ARTICLES

PROSECUTING THE EXONERATED: ACTUAL INNOCENCE AND THE DOUBLE JEOPARDY CLAUSE

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In certain circumstances, a prisoner arguing that legal errors infected her trial must convince a court of her innocence in order to get relief. Unfortunately, such judicial exonerations often fail to persuade prosecutors, who are generally free to retry prisoners who successfully challenge their convictions. There have been several instances in which prisoners convinced courts of their innocence and overturned their convictions, only to have prosecutors bring the exact same charges against them a second time. This Article argues that the Double Jeopardy Clause protects these exonerated defendants from the ordeal of a second prosecution. Permitting prosecutors to continue to pursue such individuals contradicts established Supreme Court case law, violates the policies animating the Double Jeopardy Clause, and impairs the operation of the criminal justice system.

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INTRODUCTION

Robert Shaw owned a jewelry store in Phoenix, Arizona. During a robbery of his store, a robber brutally beat him on the head with a skillet before strangling him to death with his own necktie.[1] In 1998, the State of Arizona charged Paris Carriger with the murder.[2] In January of 1999, Carriger entered into a plea bargain with the State, under which he pled no contest.[3]

At first blush, this might not seem very unusual. But Robert Shaw was murdered in March of 1978,[4] and in July of 1978, the State of Arizona convicted Carriger of the murder and sentenced him to death.[5] He spent nineteen years on death row.[6] Then, in December of 1997, Carriger proved to a court that he was innocent.[7] The Ninth Circuit, sitting en banc, ruled that prosecutors had violated Carriger's constitutional rights and that "no reasonable juror hearing all of the now-available evidence would [find] Carriger [guilty] beyond a reasonable doubt."[8]

Carriger is not the only person to face a second state prosecution after being convicted by state authorities and exonerated by a federal court. At the same time that the State of Arizona was charging Carriger with the murder of Robert Shaw, the State of Missouri was charging Lloyd Schlup with the murder of Arthur Dade.[9] Like Carriger, Schlup had already been convicted of the mur-

1. Carriger v. Stewart, 132 F.3d 463, 465 (9th Cir. 1997) (en banc).

2. *See* James Carroll, Editorial, *Your Letters Made a Difference: Paris Carriger Is Free*, BOS. GLOBE, Feb. 2, 1999, at A15, *available at* http://truthinjustice.org/carriger.htm.

3. *See id.*

4. *Carriger*, 132 F.3d at 468.

5. *Id.* at 466.

6. Sharon Broussard, Editorial, *From Death Row to Freedom: Ex-Inmate Works Thank-You Circuit*, PLAIN DEALER (Cleveland), Sept. 1, 1999, at 9B.

7. *Carriger*, 132 F.3d at 478.

8. *Id.* at 478-79. More specifically, it found that the prosecution violated Carriger's right to due process of law by failing to disclose material exculpatory evidence in violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). *Carriger*, 132 F.3d at 481-82.

9. Tim O'Neil, *Killer Who Escaped Execution over New "Evidence" Pleads Guilty*, ST. LOUIS POST-DISPATCH, Mar. 25, 1999, at A15.

der and sentenced to death.[10] Schlup had spent over ten years on death row,[11] twice came within hours of being executed,[12] and won an appeal to the United States Supreme Court[13] before the United States District Court for the Eastern District of Missouri ruled him innocent of Dade's murder.[14] And as recently as 2008, the State of Tennessee charged Paul House with the murder of Carolyn Muncey after the United States Supreme Court itself had ruled that "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."[15] Prior to his exoneration, House had spent over twenty years on death row.[16]

Each of these cases—and others like them—followed a similar course.[17] After being convicted in state court, the accused pursued direct appeals within their respective state court systems.[18] When these failed, they launched collateral attacks on their convictions and sentences by filing for writs of habeas corpus in their respective state systems.[19] When these too failed, they filed for writs of habeas corpus in federal court, where they faced significant procedural

10. Sean D. O'Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 UMKC L. REV. 1021, 1022 (2009).

11. *See id.* at 1025 (stating that he was sentenced on March 3, 1986); *see also* Schlup v. Bowersox, No. 4:92CV443 JCH, 1996 U.S. Dist. LEXIS 8887, at *128 (E.D. Mo. May 2, 1996) (granting relief and temporarily ending his stay on death row).

12. O'Brien, *supra* note 10, at 1032 (noting that Schlup came within fifteen hours of execution on March 11, 1992); *see id.* at 1044, 1046 (stating that on November 18, 1993, Governor Mel Carnahan granted a stay of execution approximately five hours before Schlup was to be executed); *see also* Tim O'Neil, *Carnahan Delays Man's Execution, Calls for Hearing*, ST. LOUIS POST-DISPATCH, Nov. 19, 1993, at C1 (stating that the latter stay came eight hours before the scheduled execution).

13. Schlup v. Delo, 513 U.S. 298 (1995).

14. *Bowersox*, 1996 U.S. Dist. LEXIS 8887, at *1.

15. House v. Bell, 547 U.S. 518, 554 (2006); Jamie Satterfield, *Paul House Gets Second Chance Thanks to Investigators, Forensics*, KNOXVILLE NEWS SENTINEL (May 17, 2009), http://www.knoxnews.com/news/2009/may/17/finally-a-legal-reprieve.

16. Emanuella Grinberg, *Exonerated Death Row Inmate: "Took 'Em Long Enough,"* CNN (May 13, 2009), http://articles.cnn.com/2009-05-13/justice/tennessee.exonerated_1_death-row-inmate-dna-evidence-house-arrest?_s=PM:CRIME.

17. This is, of course, a simplification of that process. These defendants, like most who are sentenced to death, had a long and drawn-out postconviction process that spanned years and involved several petitions and sets of counsel. *See, e.g.*, Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2002*, BUREAU JUST. STAT. BULL., Nov. 2003, at 2, 3 (noting that thirty-seven of thirty-eight states with capital statutes provide for automatic appellate review of capital sentences "regardless of the defendant's wishes").

18. *See* State v. Carriger, 599 P.2d 788 (Ariz. 1979); State v. Schlup, 724 S.W.2d 236 (Mo. 1987); State v. House, 743 S.W.2d 141 (Tenn. 1987).

19. State v. Carriger, 692 P.2d 991, 994 (Ariz. 1984); Schlup v. State, 758 S.W.2d 715, 715 (Mo. 1988); House v. State, No. 03-C-019110CR00326, 1992 WL 210578, at *1-2 (Tenn. Crim. App. Sept. 2, 1992).

obstacles. Because of incurable procedural defects in each defendant's petition, the federal courts initially refused to even consider their arguments for relief.[20]

To overcome those obstacles, all three men took advantage of the "fundamental miscarriage of justice" doctrine. This doctrine holds that if a habeas petitioner[21] establishes that she is actually innocent of the crime for which she was convicted, her wrongful conviction and imprisonment constitute a fundamental miscarriage of justice. This dire result enables a court to overcome procedural barriers and consider the merits of her habeas corpus claims.[22] Over the last decade and a half, thousands of habeas petitioners have invoked this doctrine in their attempts to secure federal habeas relief.[23]

The Supreme Court delineated the modern contours of the fundamental miscarriage of justice doctrine in *Schlup v. Delo*.[24] In *Schlup*, the Court held that a petitioner seeking relief under the doctrine must bring forth new evidence and establish that "it is more likely than not that no reasonable juror would have convicted him in . . . light of the new evidence."[25] If a petitioner meets this high burden, he may overcome the procedural barriers that would otherwise bar his path and have a federal court consider his habeas petition on the merits.[26] Courts sometimes refer to the fundamental miscarriage of justice doctrine as the "actual innocence gateway," because a showing of innocence opens a gateway that the petitioner may pass through to have his claims heard on the merits.[27] Carriger, Schlup, and House all passed through the actual innocence

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20. Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997) (en banc) ("The constitutional claims Carriger raises could have been raised [earlier], and therefore would ordinarily be barred under the abuse of the writ doctrine."); Schlup v. Delo, 11 F.3d 738, 739 (8th Cir. 1993) ("Mr. Schlup asserts a number of constitutional claims not raised, or raised and denied [previously]. Thus, these allegations . . . may be considered by this court only under limited circumstances."); House v. Bell, No. 3:96-CV-883, 2000 WL 35504792, at *1 (E.D. Tenn. Feb. 16, 2000) ("Th[is] court [ruled against House], finding that [his] claims were either correctly decided by the state court on the merits or procedurally defaulted.").

21. For brevity, petitions for habeas corpus are often referred to as habeas petitions and the filers of such petitions are often referred to as habeas petitioners. *See, e.g.*, Gonzalez v. Crosby, 545 U.S. 524, 534 (2005); Duncan v. Walker, 533 U.S. 167, 170 (2001); Schlup v. Delo, 513 U.S. 298, 309 (1995); Sawyer v. Whitley, 505 U.S. 333, 336 (1992). This Article adopts these conventions.

22. House v. Bell, 547 U.S. 518, 536-37 (2006); Coleman v. Thompson, 501 U.S. 722, 750 (1991).

23. As of October 11, 2011, a search for federal cases citing *Schlup* for a headnote relating to its actual innocence standard returned 6272 opinions on Westlaw and 6505 opinions on LexisNexis.

24. 513 U.S. 298 (1995). This was the case that Lloyd Schlup won in the Supreme Court.

25. *Id.* at 327.

26. *Id.* at 326-28.

27. *E.g.*, Dretke v. Haley, 541 U.S. 386, 388, 395-96 (2004); Smith v. Baldwin, 510 F.3d 1127, 1129-30 (9th Cir. 2007) (en banc); Cummings v. Sirmons, 506 F.3d 1211, 1223 (10th Cir. 2007); Souter v. Jones, 395 F.3d 577, 600 (6th Cir. 2005); Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

gateway, succeeded on the merits of their habeas petitions, and were granted relief by the federal courts.[28]

Yet a successful habeas petition is often not a final victory for the petitioner. A successful petition usually invalidates a trial or sentencing proceeding on the ground that the proceeding was legally flawed.[29] However, the government is generally free to initiate a new trial or sentencing proceeding.[30] Thus, a successful petitioner may soon find herself back on trial for the same offense and, ultimately, back in prison.[31] In fact, a petitioner who is granted a new trial will often remain incarcerated before and during that trial.[32]

One might wonder how this result relates to the Fifth Amendment's edict that no "person be subject for the same offence to be twice put in jeopardy of life or limb."[33] The Supreme Court has interpreted this provision, more commonly known as the Double Jeopardy Clause, as protecting a defendant from retrial on a charge for which she has already been acquitted.[34] In this context, the Supreme Court has defined an acquittal as a ruling that resolves "some or all of the factual elements of the offense charged" in the defendant's favor.[35] In other words, to constitute an acquittal, a ruling must be based on the defendant's factual innocence of the crime charged. Since most writs of habeas corpus are granted on grounds that are independent of the petitioner's innocence,[36] the Double Jeopardy Clause generally poses no bar to retrial.[37]

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28. House v. Bell, 547 U.S. 518, 555 (2006); *Schlup*, 513 U.S. at 327; Carriger v. Stewart, 132 F.3d 463, 477-78, 482 (9th Cir. 1997) (en banc).

29. 39 C.J.S. *Habeas Corpus* § 52 (West 2012).

