of AEDPA

Habeas corpus law changed repeatedly since its creation, but one of the most impactful changes occurred in 1996, when Congress passed AEDPA.[60] In enacting the new law, Congress believed it would discourage needless habeas petitions.[61] However, the law created severely restrictive ramifications:

56. *See* Halliday & White, *supra* note 32, at 625 (highlighting issue of balancing liberty interest when writ suspended). One of the defining features of the writ is that justices and judges decide the fate of defendants' imprisonment. *Id.* at 600. Liberty is one of the most basic of rights afforded to citizens by the Constitution. *See* U.S. CONST. pmbl. (affording "blessings of liberty" to all citizens). The Suspension Clause, in conjunction with the liberty granted by the Constitution, emphasizes the importance of the privilege to petition. *See* Halliday & White, *supra* note 32, at 600.

57. *See* 28 U.S.C. § 2241(e)(1) (preventing U.S. courts from hearing petitions from "enemy combatant[s]"); Boumediene v. Bush, 553 U.S. 723, 737-38 (2008) (analyzing language of § 2241(e)(1)). The *Boumediene* Court found that petitioners from Guantanamo Bay who were denied a writ of habeas corpus were wrongfully deprived of the right. 553 U.S. at 739, 798.

58. *See* Neely v. Henkel, 180 U.S. 109, 122 (1901) (explaining rights afforded by Constitution not extended to crimes outside of U.S. jurisdiction); *see also* Munaf v. Geren, 553 U.S. 674, 680 (2008) (concluding habeas provides protection only to American citizens detained in foreign jurisdictions by American forces). Even though habeas corpus protects foreign nationals committing crimes, the habeas petitioners in *Munaf* committed serious crimes in Iraq, and were thereby detained within the sovereign territory of the country. 553 U.S. at 694. Citing *Neely*, the Court held that awarding habeas relief would infringe upon the foreign court's exclusive jurisdiction. *Id.* at 697; John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1979-80 (2010) (observing Court's reluctance to expand habeas writ in international extradition cases).

59. *See* Rivera, *supra* note 42, at 855-56 (arguing low level of habeas review deprives rights afforded by Suspension Clause); Brenna D. Nelinson, Comment, *From* Boumediene *to* Garcia*: The United States's (Non)Compliance with the United Nations Convention Against Torture and Its Movement Away from Meaningful Review*, 29 AM. U. INT'L L. REV. 209, 241 (2013) (explaining Suspension Clause possesses longstanding principles disallowing habeas review for unlawful transfers). Deference to foreign sovereignty creates a tension between international law and constitutional principles. Nelinson, *supra*, at 249. Even though respecting international law is important, it may be argued that doing so in habeas review violates the freedom principles our Constitution is founded upon. *See* Rivera, *supra* note 42, at 813.

60. *See* Marceau, *supra* note 4, at 103 (accentuating decline in successful habeas petitions since AEDPA's passing). Through analyzing cases in which AEDPA had a direct impact, Marceau discovered AEDPA's impact has been severe on habeas petitions. *Id.* at 101 n.47; *see* Kim, *supra* note 27 (suggesting narrowing effect of AEDPA); *see also* Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 10-11 (2004) (summarizing changes stemming from institution of AEDPA).

61. *See supra* note 5 and accompanying text (discussing intent of AEDPA). Initially, Congress intended for AEDPA to combat terrorism by providing law enforcement officers with new tools to prevent terrorism. *See* Clinton, *supra* note 5. However, President Clinton also hoped AEDPA would "preserve independent review of

prohibiting successive filings, narrowing review to unreasonable findings, and implementing a one-year statute of limitations period.[62] By prohibiting successive filings, AEDPA provides petitioners with only one chance to receive a writ of habeas corpus.[63] Next, AEDPA authorizes judges to only grant writs upon a discovery that the original finder of fact decided in a way that is unreasonable or contrary to Supreme Court precedent.[64] For state petitioners seeking federal review, this mandate essentially instructs federal courts to defer to state court rulings when reviewing habeas petitions.[65] Even though it is clear that Congress's motivation in enacting the new deferential standard was to streamline habeas petitions and limit the amount of cases heard in court, aside from this deference requirement, little guidance was left to the courts on how to actually interpret it.[66]

Finally, AEDPA established the one-year statute of limitations period currently in force for habeas petitions.[67] Although the one-year period harshly restricts when a petitioner may file, tolling is not completely out of the question.[68]

Federal legal claims and the bedrock constitutional principle of an independent judiciary" and prevent endless death row appeals. *Id.*

62. See Antiterrorism and Effective Death Penalty Act of 1996, secs. 101, 104, 106, 28 U.S.C. §§ 2248, 2254, 110 Stat. 1214, 1217-21 (outlining habeas reforms implemented by AEDPA).

63. *See In re* Gray, 850 F.3d 139, 140 (4th Cir. 2017) (observing required approval for successive filings). While a successive filing is not completely barred by AEDPA, appeals courts may only grant a successive petition in very rare cases. *Id. Compare* Alexander v. United States, 121 F.3d 312, 314, 316 (7th Cir. 1997) (denying petitioner's third filing after AEDPA), *with* Commonwealth v. Leaster, 479 N.E.2d 124, 125 (Mass. 1985) (considering petitioner's second motion for postconviction relief before AEDPA).

64. *See* 28 U.S.C. § 2254(d) (2018) (highlighting requirements to grant writ to state prisoners); Houston v. Roe, 177 F.3d 901, 906 (9th Cir. 1999) (holding AEDPA requires well-established federal law before reversing state judgments).

65. *See* 28 U.S.C. § 2254(e)(2) (outlining requirements for federal courts' review of state court findings); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 11 (2010) (observing change in standard of review). Primus notes that it is not enough for the petitioner to show that the state court was simply wrong in deciding the question, but rather the court was *unreasonably* wrong. Primus, *supra*, at 11.

66. *See* Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) (stating AEDPA created "new, unprecedented restrictions on habeas corpus review"). It is no question that Congress wanted to limit the amount of petitions the courts heard each year when it enacted AEDPA. *See* Clinton, *supra* note 5; *see also* H.R. REP. NO. 104-518, at 111 (1996) (stating AEDPA meant to "curb . . . abuse of . . . statutory writ" in capital cases). But courts cannot agree on how this intention should apply to the habeas reforms that followed. *See* Blume, *supra* note 12, at 261 (opining question of courts' interpretation of congressional intent behind AEDPA); *see also* Fielder v. Varner, 379 F.3d 113, 120 (3d Cir. 2004) (questioning Congress's intent for AEDPA while analyzing habeas petition).