30. *See, e.g.*, Bromley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977) ("[H]olding a conviction invalid and granting the writ do not generally bar retrial on the original charge."); *see also* Capps v. Sullivan, 13 F.3d 350, 352 (10th Cir. 1993) (same); *cf.* Blackledge v. Perry, 417 U.S. 21, 31 n.8 (1974) ("[O]ur decision today [in favor of respondent habeas seeker] does not 'assure that no penalty whatever will be imposed' on [him]. . . . North Carolina is wholly free to conduct a [new] trial . . . on the original . . . charge." (quoting *Blackledge*, 417 U.S. at 39) (Rehnquist, J., dissenting)).

31. *See Capps*, 13 F.3d at 352 ("[R]ather than barring a new trial, the district court normally should facilitate it by suspending the writ for a time reasonably calculated to provide the state an adequate opportunity to conduct the new trial.").

32. *See* Carroll, *supra* note 2 (noting that Carriger remained in prison during the pendency of the new charge against him); *Despite High Court Ruling, House Doubts Relief*, WATE NEWS (Mar. 27, 2007), http://www.wate.com/story/6281274/despite-high-court-ruling-death-row-inmate-doubts-hell-be-freed.

33. U.S. CONST. amend. V.

34. *See* United States v. Ball, 163 U.S. 662, 671 (1896).

35. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

36. *See* 39 C.J.S. *Habeas Corpus* § 52 (West 2012) ("The right of a person to the writ of habeas corpus depends on the illegality of the detention, not on the person's guilt or innocence."); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970) ("[T]he one thing almost never suggested on collateral attack is that the prisoner was innocent . . . .").

37. *See* United States v. Scott, 437 U.S. 82, 96-101 (1978).

However, this Article argues that a habeas petitioner who establishes her innocence under *Schlup* or an equivalent standard[38] is differently situated from other habeas petitioners: she has secured a court ruling that she is factually innocent of the crime at issue and has thus been acquitted for purposes of the Double Jeopardy Clause. Accordingly, if a court subsequently grants relief on the merits of her habeas petition, the government cannot retry her for the same offense. This Article presents and explores this novel argument, supported both by Supreme Court precedent and the principles and policies underlying the Double Jeopardy Clause, which no party has yet raised and no court has yet considered.

Experience has shown that this issue has significant practical importance. Prosecutors are often the last to be convinced of a petitioner's innocence. The federal court rulings exonerating Paris Carriger, Lloyd Schlup, and Paul House failed to persuade the respective state prosecutors pursuing them.[39] Each of these men was once again forced to expend considerable time and energy preparing for a trial.[40] The extreme anxiety that generally accompanies the possibility of conviction and incarceration was heightened for them, both because they were keenly aware of the risk of wrongful conviction and because the state continued to imprison them during the pendency of their trials.[41] In the case of Lloyd Schlup, the state prosecutors even went so far as to seek the death penalty at his second trial.[42] This continued state of uncertainty was particularly difficult for Schlup and his family because he had come within hours of being executed on two previous occasions.[43]

Further prosecution of a petitioner who has established his innocence is also objectionable because it gives the state leverage that it may use to induce the exonerated petitioner to enter into a plea bargain. If the state offers the opportunity to plead guilty in exchange for time served, the petitioner may be tempted to accept in order to put his wrongful conviction behind him and ensure his freedom, even if the state is unlikely to win at trial. But a guilty plea can have two important consequences: First, it may hinder a lawsuit for wrongful conviction or lower the damages the petitioner can recover.[44] Worse, it

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38. There are a few additional circumstances in which a habeas petitioner can only obtain relief by making a showing of innocence that matches or exceeds *Schlup*'s rigorous standard. *See infra* notes 165-78 and accompanying text.

39. O'Brien, *supra* note 10, at 1047; Carroll, *supra* note 2; David G. Savage, *DNA Evidence Means Freedom After Two Decades*, L.A. TIMES, May 13, 2009, at A15.

40. *See* O'Brien, *supra* note 10, at 1047; Carroll, *supra* note 2; Savage, *supra* note 39.

41. Carroll, *supra* note 2; *Despite High Court Ruling, House Doubts Relief*, *supra* note 32. Lloyd Schlup would have been imprisoned anyway during this period, as he was already serving a long sentence when Arthur Dade was murdered. O'Brien, *supra* note 10, at 1047; *see also infra* note 397.

42. *See* O'Brien, *supra* note 10, at 1047-48.

43. *See id.* at 1033, 1045-46, 1048.

44. Pleading guilty can cost an accused other substantive rights as well, such as the rights to vote, hold public office, and bear arms, and may limit her ability to travel abroad.

enables the prosecution to change the story's narrative from "Wrongfully Convicted Man Freed" to "Man Found 'Innocent' Admits His Guilt."[45] Both of these results reduce accountability and impede the functioning of the criminal justice system. If this Article's argument is correct, then Lloyd Schlup, Paris Carriger, Paul House, and others like them would have been able to put an end to the criminal proceedings initiated against them after their judicial exonerations.

This Article begins in Part I by discussing the history of the Double Jeopardy Clause and the Supreme Court's interpretation of it. Part II analyzes *Schlup*'s actual innocence gateway and similar standards and places them in the context of the relevant habeas corpus jurisprudence. This Article then proceeds to analyze the intersection of these two legal doctrines in Part III, which also discusses the policy implications and addresses the most likely counterarguments.

I. THE DOUBLE JEOPARDY CLAUSE AND THE SUPREME COURT

For the first 150 years of its existence, the Supreme Court had relatively little occasion to develop its double jeopardy jurisprudence. In 1833, the Court ruled that the Double Jeopardy Clause did not apply to the states.[46] The Court later held that the federal government required explicit statutory authority to pursue criminal appeals,[47] and this authority was not provided until the enactment of the aptly named Criminal Appeals Act in 1907.[48] That Act empowered the federal government to challenge rulings dismissing indictments based on "the invalidity[] or construction of the statute" pursuant to which the indictment was made.[49] Most subsequent Supreme Court cases that involved government appeals in criminal cases concerned the interpretation of the Criminal Appeals Act and its amendments, and not the Double Jeopardy Clause itself.[50]

The Supreme Court's encounters with the Double Jeopardy Clause increased in the latter half of the twentieth century. First, in 1969, the Court held

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See, e.g., N.C. GEN. STAT. § 14-415.1(a) (2011) ("It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction . . . ."); VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote . . . .").

45. *See* O'Brien, *supra* note 10, at 1047-48; O'Neil, *supra* note 9.

46. More specifically, the Supreme Court ruled that the Fifth Amendment, of which the Double Jeopardy Clause is a part, does not apply to the states. *See* Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833).

47. United States v. Sanges, 144 U.S. 310, 312, 323 (1892).

48. *See* Criminal Appeals (Nelson) Act, ch. 2564, 34 Stat. 1246 (1907) (codified as amended at 18 U.S.C. § 3731 (2006)).

49. *Id.*

50. United States v. Scott, 437 U.S. 82, 85 (1978). For an account of the enactment and development of the Criminal Appeals Act, see *United States v. Sisson*, 399 U.S. 267, 291-96 (1970).

that the Double Jeopardy Clause applied to the states because it was incorporated through the Fourteenth Amendment.[51] In 1971, Congress amended the Criminal Appeals Act to give the federal government the power to appeal any dismissal of an indictment, "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."[52] This removed the issues of statutory construction that had occupied the Court until that point and replaced them with issues of constitutional interpretation.[53]

Thereafter, the Supreme Court initially encountered some difficulty as it tried to define the contours of the Double Jeopardy Clause. In 1975, the Supreme Court was faced with the case of George Wilson, Jr.[54] After a jury in the Eastern District of Pennsylvania found Wilson guilty of converting union funds, the district court judge dismissed his indictment on the ground that Wilson's defense had been prejudiced by pre-indictment delay.[55] The prosecution appealed the ruling, but the Third Circuit held that the Double Jeopardy Clause prohibited review.[56] The Supreme Court granted certiorari and reversed.[57] After a "detailed canvass of the history of the double jeopardy principles in English and American law" the Court concluded "that the Double Jeopardy Clause was primarily 'directed at the threat of multiple prosecutions,' and posed no bar to Government appeals 'where those appeals would not require a new trial.'"[58]

Three years later, in *United States v. Scott*,[59] the Supreme Court established the structure of its modern Double Jeopardy Clause jurisprudence. John Scott was charged with distributing narcotics.[60] He repeatedly moved to dismiss the charges against him on the ground that his defense had been preju-

51. Benton v. Maryland, 395 U.S. 784 (1969).

52. Omnibus Crime Control Act of 1970 § 14(a), Pub. L. No, 91-644, 84 Stat. 1880, 1890 (1971) (codified as amended at 18 U.S.C. § 3731).

53. United States v. Wilson, 420 U.S. 332, 337 (1975) ("Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit."); United States v. Weller, 401 U.S. 254, 255 n.1 (1971) ("The end of our problems with [the Criminal Appeals] Act is finally in sight."); *see also Scott*, 437 U.S. at 85 (describing the Court's comment in *Weller* as exhibiting "more optimism than prescience" and stating that "the 1971 amendment . . . simply shifted the focus of the debate . . . to the scope and meaning of the Double Jeopardy Clause").

54. *Wilson*, 420 U.S. 332.

55. *Id.* at 333.

56. *Id.*

57. *Id.*

58. *Scott*, 437 U.S. at 86 (quoting *Wilson*, 420 U.S. at 342).

59. 437 U.S. 82.

60. *Id.* at 84. The indictment had three separate counts. *Id.*

diced by pre-indictment delay.[61] At the close of the presentation of evidence, the district court granted his motion.[62]

The government appealed. In an opinion that heavily relied on *United States v. Jenkins*,[63] a recently decided Supreme Court case, the Sixth Circuit held that the Double Jeopardy Clause prohibited the government's appeal and dismissed for lack of jurisdiction.[64]

The Supreme Court granted certiorari and reversed.[65] The Court considered a defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made" and identified situations in which "the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence" as a scenario in which this interest might be implicated.[66] Such situations do not fit the mold of "an all-powerful state relentlessly pursuing a defendant who ha[s] either been found not guilty[,] or who ha[s] at least insisted on having the issue of guilt submitted to the first trier of fact."[67] Drawing a contrast with this sort of official malfeasance, the Court noted that "the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence."[68] Accordingly, the Court held that "[n]o interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal" in such circumstances.[69]

The Court distinguished these scenarios from "a jury verdict of not guilty" and "a ruling by the court that the evidence is insufficient to convict," both of which constitute "[a] judgment of acquittal" that cannot be appealed under the Double Jeopardy Clause.[70] It applied the same definition of "acquittal" that it had previously used: a ruling that, "whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."[71] The Court emphasized that it does not mat-

61. *Id.* Scott only moved for dismissal of two of the three charges against him, both of which involved conduct from the same time period. *See id.*

62. *Id.* The court dismissed the first and second charges. The court did not make clear on what grounds it was dismissing the second charge, but it explicitly stated that it was dismissing the first count due to prejudice from pre-indictment delay. The third charge was sent to the jury, which found the defendant not guilty. *Id.*

63. 420 U.S. 358 (1975).

64. *Scott*, 437 U.S. at 84; United States v. Scott, 579 F.2d 1013 (6th Cir. 1978).

65. *Scott*, 437 U.S. at 84. In doing so, the Court determined that it had "pressed too far in *Jenkins*" and overruled it. *Id.* at 87, 100.

66. *Id.* at 92.

67. *Id.* at 96.

68. *Id.*

69. *Id.* at 100.

70. *Id.* at 91.

71. *Id.* at 97 (alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

ter whether a decision acquitting a defendant is correct; "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' affects the accuracy of that determination, but it does not alter its essential character."[72]

Once a defendant is acquitted, the Double Jeopardy Clause protects him against any further proceedings devoted to establishing his factual guilt or innocence of the offense in question.[73] There is but one exception to this rule. When a trial court enters a guilty verdict, and either the trial judge or an appellate court overturns it on the ground that the evidence was insufficient to sustain a conviction, the government may pursue an appeal.[74] The logic underlying this result is that if a reviewing court agrees with the government, it may simply reinstate the previously rendered guilty verdict.[75] Accordingly, the court may correct the erroneous ruling on the sufficiency of the evidence without requiring the defendant to undergo a postacquittal trial, which the Double Jeopardy Clause forbids.[76] Thus, in a sense, the Double Jeopardy Clause protects a defendant against the process of being prosecuted.

The Court has consistently hewed to *Scott*'s broad framework and its expansive definition of an acquittal under the Double Jeopardy Clause. In *Smalis v. Pennsylvania*, the defendants were the owners of a building that burned down under suspicious circumstances, killing two tenants.[77] Defendants chose to be tried before a judge, and, at the end of the prosecution's case in chief, they filed a demurrer challenging the sufficiency of the evidence.[78] The trial court sustained their demurrer, finding that the evidence was insufficient to find either defendant guilty beyond a reasonable doubt.[79] The government appealed, but the Pennsylvania Superior Court held that the trial judge's ruling constituted an acquittal, and that the government's appeal was therefore barred by the Double Jeopardy Clause.[80]

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72. *Id.* at 98 (citation omitted) (quoting *id.* at 106 (Brennan, J., dissenting)).

73. Smith v. Massachusetts, 543 U.S. 462, 467 (2005) ("[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." (alteration in original) (quoting Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986))).

74. *Id.*; *Scott*, 437 U.S. at 90-91.

75. United States v. Wilson, 420 U.S. 332, 344-45 (1975).

76. *Id*. at 345.

77. *Smalis*, 476 U.S. at 141.

78. *Id.*

79. *Id.* at 141-42.

80. *Id.* at 142. More specifically, the Pennsylvania Superior Court quashed the appeal on the grounds that it was barred by the Double Jeopardy Clause. *Id.*; Commonwealth v. Zoller, 465 A.2d 16 (Pa. Super. Ct. 1983). The case was then reviewed by the Pennsylvania Superior Court en banc. *Smalis*, 476 U.S. at 142. It affirmed the trial court, reasoning that the trial court's ruling was an acquittal under the Double Jeopardy Clause, and that a reversal would necessitate postacquittal factfinding proceedings to determine the defendants' guilt, which would violate the Double Jeopardy Clause. *Id.*

The Pennsylvania Supreme Court reversed.[81] The court based its ruling on *Scott*'s statement that a judge only acquits a defendant when her ruling, "whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."[82] The Pennsylvania Supreme Court reasoned that, in considering a demurrer, a court does not weigh the evidence to determine whether a defendant is guilty or innocent, but instead considers whether the evidence, if credited by a jury, would be legally sufficient to sustain a verdict of guilty.[83] It therefore concluded that a court's ruling on a demurrer was the determination of a legal question, not the resolution of the factual elements of the charged offense.[84] Instead, it was an attempt by the defendant "to seek dismissal on grounds unrelated to his factual guilt or innocence" and, consequently, did not constitute an acquittal for purposes of the Double Jeopardy Clause.[85]

The Supreme Court granted certiorari and unanimously reversed.[86] It held that a "demurring defendant seeks . . . a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt."[87] The Court relied on *Scott*, which "plainly indicates that the category of acquittals includes 'judgment[s] . . . by the court that the evidence is insufficient to convict.'"[88] It also expressly reiterated that, for purposes of the Double Jeopardy Clause, it was of no consequence whether the trial court applied the proper legal standard in determining whether the evidence was insufficient, because that would only affect the accuracy of the trial court's determination and not its essential character.[89]

In *Smith v. Massachusetts*,[90] the Supreme Court illustrated that it was willing to carry *Scott*'s framework to its logical extreme. Smith was charged with various crimes, including unlawful possession of a firearm.[91] One element of the firearm offense was that the barrel of the weapon in question be less than sixteen inches long.[92] At trial, the only evidence that was introduced on this issue was testimony identifying the weapon as "'a pistol,' specifically 'a revolver' that 'appeared to be a .32 or a .38.'"[93] At the close of the prosecution's case

81. *Smalis*, 476 U.S. at 142; Commonwealth v. Zoller, 490 A.2d 394 (Pa. 1985).

82. *Smalis*, 476 U.S. at 142-43 (alteration in original) (quoting United States v. Scott, 437 U.S. 82, 97 (1978)); *Zoller*, 490 A.2d at 399-400.

83. *Smalis*, 476 U.S. at 143; *Zoller*, 490 A.2d at 401.

84. *Smalis*, 476 U.S. at 143; *Zoller*, 490 A.2d at 401.

85. *Smalis*, 476 U.S. at 143 (quoting *Zoller*, 490 A.2d at 401-02).

86. *Id.*

87. *Id.* at 144.

88. *Id.* (alteration and omission in original) (quoting United States v. Scott, 437 U.S. 82, 91 (1978)).

89. *Id.* at 144 n.7.

90. 543 U.S. 462 (2005).

91. *Id.* at 464.

92. *Id.*

93. *Id.* at 465.

in chief, Smith moved for a required finding of not guilty on the firearm charge, arguing that the prosecution had not proven that the gun barrel was less than sixteen inches.[94] The judge granted the motion, but did not inform the jury.[95] The defense then presented its case, which consisted of one witness.[96] During a short recess before closing arguments, the prosecution provided the judge with a case in which similar testimony to that which had been offered in Smith's case was held sufficient to establish that a gun barrel was less than sixteen inches long.[97] It asked the court to submit the firearms charge to the jury and to defer ruling on the sufficiency of the evidence until after the jury had reached its verdict.[98] The judge agreed, orally stated that she was "reversing" her prior ruling, and submitted the firearms charge to the jury along with the other charges.[99]

Smith was convicted on all three counts.[100] On appeal, he argued that his conviction on the firearms charge violated the Double Jeopardy Clause.[101] The appellate court held that Massachusetts's rules of criminal procedure permitted the judge to reconsider her earlier ruling, and that the Double Jeopardy Clause was not implicated because Smith was not subjected to a second proceeding.[102] The Supreme Judicial Court of Massachusetts denied review.[103]

The Supreme Court granted certiorari and reversed.[104] It reasoned that when the judge entered her ruling, Smith was acquitted of the charge in question.[105] The facts that the jury was not made aware of the ruling, that reversing the ruling did not require Smith to undergo another trial, that the ruling did not affect Smith's defense, and that the ruling was made under an arguably erroneous view of the law were all immaterial.[106] The ruling was a determination that Smith was factually innocent of the crime of which he was charged,[107] which

94. *Id.*

95. *Id.*

96. *Id.* Actually, Smith was tried alongside a second defendant, who was charged as an accessory after the fact, and the witness was called on behalf of Smith's codefendant. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 466.

101. *Id.*

102. *Id.*

103. *Id.*; Commonwealth v. Smith, 797 N.E.2d 380 (Mass. 2003).

104. *Smith*, 543 U.S. at 466.

105. *See id.* at 469-75.

106. *See id.* at 473 n.7 ("[T]he Double Jeopardy Clause has never required prejudice beyond the very exposure to a second jeopardy. To put it differently: Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause—even when the acquittal was erroneous because the evidence was sufficient.").

107. *Id.* at 467-68.

immediately entitled him to protection under the Double Jeopardy Clause.[108] Accordingly, submitting the firearms charge to the jury had subjected Smith to further factfinding proceedings in violation of the Double Jeopardy Clause.[109]

It is also worth noting that the scope of Double Jeopardy Clause protection that accompanies an acquittal extends beyond the acquitted offense itself. If an acquittal rationally implies a particular factual conclusion, the state may not bring new charges that cannot be reconciled with that factual conclusion.[110] For example, in *Ashe v. Swenson*, several men robbed six people playing poker.[111] The State tried Ashe and three other men for robbing one of the players.[112] Less evidence implicated Ashe than his codefendants, and his defense was that he was not one of the robbers.[113] The other alleged robbers were convicted or pled guilty, but the jury acquitted Ashe.[114] The State then tried and convicted Ashe for the robbery of another of the poker players.[115] The Supreme Court held that Ashe's second trial violated the Double Jeopardy Clause because the acquittal had resolved the question of whether Ashe was one of the robbers.[116]

Further, if a defendant is convicted or acquitted of a particular crime, the Double Jeopardy Clause bars a successive prosecution for another crime unless each of the two offenses includes at least one element that the other does not.[117] Thus, a petitioner who is convicted of the lesser included offense of joyriding cannot subsequently be convicted for the greater offense of car theft.[118]

The Supreme Court has even applied the principles it identified in *Scott* when considering whether a state may make repeated attempts to impose the death penalty on a particular defendant. The Double Jeopardy Clause generally does not protect a defendant who overturns a conviction and secures a new trial from the possibility of receiving a harsher sentence in the new proceeding than she received following the original trial.[119] However, when a death sentencing proceeding "ha[s] the hallmarks of [a] trial on guilt or innocence," as many modern state death penalty sentencing proceedings do, "the protection afforded

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108. *Id.* at 469 n.4 ("[A]n acquittal, once final, may not be reconsidered on appeal or otherwise."); *see also id.* at 469-75.

109. *Id.* at 469 n.4 ("*Smalis* squarely held . . . that appeal was barred because further factfinding proceedings before the trial judge . . . were impermissible." (citing Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986)).

110. Ashe v. Swenson, 397 U.S. 436 (1970).

111. *Id.* at 437.

112. *Id.* at 438.

113. *Id.*

114. *Id.* at 439; Ashe v. Swenson, 399 F.2d 40, 42 & n.5 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970).

115. *Ashe*, 397 U.S. at 439-40.

116. *Id.* at 446-47.

117. United States v. Dixon, 509 U.S. 688, 696 (1993); Blockburger v. United States, 284 U.S. 299, 304 (1932).

118. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 169 (1977).

119. Bullington v. Missouri, 451 U.S. 430, 438 (1981).

by the Double Jeopardy Clause to one acquitted by a jury also [applies], with respect to the death penalty, at his retrial."[120] Once a judge or jury affirmatively finds that the defendant should not be put to death, the defendant has been "acquitted" of the death penalty, and the state may not seek to impose the death penalty in a subsequent sentencing proceeding.[121] This is true even if the factfinder bases the "acquittal" on an incorrect construction of the relevant law.[122] On the other hand, if a judge or jury does not reach such a determination—if it hangs on the question of death, for example—then there has been no factual determination that the defendant is "innocent" of the death penalty and therefore there has been no "acquittal" within the meaning of the Double Jeopardy Clause.[123] Accordingly, the state is free to bring a new sentencing proceeding to try to impose the death penalty on the defendant.[124] These rules map directly onto those propounded by *Scott*.