67. *See* 28 U.S.C. § 2244(d)(1) (noting when one-year period begins). Before AEDPA, there was no time limit on when a petitioner could file for a writ of habeas corpus. *See* Diane E. Courselle, *AEDPA Statute of Limitations: Is It Tolled When the United States Supreme Court Is Asked to Review a Judgment from a State Post-Conviction Proceeding?*, 53 CLEV. ST. L. REV. 585, 586 (2006). As long as the petitioner remained in custody, he or she could file a petition for a writ at any point in time. *Id.*

68. *See* 28 U.S.C. § 2244(d)(2) (indicating statutory tolling period). The language of the text states that pending appeals or collateral review shall not count to the one-year period set forth in § 2244(d)(1). *Id.* In addition to the statutory tolling provisions, a minority of courts have permitted equitable tolling of the limitations period, as well. *See* Anne R. Traum, *Last Best Chance for The Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 554-55 (2009) (summarizing use of equitable tolling doctrine under

Critics of AEDPA claim its backlash—like the statute of limitations period and the deference awarded to state courts—is too severe.[69] The strict provisions and changes applied to habeas corpus law very well could be interpreted as unconstitutional.[70] However, the Supreme Court repeatedly refuses to find it as such.[71]

D. Sixth Amendment Right to Counsel

Often paired hand in hand with habeas petitions are claims for ineffective assistance of counsel.[72] The Sixth Amendment to the United States Constitution protects one's right to a fair trial, including the right to representation by counsel.[73] Court-appointed counsel was not always a given, but rather became an adopted practice over time.[74] Gradually, the right evolved from a guarantee of *any* counsel into a safety net for *effective* assistance for criminal defendants.[75] Therefore, defendants will have a viable claim for a Sixth Amendment violation

AEDPA). While § 2244(d)(2) allows for tolling during the time a proper postconviction application is pending, there is no other language regarding tolling in the statute. *Id.* at 552-53; *see* 28 U.S.C. § 2244(d). The Supreme Court has been reluctant to implicate other forms of tolling, as few Justices have supported the idea. Traum, *supra*, at 554. Lower courts, through assumed "rules" coming from an array of cases, apply equitable tolling despite the lack of support from the Supreme Court. *Id.*

69. *See* Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights [https://perma.cc/ETL7-PNVV] (equating AEDPA to "atomic bomb" dropped on habeas law). *But see* Blume, *supra* note 12, at 297 (suggesting impact less severe than anticipated).

70. *See* Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 416 (1998) (arguing AEDPA facially unconstitutional).

71. *See* Felker v. Turpin, 518 U.S. 651, 661-62 (1996) (rejecting argument AEDPA removes Supreme Court's habeas jurisdiction); Houston v. Roe, 177 F.3d 901, 906 (9th Cir. 1999) (explaining AEDPA does not violate Suspension Clause); Woolley, *supra* note 70, at 416 (noting Supreme Court's failure to find AEDPA unconstitutional).

72. *See* Primus, *supra* note 17 (illuminating frequency of ineffective assistance claims in petitions for postconviction relief).

73. *See* U.S. CONST. amend. VI (enumerating rights of accused criminal defendants). The Sixth Amendment explicitly grants defendants the right "to have Assistance of Counsel for his defence" in all criminal proceedings. *Id.*; *see also* Strickland v. Washington, 466 U.S. 668, 684 (1984) (declaring assistance of counsel required for fair trial); Powell v. Alabama, 287 U.S. 45, 70 (1932) (reiterating assistance of counsel instrumental to fair criminal trials).

74. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasizing right to counsel fundamental to fair trials); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 7 (2013) (indicating gradual introduction of lawyers in criminal proceedings). The ability to have a lawyer defend a criminal in court finally became acceptable when Congress ratified the Sixth Amendment; but even then, right to counsel was only applicable to misdemeanors at the expense of the defendant. *See* King, *supra*, at 7. In ratifying the Sixth Amendment, the Framers granted defendants the right to obtain counsel rather than provide them with an affirmative right to a lawyer's aid. *Id.* at 7. Analyzing multiple cases that denied a finding of a fundamental right, the *Gideon* Court stressed the fact that assistance is imperative to providing a defendant with a fair trial—going so far as to call it an "obvious truth." 372 U.S. at 344.

75. *See Strickland*, 466 U.S. at 686 (discussing nature of effective assistance of counsel). The Supreme Court established in *Strickland* that merely appointing a lawyer does not protect the defendant's right to counsel; instead, counsel must provide "adequate legal assistance" to appropriately provide a defendant with his right. *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[76]

To prove that counsel actually provided ineffective assistance, a claim must satisfy two prongs set forth by *Strickland v. Washington*:[77] The defendant must show that counsel was actually ineffective, and that the counsel's errors were so serious as to deprive him or her of a fair trial because, but for the errors, the outcome would be different (*Strickland* Test).[78] Since the Sixth Amendment does not set forth any specific requirements of court-appointed counsel, the analysis begins with a "reasonable" standard set forth in the *Strickland* Test's first prong.[79] Next, when examining counsel's impact on the trial's outcome, the court must find that the ineffective actions directly affected the outcome of the case.[80] The Sixth Amendment stands to protect defendants from unreasonable reliance on trial outcomes, and therefore will not support an ineffective assistance claim without the claimant establishing these two elements.[81]

With limited possibilities for postconviction relief in state courts, defendants alleging ineffective assistance often resort to filing for a writ and seeking relief in federal court.[82] Thus, many ineffective assistance claims find themselves buried within habeas corpus petitions.[83] Even with the close connection between ineffective assistance and habeas petitions, classifying these petitions as civil suits means defendants do not have a right to counsel during such habeas

76. *Id.* Because the Court has established that the Constitutional right to counsel requires effective assistance, it follows that *ineffective* assistance by counsel provides defendants with a claim. *See id.*

77. 466 U.S. 668 (1984).

78. *Id.* at 687 (outlining two requirements for ineffective assistance claims).