Thus, since its decision in *Scott*, the Supreme Court's view of the Double Jeopardy Clause has been clear: any ruling by a factfinder that a defendant is factually innocent of a crime constitutes an acquittal and entitles her to double jeopardy protection. Such a ruling may be made by a judge or jury,[125] it may be at trial or in a subsequent proceeding,[126] it may be made under any label,[127] and it may even be made under an erroneous view of the law.[128] Once acquit-

120. *Id.* at 438-39, 446.

121. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003) ("[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'"); *Bullington*, 451 U.S. at 446.

122. Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984) (finding that the Double Jeopardy Clause prohibited subjecting the defendant to a second death penalty determination after the first determination, made under an incorrect view of the law, imposed a life sentence).

123. *Sattazahn*, 537 U.S. at 104-06; *see also* Poland v. Arizona, 476 U.S. 147, 152, 154 (1986) (finding no constitutional bar to reimposing the death penalty after appeal); Spaziano v. Florida, 468 U.S. 447, 457-58, 465 (1984) (holding that the Double Jeopardy Clause does not bar a judge from imposing a death sentence over a jury's recommendation of life when the judge bears ultimate responsibility for determining the penalty).

124. *Sattazahn*, 537 U.S. at 109, 112-13; *Poland*, 476 U.S. at 157; *Spaziano*, 468 U.S. at 465.

125. United States v. Scott, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."); United States v. Mackins, 32 F.3d 134, 137 (4th Cir. 1994) ("An acquittal represents a judgment by a jury or a court that the evidence is insufficient to convict.").

126. Burks v. United States, 437 U.S. 1, 10-12, 18 (1978).

127. *Scott*, 437 U.S. at 97 ("[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" (second alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977))).

128. *See* Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984); *Scott*, 437 U.S. at 91, 98.

ted, the defendant is protected against being placed in jeopardy again for the offense in question.[129]

II. *SCHLUP V. DELO* AND THE ACTUAL INNOCENCE GATEWAY

Ordinarily, when an individual is convicted of a crime in a state court, he has several judicial avenues that he may use to challenge his conviction.[130] His first line of attack is to challenge his conviction directly through one or more appeals.[131] If this tactic does not succeed, he may make a collateral attack on his conviction by filing a habeas petition in state court.[132] If the petitioner fails to obtain relief in state court, he may be able to file a habeas petition in federal court.[133] Because federal collateral review of state court convictions raises issues of comity and federalism and undermines the finality of the criminal process,[134] the scope of federal habeas review is constrained by a number of judicially established doctrines[135] and legislative restrictions.[136]

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129. Smith v. Massachusetts, 543 U.S. 462, 467 (2005) ("[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." (alteration in original) (quoting Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986))).

130. Or, in the applicable case, his sentence. *See, e.g.*, Sigala v. Campbell, 130 F. App'x 129 (9th Cir. 2005) (considering state prisoner's claim that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment).

131. *See* James N.G. Cauthen & Barry Latzer, *Time on Appeal: Empirical Evidence on Capital Case Processing in New Jersey*, JUDGES' J., Fall 2000, at 12, 13.

132. *See, e.g.*, State v. Carriger, 692 P.2d 991 (Ariz. 1984); Schlup v. State, 758 S.W.2d 715 (Mo. 1988); House v. State, No. 03-C-019110CR00326, 1992 WL 210578 (Tenn. Crim. App. Sept. 2, 1992). This Article generally refers to petitions for state postconviction collateral relief as state habeas corpus petitions, regardless of the nomenclature that individual states have adopted.

133. 28 U.S.C. § 2254 (2006). An individual may also seek a pardon or other clemency, but this is generally a discretionary power vested solely in the executive. 59 AM. JUR. 2D *Pardon and Parole* § 12 (West 2012) ("The power to pardon conferred by the various constitutions is practically unrestricted [and] is left to the absolute discretion of the official having that power . . . . [T]he official is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control . . . or discretion in such matters.").

134. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 279 (2008); Teague v. Lane, 489 U.S. 288, 308 (1989); Engle v. Isaac, 456 U.S. 107, 134 (1982); Rose v. Lundy, 455 U.S. 509, 515, 518 (1982); Darr v. Burford, 339 U.S. 200, 204 (1950); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 266-69 (2006) (noting that the Rehnquist Court "focused on the interests of comity, federalism, and finality" in its habeas cases); James J. Sticha, Note, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 MINN. L. REV. 1615, 1619 (1996).

135. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 729-32 (1991) (discussing "independent and adequate state ground doctrine" and "exhaustion doctrine").

136. *See, e.g.*, 28 U.S.C. § 2254(b)-(c). *See generally* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244, 2253-2255, 2261-2266.

One of these restrictions, known as the "exhaustion requirement,"[137] is that an individual challenging a state court conviction must exhaust all judicial remedies that that state makes available before she can avail herself of any federal judicial remedies.[138] Often, states will fix a particular window of time during which an individual may file a habeas petition,[139] or limit the number of petitions that an individual may file.[140] If an individual does not avail herself of these state remedies within the window of time established by the state, or if she fails to raise an argument in a petition during that time, she is said to have procedurally defaulted her claim to federal habeas corpus relief.[141]

Ordinarily, if an individual has committed a procedural default, a federal court will refuse to consider any of the arguments she raises in her habeas petition.[142] There are exceptions to this rule, however,[143] and if a petitioner qualifies under one of them, a federal court may reach the merits of her petition, notwithstanding any procedural defects.[144]

One such exception is the fundamental miscarriage of justice doctrine. To take advantage of this doctrine, a petitioner must establish that his case "falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice,'"[145] that is sufficient to overcome "the principles of comity and finality" that normally justify the exhaustion requirement.[146] If the petitioner succeeds in doing so, "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration."[147]

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137. Note, *Review Proceedings*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 805, 872, 883 (2008).

138. 28 U.S.C. § 2254(b)(1)(A); *see also* Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (discussing the exhaustion requirement); *Ex parte* Hawk, 321 U.S. 114, 116-17 (1944) (same).

139. *See, e.g.*, OR. REV. STAT. ANN. § 138.510(3) (West 2011); VA. CODE ANN. § 8.01-654(A)(2) (2011).

140. *See, e.g.*, VA. CODE ANN. § 8.01-654(B)(2) ("No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.").

141. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 92 (2006) ("In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the . . . name of procedural default . . . ."); Gray v. Netherland, 518 U.S. 152, 162 (1996); Smith v. Baldwin, 510 F.3d 1127, 1138 (9th Cir. 2007) (en banc) ("[Smith's] claims are procedurally defaulted for federal habeas purposes because Oregon's time limit for filing petitions for post-conviction relief bar Smith from now returning to state court to exhaust his remedies.").

142. *See Woodford*, 548 U.S. at 93.

143. *See Gray*, 518 U.S. at 162 ("[T]he procedural bar . . . prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default."); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

144. *See Gray*, 518 U.S. at 162; Schlup v. Delo, 513 U.S. 298, 314-15 (1995).

145. *Schlup*, 513 U.S. at 314-15 (omission in original) (quoting McClesky v. Zant, 499 U.S. 467, 494 (1991)).

146. *Id.* at 320 (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)).

147. *Id.* at 320-21 (quoting *Carrier*, 477 U.S. at 495).

The Court has long recognized the existence of this doctrine,[148] but it first established its modern contours in *Schlup v. Delo*.[149] In *Schlup*, the Court held that a petitioner who demonstrates that he is "actually innocent"[150] of the crime of which he was convicted may overcome his procedural default and present his claims for habeas corpus to a federal court.[151] To demonstrate his innocence, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him."[152] In making this determination, the reviewing court should not limit itself to the evidence introduced at trial; instead, it must consider "all the evidence,"[153] including evidence that has "become available only after the trial,"[154] and without regard to rules governing the admissibility of evidence ("but with due regard to any unreliability" of inadmissible evidence).[155]

It bears emphasizing that the fundamental miscarriage of justice exception delineated in *Schlup* is an extremely narrow exception. It does not require a petitioner to show that it is more likely than not that *a* reasonable juror would find him innocent, or even that *most* reasonable jurors would do so, but that *every* reasonable juror would find him innocent. As courts have repeatedly recognized, this is an exceedingly high bar to clear.[156] In practice, the cases in which petitioners are able to take advantage of the exception tend to be those in which the prosecution's case was relatively weak and the defense team produces "new reliable evidence—[such as] exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[157]

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148. *See* Sawyer v. Whitley, 505 U.S. 333, 339 (1992); *McCleskey*, 499 U.S. at 494; *Carrier*, 477 U.S. at 495-96; Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

149. 513 U.S. 298.

150. *Id.* at 301, 326-27; *see also id.* at 338 (Rehnquist, C.J., dissenting) (citing *Carrier*, 477 U.S. at 496).

151. *Id.* at 321-24, 331-32 (majority opinion).

152. *Id.* at 327.

153. *Id.* at 328 (quoting Friendly, *supra* note 36, at 160).

154. *Id.* (quoting Friendly, *supra* note 36, at 160).

155. *Id.* at 327-28.

156. *See, e.g.*, House v. Bell, 547 U.S. 518, 538 (2006) ("[I]t bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case."); Smith v. Baldwin, 510 F.3d 1127, 1140 (9th Cir. 2007) (en banc) (describing *Schlup*'s actual innocence standard as a "high burden"); Nance v. Norris, 392 F.3d 284, 291 (8th Cir. 2004) ("[T]he *Schlup* standard is quite high . . . ."); Auld v. Montana, No. CV 10-70-M-DWM, 2010 WL 3024873, at *1 (D. Mont. July 29, 2010) (describing proffered evidence as "insufficient to meet the high standard necessary under *Schlup*"); Reasonover v. Washington, 60 F. Supp. 2d 937, 949 n.7 (E.D. Mo. 1999) (noting that it is "difficult for the petitioner to prevail under the *Schlup* standard").

157. *Schlup*, 513 U.S. at 324; *see also House*, 547 U.S. at 540-41 (describing the case against Paul House as circumstantial); Souter v. Jones, 395 F.3d 577, 592 (6th Cir. 2005) ("[T]his new evidence—the changed testimony of [expert witnesses who testified for the state at trial], the [additional expert and forensic evidence introduced by the defense, and] the photos of the [victim's] bloody clothes—when taken together chips away at the rather slim

Under *Schlup*, a petitioner who successfully demonstrates his actual innocence is not necessarily entitled to any substantive relief, such as a new trial or having his conviction vacated.[158] Such a showing merely allows the petitioner to have a federal court *consider* the merits of his habeas claim.[159] Thus, a habeas petitioner's "claim for relief [under *Schlup*] depends critically on the validity of [the substantive] claims" presented in his habeas petition.[160] The Court therefore characterized a claim of innocence under *Schlup* as "procedural" because it serves only to allow a petitioner to overcome the procedural obstacles that prevent a federal court from considering the merits of his substantive claims.[161] The Court identified actual innocence as the appropriate touchstone for considering the merits of a habeas petitioner's claims because when a habeas petitioner "presents [sufficiently strong] evidence of innocence[,] . . . a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."[162]

Thus, a claim of actual innocence under *Schlup* is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to

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circumstantial evidence upon which Souter was convicted." (third alteration in original) (quoting Joint Appendix at 185, *Souter*, 395 F.3d 577 (No. 03-1528))); Nickerson v. Roe, 260 F. Supp. 2d 875, 894, 906 (N.D. Cal. 2003) ("No physical evidence linked Nickerson to the Evans murders. . . . [T]he state has been unable to explain [how] a startlingly obese [425-pound] man manage[d] to flee several blocks . . . without being seen [while] [n]umerous witnesses saw men fleeing who were of average height and build.").

158. *Schlup*, 513 U.S. at 315 ("Schlup's claim of innocence does not by itself provide a basis for relief."); *cf.* Herrera v. Collins, 506 U.S. 390, 400, 404-05, 417 (1993) (considering, without accepting or rejecting, a petitioner's argument that innocence may alone constitute grounds for federal habeas relief).

159. *Schlup*, 513 U.S. at 315 ("[A *Schlup* claim] is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" (quoting *Herrera*, 506 U.S. at 404)).

160. *Id.* at 315.

161. *Id.* at 314-15. There is one way in which meeting the *Schlup* test may aid a petitioner in establishing her substantive constitutional claims. Many such claims require a petitioner to show both that her constitutional rights were violated and that such violations actually harmed her. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (requiring federal habeas petitioners to establish they were prejudiced by legal error); *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring someone making a claim of ineffective assistance of counsel to prove that she suffered prejudice as a result of counsel's deficient performance); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that a defendant's due process rights are violated when the prosecution withholds exculpatory evidence from the defense only if that evidence is material). This contrasts with so-called structural errors, which automatically require reversal. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986); Waller v. Georgia, 467 U.S. 39, 49-50 (1984); Tumey v. Ohio, 273 U.S. 510, 535 (1927). A petitioner who demonstrates that she is actually innocent is likely to have an easier time demonstrating that she was damaged by any legal infirmities that plagued her proceedings. *See* Larsen v. Adams, 718 F. Supp. 2d 1201, 1224 (C.D. Cal. 2010) ("Having previously concluded that Petitioner passes through the *Schlup* gateway, the Court finds that Petitioner necessarily satisfies the *Strickland* test for prejudice . . . .").

162. *Schlup*, 513 U.S. at 316.

have his otherwise barred constitutional claim considered on the merits."[163] Consequently, the fundamental miscarriage of justice exception to procedural default that the Court elucidated in *Schlup* is sometimes referred to as the "actual innocence gateway."[164]

There are certain other circumstances in which habeas petitioners must make a procedural showing of innocence sufficient to meet or exceed *Schlup*'s standard in order to obtain substantive relief. For example, in *Sawyer v. Whitley*,[165] the Court considered an issue much like the one it would later face in *Schlup*. Sawyer was a state prisoner sentenced to death who argued that the facts of his offense rendered him ineligible for the death penalty.[166] He sought federal habeas relief from his state death sentence, but he had procedurally defaulted his state remedies.[167] The Court held that, to overcome his procedural default and have a federal court consider his habeas petition on the merits, Sawyer "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty . . . ."[168] The *Schlup* standard was modeled after the *Sawyer* standard, except that *Schlup* replaced *Sawyer*'s "clear and convincing evidence" requirement with a "more likely than not" requirement.[169] Thus, the *Sawyer* standard for innocence of a death-penalty-eligible offense is essentially identical to the *Schlup* standard for innocence, except that the *Sawyer* standard is "more stringent."[170]

The Antiterrorism and Effective Death Penalty Act (AEDPA) and its amendments have also imposed actual innocence requirements on certain federal habeas petitioners. These actual innocence provisions mirror the *Sawyer* standard, as they require a petitioner to "establish by clear and convincing evidence that," "in light of the evidence as a whole," "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[171] These actual innocence requirements apply to state prisoners who raise second or successive petitions, or who request an evidentiary hearing to develop a claim after failing to establish its factual basis in state court proceedings.[172] They also apply to second or successive petitions by federal pris-

163. *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404).

164. *E.g.*, Dretke v. Haley, 541 U.S. 386, 395 (2004); Wolfe v. Johnson, 565 F.3d 140, 158 (4th Cir. 2009); Smith v. Baldwin, 510 F.3d 1127, 1140 (9th Cir. 2007) (en banc); Cummings v. Sirmons, 506 F.3d 1211, 1223 (10th Cir. 2007); Souter v. Jones, 395 F.3d 577, 600 (6th Cir. 2005); Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

165. 505 U.S. 333 (1992).

166. *See id.* at 335-36.

167. *See id.*

168. *Id.* at 336.

169. *See* Schlup v. Delo, 513 U.S. 298, 326-27 (1995).

170. *Id.*

171. 28 U.S.C. § 2244(b)(2)(B)(ii) (2006); *see also id.* § 2254(e)(2)(B); *id.* § 2255(h).

172. *Id.* §§ 2244(b)(2), 2254(e).

oners.[173] Like the *Sawyer* standard discussed above, these statutory provisions track *Schlup*'s actual innocence standard, but are even more restrictive.

Finally, some states have incorporated *Schlup* into their state habeas corpus jurisprudence. More specifically, several states use *Schlup*'s actual innocence standard as the test to determine when a state prisoner who has procedurally defaulted her state habeas claims may overcome her procedural default and have her claims heard on the merits by a state court. These states include Missouri,[174] Montana,[175] Nevada,[176] and Virginia.[177] Texas has even codified *Schlup*'s standard as the requirement for successive state habeas petitions.[178] Unlike the *Sawyer* and AEDPA standards discussed above, which are more rigorous than the *Schlup* standard, these standards mirror *Schlup*'s actual innocence standard exactly.

III. THE INTERSECTION OF *SCHLUP* AND THE DOUBLE JEOPARDY CLAUSE

With this framework in place, we can now consider whether a petitioner who succeeds in making a *Schlup* claim has been acquitted for purposes of the Double Jeopardy Clause. First, it is worth highlighting the practical importance of this inquiry.

A. *Practical Implications of an Acquittal to a Successful Habeas Petitioner*

Ordinarily, when a federal court grants a habeas petition, the court is ruling that the petitioner's conviction or sentence violated the United States Constitution.[179] This may happen if, for example, the performance of the individual's trial lawyer was so deficient that it failed to satisfy the requirements of the right to counsel,[180] if the trial court deprived the individual of the right to confront

173. *Id.* § 2255(h).

174. State *ex rel.* Nixon v. Jaynes, 63 S.W.3d 210, 216 (Mo. 2001).

175. State v. Pope, 80 P.3d 1232, 1242 (Mont. 2003).

176. Steese v. State, No. 54344, 2010 WL 4514351, at *1 (Nev. Nov. 5, 2010).

177. Reedy v. Wright, 60 Va. Cir. 18, 25 (2002). For certain states, it is not entirely clear whether they have adopted the *Schlup* standard. *See, e.g.*, Rhoades v. State, 220 P.3d 1066 (Idaho 2009); Silverburg v. Commonwealth, No. 2001-SC-0400-MR, 2006 WL 2986512 (Ky. Oct. 19, 2006).

178. TEX. CODE CRIM. PROC. ANN. art 11.07, § 4(a) (West 2011); *see Ex parte* Brooks, 219 S.W.3d 396, 399-400 (Tex. Crim. App. 2007).

179. *See* 28 U.S.C. § 2254(a) (2006).

180. *See* U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 697-98 (1984); Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir. 2005).

the witnesses against her,[181] or if the trial court imposed a cruel and unusual sentence.[182]

Most grounds for habeas corpus relief do not depend upon (or even consider the question of) the petitioner's innocence of the underlying offense.[183] Instead, they focus on whether there was a legal deficiency in the particular proceeding at which the individual was convicted or sentenced.[184] Accordingly, the government generally has the opportunity to continue its pursuit of the individual by initiating a new trial or sentencing proceeding.[185] Thus, a successful habeas petitioner may soon find herself back on trial for the same offense and, ultimately, back in prison.[186] In fact, a prisoner who is granted a new trial will often remain incarcerated before and during that trial.[187]

On the other hand, if an individual obtains a writ of habeas corpus after making a successful claim of innocence under *Schlup* or one of the comparable standards discussed above, she has demonstrated to a court that she is actually innocent of the underlying crime.[188] If this does not constitute an acquittal for purposes of the Double Jeopardy Clause, the state will be free to bring the same charges against her as it originally brought, just as it would be free to reprosecute any other habeas petitioner. However, if a demonstration of innocence under *Schlup* or its brethren constitutes an acquittal within the meaning of the

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181. U.S. CONST. amend. VI; Whorton v. Bockting, 549 U.S. 406 (2007); Crawford v. Washington, 541 U.S. 36 (2004); United States v. Becker, 502 F.3d 122 (2d Cir. 2007).

182. U.S. CONST. amend. VIII; Roberts v. Collins, 544 F.2d 168, 169-70 (4th Cir. 1976) (per curiam).

183. *See, e.g.*, Friendly, *supra* note 36, at 145 ("[T]he one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime."), *cited with approval in* Schlup v. Delo, 513 U.S. 298, 321-22 (1995) ("Judge Friendly's observation a quarter of a century ago . . . remains largely true today.").

184. *See* 39 C.J.S. *Habeas Corpus* § 52 (West 2012) ("[T]he right of a person to habeas corpus relief depends on . . . the legality or illegality of the detention. . . . The legality or illegality of the detention, in turn, depends on whether the fundamental requirements of law have been complied with, and not on the guilt or innocence of the detainee." (footnotes omitted)).

185. *See, e.g.*, Bromley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977) ("[H]olding a conviction invalid and granting the writ do not generally bar retrial on the original charge."); *see also* Douglas v. Workman, 560 F.3d 1156, 1176 (10th Cir. 2009); Capps v. Sullivan, 13 F.3d 350, 352 (10th Cir. 1993); *cf.* Blackledge v. Perry, 417 U.S. 21, 31 n.8 (1974) ("[O]ur decision today [in favor of respondent habeas seeker] does not 'assure that no penalty whatever will be imposed' on [him]. . . . North Carolina is wholly free to conduct a [new] trial . . . on the original misdemeanor assault charge." (quoting *Blackledge*, 417 U.S. at 39 (Rehnquist, J., dissenting))).

186. *Cf.* Barbara Boyer & Rich Henson, *Lambert Back in Jail After 10 Months Free*, PHILA. INQUIRER, Feb. 5, 1998, at A1 (describing the scene when "a composed Lisa Michelle Lambert . . . returned to the same stark prison walls she so triumphantly departed 10 months ago" following her receipt of federal habeas relief by District Judge Stewart Dalzell).

187. *See Capps*, 13 F.3d at 352 ("[D]istrict court[s] normally should facilitate [a new trial] by suspending the writ for a time reasonably calculated to provide the state an adequate opportunity to conduct the new trial.").

188. *See Schlup*, 513 U.S. at 298.

Double Jeopardy Clause, a habeas petitioner who successfully establishes her innocence and proceeds to secure habeas relief cannot be charged with the same offense a second time.

At first blush, this may seem to be a question of only academic importance.[189] One might think that legal protection against a second prosecution would be of little value to habeas petitioners who have brought forth sufficiently persuasive evidence to meet *Schlup*'s actual innocence test. One might expect that prosecutors would be unlikely to pursue charges against such individuals, or that such individuals would not fear a second trial because, given the strong evidence of innocence at their disposal, they would have a trivial chance of being convicted.