79. *See id.* at 688 (discussing what constitutes reasonably effective assistance of counsel). As a cause of action, ineffective assistance is not intended to arouse pointless claims from unhappy defendants, so a standard must be set under which adequate relief may still be granted. *Id.* at 690. The Court in *Strickland* noted that certain basic duties are required to represent a criminal defendant. *Id.* at 688. However, there is no exhaustive list of duties an attorney must abide by; instead, courts consider the standards within the legal profession as guides, rather than looking upon counsel's behavior with the benefit of knowing the outcome. *Id.* at 688-89.

80. *See id.* at 691-92 (explaining error by counsel must have direct effect on case outcome). The Supreme Court clarified, though, that not all errors by counsel are sufficient to justify a claim of ineffective assistance. *Id.* Thus, an error by counsel can be unreasonable—and therefore meet the first prong of the *Strickland* Test—but not reach the level of ineffective assistance. *Id.* Although an error of this nature is unreasonable on the part of the attorney, it does not violate the defendant's right when it has no impact on the trial's outcome. *Id.*

81. *Strickland*, 466 U.S. at 691-92. (explaining need for prejudicial element to find ineffective assistance of counsel under Constitution).

82. *See* Primus, *supra* note 17 (observing problems with postconviction relief in state courts).

83. *See supra* note 17 and accompanying text (describing use of habeas corpus to pursue ineffective assistance claims).

proceedings.[84] But, not all hope is lost—courts may still use discretion and determine that the aid of counsel is appropriate in dire cases.[85]

The separation between ineffective assistance and habeas corpus law had two main impacts on ineffective assistance claims under AEDPA.[86] First, the new deference to state findings allows for relief only when the state's decision is contrary to established federal law or was not adjudicated on the merits.[87] Therefore, state petitioners seeking habeas corpus to pursue an ineffective assistance claim first must establish that the lower court decision was unreasonably improper before even reaching a review of the merits of the claim.[88]

Second, on top of this jurisdictional element, AEDPA created a stricter standard of review for ineffective assistance claims within habeas petitions.[89] Courts must now apply the *Strickland* Test to claims in conjunction with AEDPA's requirements.[90] Not only must petitioners meet the ineffective assistance standard, but they must also do so within the time limitations of AEDPA.[91] Therefore, if a petitioner files outside of AEDPA's statute of limitations period and cannot prove the late filing is due to counsel's

84. *See* 28 U.S.C § 2254(i) (2018) (barring habeas relief on grounds of "ineffective or incompetence of counsel"); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (declining prisoners right to counsel when attacking convictions); Sarah L. Thomas, Comment, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1143 (2005) (noting Supreme Court's refusal to apply right to counsel to habeas claims).

85. *See* Thomas, *supra* note 84, at 1153 (observing court's appointment of counsel after petitioner met burden of proof pro se).

86. *See* text accompanying *supra* note 19 (discussing AEDPA's impact on ineffective assistance claims); *see also* Pinholster v. Ayers, 590 F.3d 651, 662 (9th Cir. 2009) (explaining analysis of review under AEDPA's provisions), *rev'd sub nom.* Cullen v. Pinholster, 563 U.S. 170 (2011); McAllister, *supra* note 19, at 127 (outlining how deferential standard imposed by AEDPA impacts ineffective assistance claims).

87. Antiterrorism and Effective Death Penalty Act of 1996, sec. 104, 28 U.S.C. § 2254, 110 Stat. 1214, 1219 (amending statute to prohibit relief unless unreasonable finding by state court); *see Pinholster*, 590 F.3d at 662 (interpreting language of AEDPA for application to case); *supra* notes 64-66 and accompanying text (analyzing deference granted to state decisions by AEDPA).

88. *See Pinholster*, 590 F.3d at 661-62 (reviewing lower court decision before reaching ineffective assistance of counsel analysis).

89. *See* Hanson v. Sherrod, 797 F.3d 810, 824-26 (10th Cir. 2015) (discussing standard of review under AEDPA). While a new standard was not expressly created through AEDPA, the presumption that lower courts' findings of fact are correct adds another hoop for petitioners to jump through. *See id.* at 825. Thus, in addition to meeting the standard for ineffective assistance, the petitioner must rebut this presumption with clear and convincing evidence. *Id.*

90. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 380 (2005) (reviewing petitioner's claim through application of *Strickland* Test); Wiggins v. Smith, 539 U.S. 510, 520-21 (2003) (noting AEDPA requires application of precedent, namely *Strickland* Test for ineffectiveness); Williams v. Taylor, 529 U.S. 362, 375 (2000) (applying *Strickland* standard to determine viability of ineffective assistance claim with AEDPA limitations).

91. *See Hanson*, 797 F.3d at 824 (observing AEDPA governs review of habeas petitions); Palladino v. Perlman, 269 F. Supp. 2d 36, 38-39 (E.D.N.Y. 2003) (denying review because late filing not affected by counsel's ineffective assistance). In *Palladino*, the petitioner's claim was filed close to two years after the expiration of the statute of limitations period. 269 F. Supp. 2d at 38-39. However, the court denied the petition because the "alleged ineffectiveness did not interfere with petitioner's timely filing of a habeas application." *Id.* at 39.

ineffectiveness, the petition is untimely, the claim lacks merit, and the court must dismiss it.[92]

Between the deference to state courts and the one-year time constraints, the dual requirements create an issue of whether a defendant may even pursue constitutional violations.[93] It is true that it is not completely impossible to succeed in a petition for ineffective assistance after AEDPA.[94] But between the deference awarded to state findings and courts' fear of nullifying the statute of limitations period, petitioners seeking such relief outside the limitations period face no easy task.[95]

Analysis of this nature calls for a cohesive reading of *Strickland* and AEDPA, but competing interpretations of how much deference to apply cause turmoil, resulting in differing opinions.[96] In some instances, courts simply defer to the

92. *See Palladino*, 269 F. Supp. 2d at 39 (dismissing claim without proof of counsel preventing timely filing); Virginia E. Harper-Ho, Note, *Tolling of the AEDPA Statute of Limitations:* Bennett, Walker *and the Equitable Last Resort*, 4 CAL. CRIM. L. REV. 1, ¶ 31 (2001), http://scholarship.law.berkeley.edu/bjcl/vol4/iss1/1 [https://perma.cc/B5VZ-9ANC] (observing application of equitable tolling when counsel directly responsible for untimeliness).