Yet experience has belied both of these suppositions. Prosecutors are often the last to be convinced of the petitioner's innocence.[190] First, prosecutors have structural incentives to resist claims of innocence. District attorneys sometimes tout their office-wide conviction rates as a means to secure resources in the budgeting process and, in the case of elected district attorneys, to bolster their electoral prospects.[191] Similarly, a postconviction exoneration undercuts the reputation and credibility of the prosecutor who originally tried the case and of the office in general.[192] It can call the results of other prosecutions into doubt and hamper legitimate goals of the office.[193] It can also lead to a lawsuit for wrongful conviction, which is likely to be expensive and garner additional bad publicity.[194]

There are also a number of psychological factors that may make prosecutors resistant to postconviction claims of actual innocence. The vast majority of prisoners' claims of actual innocence are unsubstantiated, which fosters prosecutorial skepticism of them in general.[195] Further, the act of making an argument can cause a person to believe what they are arguing;[196] thus, a skeptical

189. *See* Albert W. Alschuler, *Foreword* to DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, at xiii (2004) ("'Lawyer's law' is the law of interest only to lawyers. The twists and turns of double jeopardy law might seem to qualify.").

190. *See, e.g.*, House v. Bell, 386 F.3d 668, 709 (6th Cir. 2004) (Merritt, J., dissenting) ("Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error."), *rev'd*, 547 U.S. 518 (2006).

191. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 & n.42 (2004).

192. *Id.* at 136-37.

193. *Id.*

194. *See id.* at 167-68.

195. *Id.* at 148-49.

196. *See, e.g.*, ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY 184-92 (4th ed. 2002) ("[W]hen a person states an opinion or attitude that runs counter to his or her private belief . . . it [can] result[] in a change in the individual's private attitude in the direction of the public statement."); DAVID G. MYERS, PSYCHOLOGY 552-54 (5th ed. 1998) ("If induced to speak

prosecutor who challenges a postconviction claim of actual innocence may become increasingly convinced of the defendant's guilt. Moreover, people generally have trouble admitting their mistakes, especially when the mistake results in serious harm.[197] It can be particularly difficult for prosecutors to acknowledge such mistakes because they see themselves as serving the interests of justice; ironically, their sincere good intentions can sometimes prevent them from recognizing when a prosecution has gone awry.[198]

To be sure, prosecutors are sometimes convinced that an innocent individual has been wrongfully convicted. The case of Larry Souter is instructive. In 1979, Souter met Kristy Ringler at a bar.[199] The two then continued on to a house party.[200] Souter, who had been drinking heavily from a pint-sized whiskey bottle, was the last person to see Ringler before she left the party. Soon thereafter, her body was found nearby in the middle of the road.[201] She had suffered a head wound and died shortly after being found.[202] Investigators found glass in Ringler's jeans and in the bandages around her wounds.[203] A forensic pathologist hired by the State concluded that Ringler's injuries were consistent with being hit by a car, not a homicide.[204]

Twelve years later, the case was reopened after the election of a new sheriff who had committed to reviewing unsolved homicide files.[205] The State tried Souter for murder, arguing that he had hit Ringler with his whiskey bottle.[206] The case was circumstantial; the State introduced three expert witnesses who testified that Ringler's wounds were consistent with being struck by a bottle with a sharp edge.[207] The bottle did not have a sharp edge at the time of trial, but one of the State's experts testified that he had inspected the bottle a year

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or write on behalf of a point of view they have doubts about, [people] begin to believe their own words. Saying becomes believing."); *id.* at 554 ("[The] more responsible we feel for a troubling act, . . . the more motivated we are to find consistency, such as by changing our attitudes to help justify the act."); *cf.* Gary L. Wells & Richard E. Petty, *The Effects of Overt Head Movements on Persuasion: Compatibility and Incompatibility of Responses*, 1 BASIC & APPLIED SOC. PSYCHOL. 219 (1980) (finding that students made to nod during a speech advocating tuition hikes were significantly more likely to agree with the speaker, while those made to shake their heads were significantly more likely to disagree with the speaker).

197. James McCloskey, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989); Medwed, *supra* note 191, at 138.

198. *See* Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 402-03 (2011).

199. Souter v. Jones, 395 F.3d 577, 581 (6th Cir. 2005).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 582.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 583.

earlier and that it had a sharp edge at that time.[208] There was a trace amount of Type A blood on the bottle's label.[209] Both Souter and Ringler had Type A blood, and witnesses corroborated Souter's claim that he had cut his finger on a jagged door handle at the party.[210] There was no other physical evidence tying Souter to the crime; there was no other blood or hair on the bottle, on Souter, or on his boots.[211] The bottle was made of brown glass, but the glass particles found on Ringler were not brown.[212]

Souter was convicted,[213] procedurally defaulted his state habeas claims, and sought federal habeas relief.[214] He argued that the court should consider his substantive claims because he was actually innocent under *Schlup*.[215] He introduced several pieces of exculpatory evidence. Two of the three forensic experts who testified for the prosecution at trial recanted their testimony, stated that it was "unlikely" that the bottle could have caused Ringler's injuries, and discredited the credentials of the State's third expert witness.[216] Souter presented extensive evidence from the bottle manufacturer and forensic technicians that proved that the bottle could not have had a sharp edge, as well as an affidavit from the police laboratory technician, who said that the bottle did not have a sharp edge when it was recovered after the murder.[217] The Sixth Circuit found that Souter had satisfied *Schlup*'s actual innocence requirement and instructed the district court to consider the merits of his habeas petition on remand.[218]

After the Sixth Circuit's ruling, Carla Dimkoff saw a news report about Souter's case.[219] She contacted Souter's attorneys and told them how her father, James Keller, had unexpectedly come to visit the day of Ringler's death.[220] Keller went out drinking that night, and Dimkoff found him trying to

208. *Id.*

209. *Id.* at 582.

210. *Id.* at 582 & n.2. This story was lent further credence by the fact that the investigating officer also cut his finger on that same door handle during his investigation. *Id.* at 582 n.2. Roughly forty-three percent of the U.S. population has Type A blood. *Id.* at 582.

211. *Id.* at 582.

212. *Id.*

213. *Id.* at 583.

214. *Id.*

215. *See id.* at 583-84.

216. *Id.*

217. *Id.* He also introduced previously unavailable pictures of the crime scene that showed the back of Ringler's clothes covered in blood. *Id.* at 584. This was important because Ringler was found lying on her back and little blood was visible. At trial, the prosecution argued that this explained the lack of blood on Souter and his boots, but the large amounts of blood visible in these photos made it significantly less likely that Souter could have hit or moved Ringler without getting any blood on himself. *Id.* at 591-92.

218. *Id.* at 602.

219. John Agar, *26 Years Later, Somebody Listened*, GRAND RAPIDS PRESS, Apr. 7, 2005, at A1.

220. *Id.*

repair a broken side-view mirror on his motor home the next day.[221] He would not say how the mirror was damaged, immediately drove back to his home out of state despite his announced plans to stay the week, and took the broken mirror pieces with him instead of leaving them in her trash.[222] When Ringler's body was found along the route between Dimkoff's residence and the bar where Keller had been drinking, Dimkoff contacted the police about her suspicions.[223] She spoke to detectives, who also contacted her father in Tennessee.[224] She assumed that the death had gone unsolved and did not know that Souter was convicted twelve years later.[225] In response to a Freedom of Information Act request from Souter's attorneys, the sheriff's department produced documents, including a handwritten note from Dimkoff, that corroborated her story.[226] At that point, state officials acknowledged that they had gotten the wrong man, and that Souter should never have been prosecuted.[227]

But state prosecutors are not always so easy to persuade. Paul House was convicted of murdering Carolyn Muncey.[228] In *House v. Bell*, the Supreme Court ruled that House had established his innocence and that a federal court could therefore consider the merits of his procedurally defaulted habeas claims.[229] The State of Tennessee was unmoved by the Court's determination and proceeded to fight to keep House in prison at every turn. It challenged House's habeas claims on the merits.[230] The federal district court found for House and granted him a conditional writ of habeas corpus that required the State to either retry him within 180 days or free him.[231] The State appealed the district court's order[232] and, after this tactic proved unsuccessful, began making preparations to retry him.[233] The State conducted DNA tests on blood found

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. John Agar, *Murder Suspect "Was Done Wrong,"* GRAND RAPIDS PRESS, July 6, 2005, at A1.

228. House v. Bell, 547 U.S. 518, 521 (2006).

229. *Id.* at 555 ("House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims.").

230. House v. Bell, No. 3:96-cv-883, 2007 U.S. Dist. LEXIS 94176, at *4-5 (E.D. Tenn. Dec. 20, 2007).

231. *Id.* at *2.

232. House v. Bell, 276 F. App'x 437 (6th Cir. 2008) (per curiam).

233. *See* Dwight Lewis, *House Release Is a Long-Awaited Triumph of Democracy*, TENNESSEAN, July 3, 2008; *Tennessee: State to Retry Inmate*, N.Y. TIMES, May 29, 2008, at A23; Deborah Hastings, *Released from Death Row, but Not Exonerated*, MSNBC (July 25, 2008), http://www.msnbc.msn.com/id/25836468/ns/us_news-crime_and_courts/t/released-death-row-not-exonerated/#.TsSuGGBVTz8.

under the victim's fingernails and cigarette butts found near her body.[234] When the DNA found on these items matched neither House nor the victim, but instead a third party,[235] the State conducted additional DNA tests on hair found in the victim's hand.[236] Even after these subsequent tests failed to link House to the crime, the prosecution still did not drop the charges against House until his counsel found new witnesses whose testimony exonerated House and incriminated the victim's husband,[237] and even then prosecutors remained convinced of House's involvement.[238] All told, the State kept House imprisoned for over two years after the Supreme Court found him innocent,[239] and continued to pursue charges against him for nearly a year after that.[240]

Sometimes it is not enough for a defendant to convince state prosecutors of her innocence. For example, in *Stocker v. Warden*, state prosecutors conceded that Roy Stocker was innocent of the charged crimes, yet still refused to grant any relief.[241] While cases like Roy Stocker's are unusual, they illustrate the difficulties an exonerated defendant may encounter when attempting to convince prosecutors of her innocence.

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234. *See* Rose French, *Former Death Row Inmate's DNA Not on Key Evidence*, DESERET NEWS (Feb. 20, 2009), http://www.deseretnews.com/article/705286366/Ex-death-row-inmates-DNA-not-found-on-evidence.html.

235. *Id.*; *see Tennessee: No DNA Match Is Found*, N.Y. TIMES, Feb. 21, 2009, at A11.

236. *See* French, *supra* note 234 ("Testing has again failed to find [House's] DNA . . . on evidence that will be used to retry him for a woman's murder."); Jamie Satterfield, *Prosecutor Drops Charges; House's Family "on Cloud Nine,"* KNOXVILLE NEWS SENTINEL (May 12, 2009, 2:28 PM), http://www.knoxnews.com/news/2009/may/12/prosecutor-moves-drop-charges-against-ex-death-row (discussing "[a] new round of DNA testing of hair found in [victim Carolyn] Muncey's hand").

237. Satterfield, *supra* note 15.

238. Robbie Brown, *Tennessee: Freedom After 22 Years on Death Row*, N.Y. TIMES, May 13, 2009, at A18.

239. The Supreme Court issued its opinion in favor of House on June 12, 2006. House v. Bell, 547 U.S. 518 (2006). House was first released from incarceration—on bail, in advance of his new trial, after his mother received an anonymous $10,000 contribution for this purpose—on the morning of July 2, 2008. Hastings, *supra* note 233; Lewis, *supra* note 233.

240. The State asked a judge to dismiss the new charges against House on May 12, 2009. *See* Satterfield, *supra* note 15.

241. Stocker v. Warden, No. 02-2077, 2004 U.S. Dist. LEXIS 5395, at *1 (E.D. Pa. Mar. 25, 2004) ("[T]his case [is] extraordinary in that . . . the Commonwealth of Pennsylvania [admits] that petitioner Roy Stocker is actually innocent. However, to date, the Commonwealth has failed to vacate his conviction and has not allowed him review in the state court system. Stocker . . . is seventy-nine years old and has a serious medical condition . . . ."); *see also* Dretke v. Haley, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting) ("[A]s a result of a congeries of mistakes . . . respondent was . . . erroneously convicted and sentenced under Texas' habitual offender law . . . . The State concedes that respondent does not qualify as a habitual offender and that [his] 16-year sentence was imposed in error."); *id.* at 399 (Kennedy, J., dissenting) ("Texas officials come before our Court opposing Haley's petition for relief. They wish to send Haley back to prison for a crime they agree he did not commit.").

Failing to treat a showing of innocence under *Schlup* as an acquittal for Double Jeopardy Clause purposes is also troubling because it undermines accountability in the criminal justice system. If the state is free to bring new charges, this gives prosecutors a major source of negotiating power in their dealings with the exonerated petitioner. Prosecutors are likely to use this leverage to reduce the negative consequences they or their offices suffer from the wrongful conviction.

For example, the state may offer the individual a plea bargain under which she may plead guilty in exchange for a sentence of time served. Even if the state is unlikely to win at trial, the petitioner may be tempted to accept the state's offer in order to put her wrongful conviction behind her and ensure her freedom. Such a guilty plea can reduce prosecutorial accountability in two important ways.

First, state laws strip convicted felons of substantive political rights that the wrongfully convicted could use to apply pressure for reform.[242] For example, many states prohibit convicted felons from voting[243] or holding public office.[244] A guilty plea may also have a more direct impact on prosecutorial accountability by hindering a lawsuit for wrongful conviction. In some states, pleading guilty to a crime generally precludes recovery for wrongful conviction.[245] And even if a petitioner succeeds in a wrongful conviction lawsuit after accepting such a plea bargain, the guilty plea may cause a jury to reduce the damages that it awards.

Second, the guilty plea enables the prosecution to change the story's narrative from "Wrongfully Convicted Man Freed" to "Man Found 'Innocent' Admits His Guilt."[246] The prosecution may also be able to alter the media narra-

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242. *See generally* OFFICE OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996), *available at* https://www.ncjrs.gov/pdffiles1/pr/195110.pdf (providing a comprehensive survey of federal and state statutes stripping various substantive rights from convicted felons).

243. *See, e.g.*, ALA. CONST. art. VIII, § 177(b), *amended by* ALA. CONST. amend. 579 ("No person convicted of a felony involving moral turpitude . . . shall be qualified to vote . . . ."); VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote . . . .").

244. *See, e.g.*, ALA. CODE § 36-2-1(a)(1) (2011) (stating that "[t]hose who are not qualified electors," including certain convicted felons, "shall be ineligible to and disqualified from holding office under the authority of this state"). States also commonly prohibit convicted felons from owning firearms. *See, e.g.*, N.C. GEN. STAT. § 14-415.1(a) (2011) ("It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction . . . .").

245. *See, e.g.*, MASS. GEN. LAWS ch. 258D, § 1(C)(iii) (2011) ("In order for an individual to prevail and recover damages against the commonwealth [for wrongful conviction], the individual must establish, by clear and convincing evidence, that . . . he did not plead guilty to the offense charged, or to any lesser included offense . . . .").

246. *See* O'Brien, *supra* note 10, at 1047-48; *see also* Noel Levy, *Decision Not to Retry Inmate Carefully Made*, ARIZ. REPUBLIC, May 26, 1999, at 9B; O'Neil, *supra* note 9.

tive in a somewhat less dramatic fashion by agreeing to drop the charges if the defendant promises to say positive things about the prosecutor's office. This may be particularly likely to happen if the wrongful conviction and the exoneration happened under different administrations.[247] The net effect of the changed publicity is reduced public pressure on prosecutors to implement reforms in the wake of wrongful convictions. This reduced accountability ultimately impairs the operation of the criminal justice system to the public's detriment.

Thus, the relationship between *Schlup*'s actual innocence gateway and the Double Jeopardy Clause is of great practical importance, both to a successful *Schlup* petitioner and to society as a whole.[248] If a showing of actual innocence under *Schlup* or a comparable standard constitutes an acquittal, then a petitioner who obtains habeas relief after proving her innocence under such a standard is immune from further prosecution. Otherwise, she is legally vulnerable to being convicted of the same offense a second time and may be forced to endure the uncertainty and anxiety of further prosecution. With this framework in mind, we can now analyze whether *Schlup*'s actual innocence gateway meets the definition of an acquittal in the double jeopardy context.

B. *Actual Innocence Under* Schlup *as an Acquittal*

As established in Part II above, for purposes of the Double Jeopardy Clause, an acquittal encompasses far more than a jury verdict of "not guilty." A ruling constitutes an acquittal if, "whatever its label, [it] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."[249]

When a court finds a petitioner actually innocent under *Schlup*, it holds that "it is more likely than not that no reasonable juror"[250] considering "all the evidence"[251] would find the defendant guilty. In other words, the reviewing court has considered the evidence before it and concluded that that evidence establishes, to a very high degree of proof, that the petitioner did not commit the

247. *Cf.* Robert B. Carey, *Releasing Killer Scot-Free Is an Outrageous Affront*, ARIZ. REPUBLIC, May 19, 1999, at 6B (former prosecutor who worked on case challenging subsequent administration's ultimate decision not to pursue a new trial after convicted defendant made showing of innocence under *Schlup*); Levy, *supra* note 246 (current prosecutor defending the decision and attacking former prosecutor).

248. *See* David Feige, *Pyrrhic Acquittal*, SLATE (Oct. 24, 2007, 3:42 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/10/pyrrhic_acquittal.html ("The reality of . . . criminal prosecution is that even when juries are deeply skeptical of government overreaching, in the end, the relentless might of the government almost always leaves those it prosecutes bankrupt and incarcerated.").

249. United States v. Scott, 437 U.S. 82, 97 (1978) (second alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

250. Schlup v. Delo, 513 U.S. 298, 327 (1995).

251. *Id.* at 328 (quoting Friendly, *supra* note 36, at 160).

crime of which she was convicted. Courts have frequently emphasized that the *Schlup* inquiry is about factual innocence.[252] Indeed, the Supreme Court has repeatedly asserted that, when applying *Schlup*, "'actual innocence' means factual innocence, not mere legal insufficiency"[253] and has emphasized the fact-finding role of a court applying the *Schlup* standard.[254] The Supreme Court has also written at some length about what actual innocence means in this context:

> A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mis-

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252. Pudelski v. Wilson, 576 F.3d 595, 606 n.2 (6th Cir. 2009) (referring to a *Schlup* claim as "a claim of actual, factual innocence"); Barreto-Barreto v. United States, 551 F.3d 95, 102 (1st Cir. 2008) (equating *Schlup* claim with claim of factual innocence); Rich v. Dep't of Corr., 317 F. App'x 881, 883 (11th Cir. 2008) (rejecting *Schlup* claim "because [the petitioner] has presented no new evidence of his factual innocence"); Jenkins v. Johnson, 231 F. App'x 618, 619 (9th Cir. 2007) ("A claim of actual innocence requires factual innocence."); Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005) ("[A]ctual innocence means factual innocence . . . ." (quoting Bousley v. United States, 523 U.S. 614 (1998))); Doe v. Menefee, 391 F.3d 147, 162 (2d Cir. 2004) ("As *Schlup* makes clear, the issue before . . . a court is . . . factual innocence."); Rodriguez v. Johnson, 104 F.3d 694, 697 (5th Cir. 1997) ("[T]he term 'actual innocence' means *factual* . . . innocence . . . [that is,] that the person did not commit the crime." (first alteration in original) (quoting Johnson v. Hargett, 978 F.2d 855, 859-60 (5th Cir. 1992))); Frizzell v. Hopkins, 87 F.3d 1019, 1021 (8th Cir. 1996) (equating *Schlup* claim with claim of factual innocence).

253. *Bousley*, 523 U.S. at 623; *see also* Calderon v. Thompson, 523 U.S. 538, 559 (1998) ("[A *Schlup* claim] is concerned with actual as compared to legal innocence." (quoting Sawyer v. Whitley, 505 U.S. 333, 339 (1992))); Smith v. Murray, 477 U.S. 527, 537-38 (1986) (similar). There is arguably some tension between these statements and the Supreme Court's assertion that the *Schlup* analysis "incorporate[s] the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 U.S. at 328.

254. *See, e.g.*, House v. Bell, 547 U.S. 518, 559-60 (2006) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("In *Schlup*, we contrasted a district court's role in assessing the reliability of new evidence of innocence [in order to apply the *Schlup* standard] with a district court's role in deciding a summary judgment motion. We explained that, in the latter situation, the district court does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial. Assessing the reliability of new evidence, on the other hand, is a typical factfinding role, requiring credibility determinations and a weighing of the 'probative force' of the new evidence in light of 'the evidence of guilt adduced at trial.' We found it '[o]bviou[s]' that a habeas court conducting an actual innocence inquiry must do more than simply check whether there are genuine factual issues for trial." (second and third alterations in original) (quoting *Schlup*, 513 U.S. at 332)); *Schlup*, 513 U.S. at 331-32 ("[T]he District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. Obviously, the court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment. Instead, the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." (citations omitted)).

> take. In [this] context . . . , the concept of "actual innocence" is easy to grasp.[255]

Thus, under both a straightforward reading of *Schlup*'s language and the Supreme Court's own descriptions of the *Schlup* standard, a ruling that a petitioner is actually innocent under *Schlup* is a determination by the court that the petitioner did not perpetrate the crime at issue. Or, to put it another way, the court has considered the evidence and made a factual finding that the petitioner did not commit the crime at issue. Accordingly, the court's ruling is a resolution of some or all of the factual elements of the charged offense in the defendant's favor and should constitute an acquittal under the Double Jeopardy Clause.

The consistency that the Supreme Court has shown in applying this definition of "acquittal" to other judicial rulings further bolsters this conclusion. The Court has repeatedly ignored the labels that judges have given their actions and inquired into the facts surrounding specific rulings to determine whether each resolved one or more factual elements of the offense in the defendant's favor.[256] Courts have found that defendants undergoing jury trials were acquitted by a variety of trial judge rulings, including rulings directing the jury to return a verdict of not guilty,[257] entering a verdict of not guilty,[258] and granting demurrers challenging the sufficiency of the evidence.[259]

But perhaps the most comparable decision that the Supreme Court has found to be an acquittal under the Double Jeopardy Clause is a ruling that the evidence is legally insufficient to support a conviction.[260] Under *Jackson v. Virginia*, a defendant seeking to overturn his conviction based on the insufficiency of the evidence must show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[261] Such a ruling may be made by the trial judge[262] or by a subsequent court reviewing the trial.[263] There are clear similarities between the *Schlup* and *Jackson* standards, which favors treating *Schlup*, like *Jackson*, as an acquittal under the Double Jeopardy Clause.