93. *See Suspended Justice*, *supra* note 20, at 1097-98 (maintaining AEDPA's provisions may unconstitutionally suspend right to petition); *see also* Murphy v. United States, 634 F.3d 1303, 1314 (11th Cir. 2011) (denying ineffective assistance claim because of AEDPA's statute of limitations period). In 2007, petitioner Murphy sought relief on an ineffective assistance claim in connection with a sentencing that occurred in 2004. *Murphy*, 634 F.3d at 1305. The district court dismissed the claim as time barred, and the appeals court affirmed. *Id.* at 1306, 1314. Because the order reducing the sentence had no effect on the statute of limitations period, Murphy's time was not tolled and he received no opportunity to pursue counsel's ineffectiveness. *Id.* at 1309; *see also* Rainey v. Sec'y for the Dep't of Corr., 443 F.3d 1323, 1330 (11th Cir. 2006) (affirming refusal to toll statute of limitations period and denying ineffective assistance claim).

94. *See Williams*, 529 U.S. at 397-98 (reversing judgment to protect petitioner's constitutional right to effective assistance); *see also* Shoop v. Ballard, No. 1:15CV47, 2016 U.S. Dist. LEXIS 102984, at *10-11 (N.D. W. Va. Aug. 5, 2016) (concluding petitioner's ineffective assistance claim timely due to resentencing); Blume, *supra* note 12, at 280 (indicating Court allowed three ineffective assistance claims after AEDPA); O'Meara, *supra* note 30, at 577-86 (discussing multiple cases analyzing ineffective assistance with AEDPA).

95. *See* Hadar Aviram et al., *Check, Pleas: Toward A Jurisprudence of Defense Ethics in Plea Bargaining*, 41 HASTINGS CONST. L.Q. 775, 825 (2014) (observing double deference makes ineffective assistance claims "nearly impossible"); Harper-Ho, *supra* note 92, at ¶ 32 (suggesting defendants seeking statute of limitations tolling "face an uphill battle"); McAllister, *supra* note 19, at 128 (explaining *Strickland*'s presumption of efficient counsel performance).

96. *See* Pinholster v. Ayers, 590 F.3d 651, 663 (9th Cir. 2009) (applying AEDPA but questioning level of deference to use), *rev'd sub nom.* Cullen v. Pinholster, 563 U.S. 170 (2011). Because both parties agreed AEDPA applied in the case at bar, the only question to determine was how to defer to the California Supreme Court's decision. *Id.* The court ultimately decided that although precedent did not clearly set out what to do, similar situations led the court to conduct an independent review of the record "to ascertain whether the state court decision was objectively unreasonable." *Id.*

state court findings by following AEDPA's standards.[97] Other cases simply continue to comply with the standard set forth in *Strickland*.[98]

Notwithstanding these new difficulties in filing valid claims for ineffective assistance that emerged since AEDPA's passing, petitioners can still succeed in obtaining review through habeas relief.[99] When a judge grants habeas and a petitioner meets the *Strickland* standard—proving counsel was ineffective—courts have held that resentencing can be an appropriate remedy.[100] Of course, courts must still review cases and adjust the sentence "so that [the defendant] may perfect an appeal."[101] Even though AEDPA made it more difficult to receive habeas relief for ineffective assistance, the notion of equity—especially in terms of resentencing—still applies to ensure defendants' rights are protected.[102]

E. Circuit Split

Close to twenty years after its enactment, AEDPA is still causing confusion and disagreement in the courts.[103] Specifically, differing definitions of "finality" and which one to apply to resentencing creates confusion about deference to

97. *See* McAllister, *supra* note 19, at 122 (discussing division of different interpretations of deference between AEDPA and *Strickland*); *see also* Cullen v. Pinholster, 563 U.S. 170, 186 (2011) (suggesting federal court provides no "alternative forum" for fact-finding). In *Cullen*, the Supreme Court reversed a lower federal court's grant of writ because it reviewed inappropriate evidence. 563 U.S. at 186. The petitioner could not support his petition on the merits of the state court findings alone—indicating that AEDPA might not provide a completely new forum to review facts, and encourages courts to defer to state findings. *Id.* at 186-87.

98. *See* McAllister, *supra* note 19, at 127-28 (outlining deference given to attorneys under *Strickland* Test); *see also supra* note 90 and accompanying text (discussing *Strickland* application in ineffective assistance claims).

99. *See supra* note 94 and accompanying text (reviewing ineffective assistance claims in post-AEDPA era); *see also, e.g.*, Wiggins v. Smith, 539 U.S. 510, 521, 538 (2003) (affirming petitioner properly granted habeas corpus for review of counsel's effectiveness); Williams v. Taylor, 529 U.S. 362, 376-77 (2000) (holding petitioner entitled to habeas relief to review conduct of counsel); *Pinholster*, 590 F.3d at 664 (holding habeas relief for ineffective assistance claim appropriate).

100. *See* 28 U.S.C. § 2255(b) (2018) (noting courts may provide remedy of resentencing). Section 2255, which outlines possible relief on motions attacking judgments, expressly provides that a resentencing or a correction is proper. *Id.* Since habeas petitions challenge prior sentences and judgments, it follows that resentencing is suitable relief. *Id.*; United States v. Hernandez, 450 F. Supp. 2d 950, 984 (N.D. Iowa 2006) (finding resentencing on basis of guilty plea appropriate remedy for ineffective assistance).

101. Rodriquez v. United States, 395 U.S. 327, 332 (1969) (reversing appeal denial due to lack of circumstantial inquisition); *see* Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949, 952 (2013) (suggesting resentencing proper relief when original punishment too harsh).

102. *Rodriquez*, 395 U.S. at 330 (observing need to treat burdened petitioners equally). The rules and rights provided to defendants are given in the pursuit of justice; therefore, "those whose right to appeal has been frustrated . . . should not be given an additional hurdle to clear" because of a previous violation. *Id.* at 330. Resentencing is a way to provide an equitable relief to the violated defendant. *Id.* at 332; *see also* Schlup v. Delo, 513 U.S. 298, 319-20 (1995) (acknowledging principle of equality behind habeas corpus relief). It follows that the equitable nature of habeas relief allows courts to utilize resentencing as the method of protecting equality in ineffective assistance claims. *Rodriquez*, 395 U.S. at 332.

103. *See* Woodfolk v. Maynard, 857 F.3d 531, 542-43 (4th Cir. 2017) (addressing split in circuit decisions); *supra* note 10 and accompanying text (examining relevant cases on both sides of the split).

lower courts, and thus produces varying outcomes for habeas petitioners.[104] The Fourth, Fifth, Sixth, and Eleventh Circuits tend to follow the definition of "sentence" set forth by the Supreme Court in criminal cases.[105] The Fourth Circuit recently addressed this issue head on in *Woodfolk v. Maynard*.[106] The petitioner in *Woodfolk* was originally convicted of attempted murder in 1988.[107] After multiple hearings and attempts for postconviction relief, a circuit court reviewed a prior order by the Court of Special Appeals and reimposed the sentence from his 1988 conviction.[108] After exhausting all remedies, the Fourth Circuit allowed Woodfolk's appeal to analyze whether the lower court properly dismissed his habeas petition as untimely, where he argued that this "resentencing" constituted a new final judgment.[109] Despite a compelling argument from the government that the resentencing only revived an old claim, the Fourth Circuit reversed the lower court's decision and held that the 2008 resentencing instead created a new judgment for Woodfolk—effectively tolling the one-year statute of limitations period.[110] The Fifth, Sixth, and Eleventh

104. *See* Kim, *supra* note 12, at 568-72 (addressing different definitions of finality). *Compare Woodfolk*, 857 F.3d at 540 (concluding change in sentence constituted finality of judgment), *with* Fielder v. Varner, 379 F.3d 113, 118 (3d. Cir. 2004) (interpreting final's plain meaning and declining habeas review).

105. *See Woodfolk*, 857 F.3d at 542 (interpreting sentence to mean judgment in criminal cases); *see also* Burton v. Stewart, 549 U.S. 147, 156-57 (2007) (analyzing definition of final judgment to mean sentence in criminal cases); Berman v. United States, 302 U.S. 211, 212 (1937) (adopting criminal definition of "sentence" when interpreting final judgments). Because a criminal judgment includes both the sentence and the conviction, it would follow that any change in the sentence would, thus, allow for new habeas petitions. *See* Frohock, *supra* note 11, at 1107.

106. 857 F.3d at 540 (addressing facts and circumstances of Woodfolk's resentencing).

107. *See id*. at 535-36 (detailing history of Woodfolk's conviction). Woodfolk pled guilty to attempted murder and use of a handgun after pressure from his then-attorney. *Id.* He was sentenced to fifteen years in prison based on this plea. *Id.*

108. *See id*. at 537-38 (discussing circuit court order). The main point of the circuit court hearing was to address the Court of Special Appeal's reversal of Woodfolk's motion to correct his illegal sentence. *Id*. at 537. The reversal effectively took away the new trial the court had granted. *Id.* At the hearing, Woodfolk requested that the court reimpose his original 1988 sentence to allow for postconviction relief. *Id.*

109. *See* Woodfolk v. Maynard, 857 F.3d 531, 540 (4th Cir. 2017) (detailing Woodfolk's argument of new final judgment). Woodfolk based his argument on the idea that the resentencing in 2008 commenced his statutory limitations period, which was then tolled by postconviction proceedings. *Id.*

110. *See id.* at 542-43 (agreeing with majority of circuits in determining resentencing constitutes new judgment). The government argued that the 2008 resentencing revived the original claim rather than giving authorization for a de novo review. *Id*. at 540. In 1988, Woodfolk filed a motion asking for modification of his criminal sentence pursuant to Maryland Rule 4-345. *Id*. Thus, the state specifically noted that an opinion on this motion became final in 2007—meaning the statute of limitations period ran out a year later in 2008. *Id.* at 540-41. Woodfolk, on the other hand, argued his petition was timely because it was filed within one year of the judgment entered on his 2008 resentencing. *Id.* at 540. The court, though, denied this argument by analyzing the criminal definition of "judgment" and applying that to Woodfolk's case. *Id.* at 542. Because Ninth Circuit precedent instructs the court that "the limitations period generally does not commence until both the petitioner's conviction and sentence become final," Woodfolk's one-year period began when the circuit court's judgment on his 2008 resentencing became final. *Id.*

Circuits have joined the Fourth Circuit in this decision that resentencing may allow for the tolling of AEDPA's statute of limitations.[111]

Although a majority of courts support one another on this point, there is no harmony regarding the finality of convictions with respect to resentencing and AEDPA.[112] The Tenth Circuit, for instance, looks to whether the untimely claims pertain to the resentencing.[113] In *Prendergast v. Clements*,[114] the petitioner filed an application for habeas corpus with five separate claims—three of which outdated the statute of limitations period.[115] The court, however, rejected the argument that one timely *claim* makes an entire *application* appropriate.[116]

The *Prendergast* court also criticized the Eleventh Circuit's reasoning in *Walker v. Crosby*.[117] Like the *Woodfolk* court, the *Walker* court allowed resentencing to toll AEDPA's statute of limitations period, although the habeas petition did not challenge the resentencing.[118] Though the Tenth Circuit acknowledges that a judgment equates to finality, the split rests on the belief that allowing resentencing to toll the statute of limitations—regardless of the underlying claim—would incentivize disobedience by prisoners who want to obtain a new final judgment so they can petition for habeas corpus outside of AEDPA's statute of limitations.[119]

111. *See* Crangle v. Kelly, 838 F.3d 673, 679-80 (6th Cir. 2016) (explaining material change in conditions caused by resentencing constitutes new judgment); Scott v. Hubert, 635 F.3d 659, 666 (5th Cir. 2011) (holding remanded resentencing judgments become final for AEDPA purposes upon conclusion of review); Rainey v. Sec'y for the Dep't of Corr., 443 F.3d 1323, 1327-28 (11th Cir. 2006) (determining petitions under AEDPA run from date of resentencing's finality); Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) (noting precedent uses resentencing when determining final judgment under AEDPA).

112. *See* Prendergast v. Clements, 699 F.3d 1182, 1186-87 (10th Cir. 2012) (holding statute of limitations not tolled by resentencing). The Tenth Circuit noted prior decisions from the Eleventh Circuit, but disagreed with their outcomes. *Id.* at 1186. Instead, the *Prendergast* court followed reasoning from the Third Circuit in adopting a claim-by-claim analysis for untimely petitions. *Id.* at 1187; *see also* Fielder v. Varner, 379 F.3d 113, 117-18 (3d Cir. 2004) (rejecting interpretation of untimely claims set forth by Eleventh Circuit).

113. *See* Burks v. Raemisch, 680 F. App'x 686, 690, 692 (10th Cir. 2017) (dismissing petition because claims did not pertain to resentencing).

114. 699 F.3d 1182 (10th Cir. 2012).

115. *See id.* at 1184 (addressing lower court's rejection of habeas petition).

116. *See id.* at 1187 (rejecting *Walker* rule and adopting claim-by-claim approach). On appeal, the court looked at whether the district court erred in so dismissing the claims, but ultimately agreed that each individual claim must be timely in order to be proper. *Id.*

117. *See id.* at 1186 (rejecting *Walker* rule in case at bar).

118. *See* Walker v. Crosby, 341 F.3d 1240, 1245 (11th Cir. 2003) (concluding one timely claim makes entire application for habeas relief appropriate); *accord* Woodfolk v. Maynard, 857 F.3d 531, 542-43 (2017) (holding petition timely because of resentencing).

119. *See Prendergast*, 699 F.3d at 1187 (noting "perverse incentive" created by resentence tolling); Najera v. United States, 462 F. App'x 827, 829 (10th Cir. 2012) (recognizing Supreme Court's definition of final judgment in criminal cases).

III. ANALYSIS

A. Appropriate Level of Deference Under AEDPA in Cases of Resentencing

As seen in *Woodfolk*, courts must first determine that a petition is proper before even addressing whether resentencing may toll the statute of limitations period.[120] Because AEDPA mandates giving deference to lower court decisions, state petitioners have a harder burden to meet when filing for a writ.[121] AEDPA amended the law in a way that instructs federal courts to defer to state court findings and stray only when that finding is contrary to deep-rooted federal law.[122] Thus, state petitioners receive federal review only in rare instances where the state court abused its discretion in the first place.[123]

Adding the additional jurisdictional bar through the statute of limitations to this already high deference deliberately limits habeas relief, which clearly aligns with Congress's motivation behind AEDPA's enactment.[124] It can be argued that in passing AEDPA, Congress intended to limit what cases may be heard by the Court.[125] But in so doing, Congress has overstepped its boundaries in keeping petitioners from their day in court.[126] Adding an additional procedural bar, and therefore deferring even more to the state court decisions, infringes upon the federal courts' ability to make judgments on habeas review; Congress has surpassed the power afforded to it and ultimately placed constitutional protections in jeopardy.[127] The cases show that situations and circumstances exist where petitioners are not able to file within the statute of limitations period and equitable tolling is applied to protect their individual freedom—thus

120. *See* 28 U.S.C. § 2254(d) (2018) (prohibiting grant of writs unless state court decision meets one of two exceptions); *see also Woodfolk*, 857 F.3d at 539-40 (addressing jurisdictional issues before timeliness of application).

121. *See* 28 U.S.C. § 2254(e)(1) (outlining deference awarded to state court findings); *supra* notes 65-66 and accompanying text (discussing outcome of deferential standards).

122. *See id.* § 2254(d) (limiting grant of writ to state detainees to certain situations); McAllister, *supra* note 19, at 127 (explaining deferential requirements).

123. *See* Primus, *supra* note 65, at 2 (highlighting rare instance habeas petitions reach merit of case). Even when the petitioner is successful, Primus suggests the length of the habeas process hardly helps to correct the problem. *Id.*; *see also* Marceau, *supra* note 4, at 101-02 (analyzing success rates of petitioners before and after AEDPA). While AEDPA certainly reduced the success rate of habeas petitions, data shows that a low 37.5% of habeas petitions were successful prior to its enactment. Marceau, *supra* note 4, at 101.

124. *See* Primus, *supra* note 65, at 41 (emphasizing Congress's attempt to "streamline federal habeas review" amidst tension); Clinton, *supra* note 5 (addressing intentional limitations stemming from AEDPA's passing); *supra* notes 65-66 and accompanying text (recognizing intent behind statute and confusion it left among courts).

125. *See* Primus, *supra* note 65, at 10-11 (explaining Congress's attempt to minimize habeas petitions resulted in AEDPA).

126. *See* Blume, *supra* note 12, at 262 (asserting decision of "how much habeas is 'enough'" up to courts, not Congress).

127. *See id.* (noting separation in court and Congress's power over habeas); *Suspended Justice*, *supra* note 20, at 1111 (opining whether AEDPA constitutional).

avoiding any additional deference to prior decisions created by AEDPA.[128] Prohibiting resentencing from similarly tolling the statute of limitations period adds another layer of deference to the lower courts' findings, thereby erecting more obstacles for petitioners to maneuver through and keeping the courts from hearing certain cases.[129]

B. Differing Definitions of Finality

In light of this additional deference awarded to state courts by the statute of limitations period, the competing views of finality intensify the issue of whether to toll AEDPA's statute of limitations period.[130] Congress entwined no guidance in AEDPA's text, and many courts continue to struggle in finding the appropriate definition.[131] The circuits that tend to be more lenient when it comes to tolling follow the Supreme Court's definition: A sentence is tantamount to a final judgment in a criminal case.[132] Despite this precedent, other courts believe applying the definition in this way will create "perverse incentives" to invite resentencing just to revive the statute of limitations period.[133] Petitioners would have nothing to lose, but rather, something to gain by acting out and obtaining

128. *See* Traum, *supra* note 68, at 554-55 (introducing concept of equitable tolling adopted by lower courts). Although not employed often, courts have found four main "rules" to toll the statute of limitations period based on equity. *Id.* at 555-56. These rules have proved difficult in providing guidance, and courts have typically recognized equitable tolling in the following limited circumstances:

> (1) is non-jurisdictional, and thus a statute of limitations that can be equitably tolled; (2) was enacted after the Court created a presumption favoring equitable tolling of limitations statutes, and Congress was presumed to have drafted against that presumption; (3) does not explicitly preclude equitable tolling; and (4) does not impliedly reflect a congressional intent to prohibit equitable tolling.

Id. at 557.

129. *See* Bellamy, *supra* note 60, at 45 (suggesting Congress's intent to quicken process resulted in "overlook[ing] [of] . . . key realities of habeas . . . process"). Even though the intent behind the one-year statute of limitations period was to streamline habeas applications, the short amount of time effectively created new stringent procedural barriers to those seeking relief. *See* Russell, *supra* note 14, at 97.

130. *See* Bellamy, *supra* note 60, at 13 (articulating confusion caused by lack of guidance in defining finality); Bright, *supra* note 66, at 10 (questioning whether trust in state courts proper in light of finality); *see also supra* Section II.E (analyzing relevant cases on either side of the split). Two main cases reflect these conflicting opinions: *Woodfolk* from the Fourth Circuit, and *Prendergast* from the Tenth. *Compare* Woodfolk v. Maynard, 857 F.3d 531, 543 (2017) (commencing limitations period on date of resentencing finality), *with* Prendergast v. Clements, 699 F.3d 1182, 1188 (2012) (refusing to toll limitations period based on resentencing).

131. *See* Blume, *supra* note 12, at 292-93 (detailing courts' difficulty in finding appropriate circumstances for habeas relief).

132. *See* Berman v. United States, 302 U.S. 211, 212 (2007) (equating sentence to final judgment); *see also Woodfolk*, 857 F.3d at 542-43 (interpreting Supreme Court definition and applying to case at bar); Crangle v. Kelly, 838 F.3d 673, 678 (6th Cir. 2016) (following Supreme Court analysis of resentencing and allowing limitations tolling); *supra* notes 106-107, 111 (examining cases from Fourth, Fifth, Sixth, and Eleventh Circuits resulting in tolled limitations period).

133. *Prendergast*, 699 F.3d at 1187 (undermining sister circuit's decision in fear of abuse of judicial system); *see* Fielder v. Varner, 379 F.3d 113, 119-20 (3d Cir. 2004) (suggesting Eleventh Circuit's analyses lead to unintended results).

resentencing.[134] While the Tenth Circuit's argument seems to be directly in conflict with settled law, its worries are not misplaced; the incentive to obtain resentencing results in an outcome completely contrary to our criminal justice system.[135]

Analogizing this question to the issue of when finality attaches to permit second or collateral petitions proves helpful in clarifying the main debate.[136] Similarly to tolling statute of limitations periods, in some instances courts have allowed changes in sentences to permit petitioners to file a successive petition.[137] With this precedent equating new judgments to final convictions, it logically follows that courts are supported in doing so for statute of limitations periods as well.[138] Therefore, when petitioners are resentenced, courts act properly in allowing that altered judgment to toll their AEDPA limitations period.[139]

But the split is not resolved simply by applying one uniform definition of finality; courts differ when analyzing whether the definition attaches to an application or an underlying claim.[140] On one side, courts articulate that a resentencing creates a new judgment whether it addresses the original adjudication or not.[141] Scholars agreeing with this side of the split directly contest the Tenth Circuit's view.[142] Rather, they urge that unfair relief after convictions may actually *increase* recidivism.[143] But these assertions are lacking; both sides of the disagreement tend to ignore the underlying

134. *See* Kim, *supra* note 12, at 577 (suggesting lack of finality substitutes litigation over procedural issues rather than merits).

135. *See* Frohock, *supra* note 11, at 1107 (arguing clean habeas slate from change in judgment results in abuse of writ); Kim, *supra* note 12, at 589 (noting criminal justice system intended to prevent future crime).

136. Frohock, *supra* note 11, at 1110-11 (discussing disagreement in what restarts habeas count). In addition to limiting the time period in which petitioners can file for a writ, AEDPA also prohibits successive petitions. *See* 28 U.S.C. § 2244(b)(1) (2018) (instructing dismissal of second or successive petition for writ of habeas corpus). Frohock explores at length an opinion by the Eleventh Circuit regarding whether a minute amendment in the petitioner's sentence should restart his petition count. Frohock, *supra* note 11, at 1110-11.

137. *See* Magwood v. Patterson, 561 U.S. 320, 339 (2010) (allowing petitioner to file for writ on new judgment); Frohock, *supra* note 11, at 1105-07 (outlining case where Eleventh Circuit allowed new judgment to restart habeas filings).

138. *See* Woodfolk v. Maynard, 857 F.3d 531, 543 (4th Cir. 2017) (recognizing identical definitions applied in issues of both successive filings and statute of limitations period).

139. *See* Woolley, *supra* note 70, at 440 (advocating for liberal application of AEDPA's statute of limitations in order to protect habeas review). Woolley contends that without this liberal interpretation, the protections of the writ itself may be rendered meaningless. *Id.* at 442.

140. *Compare Woodfolk*, 857 F.3d at 543 (concluding resentencing equates new judgment despite lack of disturbance to original adjudication), *with* Prendergast v. Clements, 699 F.3d 1182, 1187 (10th Cir. 2012) (basing analysis of issue on underlying claim).

141. *See Woodfolk*, 857 F.3d at 543 (emphasizing no need to disturb underlying conviction to reach new judgment); *see also* Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) (concluding petitioner may contest original conviction based on resentencing judgment).

142. *See* Kim, *supra* note 12, at 620 (arguing limits on postconviction relief also limit ability to remedy wrongful incarceration).

143. *See id.* (contesting suggestion restrictions encourage better behavior). Kim strikes down the idea that restrictions will create more effective lawyering from defense counsel and better detainee behavior by suggesting that unfair relief will actually increase recidivism. *Id.* at 620-21.

jurisprudence in the criminal justice system, effectively avoiding fairness to the petitioner and focusing on finality.[144]

C. (In)Effectively Final: Deference to State Courts' Impact on Constitutional Right to Counsel

These questions of deference, finality, and resentencing present an additional hurdle for ineffective assistance of counsel claims.[145] The standard of ineffective assistance set forth by the *Strickland* Test is already extremely difficult to meet.[146] After AEDPA, claims of this nature already face a tougher standard of double deference before holding muster and earning a review on the merits.[147] If certain resentencing can toll statute of limitations, the Sixth Amendment right is more readily available to some petitioners; but, if not, yet another procedural bar is set.[148]

The differing opinions of circuits lead one to believe that petitioners on one side of the split are more likely to succeed than those on the other; this constitutional inequity needs remedying to ensure relief does not hinge on what jurisdiction the petitioner is in.[149] However, unanimously adopting one side's interpretation will not solve the issue, as both ends of the spectrum embrace extreme views on how to approach the merits of a claim.[150] Accepting the Fourth, Fifth, Sixth, and Eleventh Circuits' approach would likely lead to a decline in wrongful incarceration and an increase in successful habeas

144. *See* Bright, *supra* note 66, at 27 (arguing AEDPA suggests system more concerned with outcomes than process).

145. *See supra* Section II.D (addressing issues applied to ineffective assistance claims because of AEDPA); *see also* Woodfolk v. Maynard, 857 F.3d 531, 539-43 (4th Cir. 2017) (analyzing procedural issues before addressing merits of ineffective assistance claim); Prendergast v. Clements, 699 F.3d 1182, 1185 (10th Cir. 2012) (refusing review of ineffective assistance claim in habeas context); Rainey v. Sec'y for the Dep't of Corr., 443 F.3d 1323, 1330 (11th Cir. 2006) (denying habeas relief for ineffective assistance regardless of resentencing).

146. *See* Blume, *supra* note 12, at 279-80 (observing Supreme Court's failure to grant ineffective assistance claim). Because the Court had failed to find any counsel ineffective prior to AEDPA's passing, one can logically presume the standards created a difficult burden for petitioners to meet. *Id.* at 280.

147. *See* McAllister, *supra* note 19, at 128-31 (recognizing competing deference standards under AEDPA); *see also* Aviram, *supra* note 95, at 796 (explaining AEDPA's deference requires showing of unreasonable application of *Strickland* Test).

148. *See* Turner, *supra* note 101, at 971-72 (highlighting potential procedural bars to relief for legitimate ineffective assistance claims); *see also supra* Section III.A (analyzing bar created by jurisdictional component of AEDPA). *Compare Woodfolk*, 857 F.3d at 543, 553 (reviewing merits of petitioner's ineffective assistance claim), *with Prendergast*, 699 F.3d at 1185 (barring ineffective assistance claim due to procedural limits).

149. *See* Blume, *supra* note 12, at 282 n.116 (emphasizing two of three successful ineffective assistance claims originate in Fourth Circuit); *see also* O'Meara, *supra* note 30, at 576-88 (discussing circuit courts' different interpretations of ineffective assistance claims after AEDPA). Although some courts allow for habeas relief based on ineffective assistance, there is still no agreement among the circuits—and it does not seem likely that agreement will appear in the near future due to the confusing nature of the law. O'Meara, *supra* note 30, at 588-89.

150. *See supra* notes 8-10 and accompanying text (introducing differing views on reaching merits of claims in habeas petitions).

petitions.[151] After meeting the deference standard and without any additional hurdles to jump over, the Supreme Court's definition of final would allow for a more lenient review of habeas petitions, thus reinforcing our one true safeguard to personal freedom–the writ.[152]

But the Tenth Circuit's worries and fears cannot be ignored.[153] If the *Woodfolk* and *Walker* approach is adopted—where a single, unrelated resentencing restarts the statute of limitations period—there would be an incentive to either act out or start needless litigation to obtain a change in sentence.[154] Yet at the same time, employing the Tenth Circuit's view on resentencing exaggerates the obstacles to habeas law that AEDPA's amendments already impose, as well as adding a new one.[155] The Court must discover a middle ground to preserve the concerns of both sides.[156] A claim-by-claim review as suggested by the Tenth Circuit in *Prendergast* should be employed in conjunction with the Supreme Court's definition of "final" adopted by the majority of the circuits in order to properly protect the constitutional right to counsel of state petitioners seeking federal review.[157]

III. CONCLUSION

The courts on either side of the split are not contesting that the right to petition for habeas relief is viewed as a vital way to protect our individual freedom, and Congress has not taken it away by enacting AEDPA. But the lack of instruction and the courts' differing opinions are jeopardizing our constitutional right to fight for our innocence—especially when we were not afforded proper help in the first place.

Both sides of the split teeter on the extreme ends of the spectrum. One side lowers walls and liberally allows altered sentences to extend the time petitioners may file for ineffective assistance. The other side builds those walls back up and requires strict adherence to statutory language. When enacting AEDPA, Congress remained silent in telling courts how to interpret their words within the

151. *See* Blume, *supra* note 12, at 298 (setting out successes and failures of AEDPA habeas petitions). Blume sets out cases from different circuits along with their outcomes. *Id.* An analysis of the data shows that the success rate continues to decline after AEDPA's enactment. *See* Marceau, *supra* note 4, at 102 (expanding on data set forth by Blume).

152. *See* O'Meara, *supra* note 30, at 589 (questioning whether AEDPA restrictions provide proper review to habeas claims); *see also Suspended Justice*, *supra* note 20, at 1110 (maintaining review absent "reason requiring . . . late petition" supports Congress's intention of efficiency).

153. *See* Frohock, *supra* note 11, at 1108 (acknowledging concrete worries about abuse of writ).

154. *See* Prendergast v. Clements, 699 F.3d 1182, 1187 (10th Cir. 2012) (cautioning sister circuits' rule creates "perverse incentives"); Kim, *supra* note 12, at 585 (noting motivation created to drag out appeals).

155. *See* Kim, *supra* note 12, at 621 (suggesting advocates of restricted review underestimate inevitable harm of such limitations).

156. *See* Bellamy, *supra* note 60, at 53 (highlighting courts' responsibility to provide sufficient review).

157. *See* Bright, *supra* note 66, at 27 (urging for process protecting fairness instead of promoting process); Traum, *supra* note 68, at 563 (observing Fourth Circuit's approach supports Congress's intent to curtail abuse of writ).

new act. The number of disagreeing cases evidences that courts are crying out for guidance.

With our right to seek relief based on ineffective assistance of counsel hinging on these decisions, the time has come for someone to provide this assistance. Woodfolk found himself claiming ineffective assistance in a more lenient court. Prendergast, however, was not as lucky. Until Congress provides some sort of middle ground, inconsistent judgments will continue to be produced, and constitutional decisions will remain in the hands of questioning courts.

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