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255. *Sawyer*, 505 U.S. at 340-41.

256. *See, e.g.*, Smith v. Massachusetts, 543 U.S. 462 (2005); Smalis v. Pennsylvania, 476 U.S. 140 (1986).

257. *See, e.g.*, United States v. Sisson, 399 U.S. 267 (1970); Fong Foo v. United States, 369 U.S. 141 (1962).

258. *See, e.g.*, Sanabria v. United States, 437 U.S. 54 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

259. *See, e.g.*, *Smalis*, 476 U.S. 140.

260. *Id.*; Burks v. United States, 437 U.S. 1, 17-18 (1978); *Martin Linen*, 430 U.S. 564.

261. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

262. *See, e.g.*, *Smalis*, 476 U.S. 140.

263. *See, e.g.*, *Jackson*, 443 U.S. 307. In *Jackson*, the petitioner was seeking federal habeas relief from a state court conviction for first-degree murder. *Id.*

Yet despite the similarities between the two standards, the Supreme Court has emphasized three distinctions between them.[264] The first (the "evidentiary distinction") is that *Schlup* and *Jackson* consider different bodies of evidence. The second (the "presumptive distinction") is that a court applying *Jackson* applies certain presumptions in favor of the prosecution that a court applying *Schlup* does not. The third (the "probabilistic distinction") is that an inquiry under *Jackson* is a binary one—either the jury had the power to find defendant guilty or it did not—whereas the inquiry under *Schlup* is a probabilistic exploration of what reasonable jurors are likely to do. However, as discussed below, the evidentiary distinction is the only one that could reasonably lead courts to decide many cases differently under the two standards. Moreover, the evidentiary distinction favors according a finding of innocence under *Schlup* more legal importance than a finding that the evidence was insufficient to convict under *Jackson*.

1. *Evidentiary distinction*

Under *Jackson*, the question is whether the evidence presented to the jury can legally support its verdict. Accordingly, a court applying *Jackson* limits its inquiry to the evidence presented at trial.[265] Under *Schlup*, however, the court must consider "all the evidence,"[266] including evidence that has "become available only after the trial."[267] The *Schlup* inquiry is even made outside the rules governing the admissibility of evidence ("but with due regard to any unreliability" of inadmissible evidence).[268]

This distinction is significant and can lead the two inquiries to reach different results. However, it favors according more weight to *Schlup*'s finding of innocence than to *Jackson*'s. Because *Jackson*'s inquiry is limited to the evidence presented at trial, its determination of evidentiary sufficiency may be erroneous if there is relevant evidence that was not presented at trial.[269] There are several ways in which this can happen: The trial judge may have improperly excluded evidence. Evidence may only have become available after the trial. An attorney may simply have failed to introduce the evidence. Or the evidence might be relevant but inadmissible, either because it was obtained improper-

264. *See* House v. Bell, 547 U.S. 518, 538 (2006); Schlup v. Delo, 513 U.S. 298, 330 (1995); *id.* at 333 (O'Connor, J., concurring).

265. *Jackson*, 443 U.S. at 324.

266. *Schlup*, 513 U.S. at 328 (quoting Friendly, *supra* note 36, at 160).

267. *Id.* (quoting Friendly, *supra* note 36, at 160).

268. *Id.* (quoting Friendly, *supra* note 36, at 160).

269. Lockhart v. Nelson, 488 U.S. 33 (1988) (holding that the sufficiency of the evidence inquiry must be based solely on the evidence admitted, and cannot include exculpatory evidence not introduced at trial). There are other avenues available to challenge erroneous evidentiary rulings, however—most notably, direct appeals. *See, e.g.*, United States v. Gajo, 290 F.3d 922, 926 (7th Cir. 2002).

ly[270] or because the evidence rules choose to exclude it in order to further some other social policy.[271] Because the *Schlup* standard considers all of the available evidence, poor trial counsel, erroneous evidentiary rulings, and other such issues cannot skew the court's analysis. Accordingly, a determination of innocence under *Schlup* is likely to be more accurate than a determination of innocence under *Jackson*.

The case of Jose Garcia helps illustrate this point. On the evening of July 16, 1991, several men murdered Cesar Vasquez in New York.[272] At trial, Penny Denor identified Garcia as one of the murderers.[273] The defense impeached her testimony by pointing out that she was under the influence of medication at the time of the murder and at trial, that her testimony had several inconsistencies, and that her identifications of Garcia had been inconsistent.[274] The only defense witness was Griselda Vasquez, the victim's sister.[275] She testified that she saw the murderers leaving the scene of the crime, and that Garcia, a friend of her brother's whom she had met many times, was not one of them.[276] She also testified that, shortly after the murder occurred, she spoke to Garcia on the telephone, and that he was in the Dominican Republic at the time.[277] However, the prosecutor established that she did not have personal knowledge of Garcia's whereabouts, because someone else had dialed the phone and handed it to her.[278] The prosecution also called a rebuttal witness who contradicted some of Vasquez's statements about the evening's events.[279] The jury found Garcia guilty.[280]

However, there was additional evidence that the defense did not present at trial. Garcia provided his lawyer with documentary evidence establishing the following: Garcia flew to the Dominican Republic on June 22 under another name to attend a friend's funeral.[281] He attempted to return to the United States the day before the murder, but the Dominican Republic arrested him at the airport for attempting to travel with false documents and imprisoned him until his wife posted his bail the following afternoon.[282] Garcia flew to California from the Dominican Republic on August 2, at which point authorities arrested him

270. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

271. *See, e.g.*, FED. R. EVID. 404 (character evidence); FED. R. EVID. 410 (statements made in the course of plea negotiations); FED. R. EVID. 501 (privileges).

272. Garcia v. Portuondo (*Garcia I*), 334 F. Supp. 2d 446, 448 (S.D.N.Y. 2004).

273. *Id.*

274. *Id.* at 448-49.

275. *Id.* at 449.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Garcia v. Portuondo (*Garcia II*), 459 F. Supp. 2d 267, 271, 277 (S.D.N.Y. 2006).

282. *Id.* at 271.

for attempting to enter the United States illegally.[283] Garcia's lawyer did not introduce this evidence at trial, in part due to a lack of diligence and in part because the trial judge indicated that he did not believe the foreign governmental records were admissible.[284]

Garcia's postconviction counsel also produced additional documentary and testamentary evidence further corroborating the above. In particular, counsel produced further proof that Garcia was arrested in the Dominican Republic the day before Cesar Vasquez was murdered in New York and that Garcia remained incarcerated in the Dominican Republic until the following afternoon.[285] Counsel also presented affidavits from multiple witnesses asserting that they saw and interacted with Garcia in the Dominican Republic between June 22 and August 2, including on the night of the murder.[286] One of these witnesses was a neighbor of Garcia's in the Dominican Republic who claimed to have received Griselda Vasquez's call on the night of the murder, woken Garcia up, and brought him back to her house, where Garcia spoke with Griselda Vasquez on her phone.[287]

Looking only at the evidence introduced at trial, the evidence was sufficient to support a conviction: if credited, Denor's testimony that Garcia was one of the murderers could support a jury's finding that Garcia was guilty beyond a reasonable doubt. Accordingly, Garcia could not make a successful *Jackson* claim.[288] However, the vast majority of Garcia's alibi evidence was not introduced at trial; some of it had not yet been collected, and that which had been collected was not introduced due to a combination of poor representation and an erroneous view of New York's evidence rules.[289] A federal district court subsequently concluded that, under *Schlup*, Garcia was actually innocent—that is, in light of all of the evidence, it was unlikely that any reasonable juror would find him guilty beyond a reasonable doubt.[290] Because this determination was made based on all of the available evidence, while the *Jackson* determination was made based on a limited and unrepresentative subset of the available evidence, there is good reason to believe that the conclusion of the *Schlup* inquiry is more reliable. The greater reliability of the *Schlup* standard counsels in favor of according greater legal protection to a defendant who meets the *Schlup* standard than to one who makes a showing of insufficient evidence under *Jackson*.

283. *Id.*

284. *Id.* at 272.

285. *Garcia I*, 334 F. Supp. 2d at 453.

286. *Garcia II*, 459 F. Supp. 2d at 277.

287. *Id.*

288. *Cf.* People v. Garcia, 632 N.Y.S.2d 62, 63-64 (App. Div. 1995) (rejecting Garcia's claim that the evidence introduced at trial did not support the jury's determination).

289. *See* N.Y. C.P.L.R. 4542 (McKinney 2011); *Garcia II*, 459 F. Supp. 2d at 271-72.

290. *Garcia I*, 334 F. Supp. 2d at 456.

In addition to being more accurate, *Schlup*'s evidentiary rule may well be less favorable to defendants. The Supreme Court has held that a criminal defendant has not been given a fair trial within the meaning of the Due Process Clause when the applicable rules of evidence prohibit her from introducing evidence that appears reliable and that is critical to her case.[291] Thus, credible, critical, exculpatory evidence is essentially always admissible. There is no equivalent rule for highly inculpatory evidence, however. Accordingly, there could potentially be situations in which the evidence introduced at trial was insufficient to convict, but inadmissible evidence strongly indicates guilt.[292] In such circumstances, this asymmetry in what evidence is admissible at trial would result in a determination under *Jackson* that the evidence was insufficient to support a conviction. Under *Schlup*, however, the court weighs all evidence in making its innocence determination, so this asymmetry does not apply and cannot benefit defendants.[293]

2. *Presumptive distinction*

The Supreme Court has noted that, when evaluating the sufficiency of the evidence under *Jackson*, the reviewing court must view all evidence in the light most favorable to the prosecution.[294] Under *Schlup*, the reviewing court must evaluate all the evidence and deduce the conclusions that reasonable jurors would likely draw.[295] Thus, a court applying *Jackson* generally need not assess the credibility of witnesses, but a court applying *Schlup* may have occasion to do so.[296]

Initially, this may seem like a major difference, but the magnitude of the presumptive distinction shrinks considerably under scrutiny. A court applying *Jackson* considers all of the admitted evidence in the light most favorable to the prosecution; it then determines whether any rational trier of fact could find the defendant guilty based on that evidence.[297] A court applying *Schlup* considers all of the evidence and determines whether it is more likely than not that any reasonable trier of fact would find the defendant guilty based on that evi-

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291. Chambers v. Mississippi, 410 U.S. 284 (1973).

292. For example, a detailed confession may have been inadmissible because of a *Miranda* violation. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

293. It is worth noting that many criminal defendants are represented by overworked, inexperienced, or incompetent counsel who may fail to find or introduce relevant exculpatory evidence. Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL'Y & L. 317, 323 (2003). To the extent that this is the case, or that new evidence is only available after trial, the *Schlup* inquiry may be more favorable to defendants than *Jackson*.

294. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

295. Schlup v. Delo, 513 U.S. 298, 329 (1995).

296. *Id.* at 330.

297. *Jackson*, 443 U.S. at 319.

dence.[298] To put it another way, a court applying *Jackson* rules in favor of the defendant if no rational factfinder could convict her based on the evidence. A court applying *Schlup* rules in favor of the defendant if it is more likely than not that no reasonable factfinder would convict the defendant based on the evidence.

Putting aside the difference in the evidence examined, which was already discussed above, that leaves two differences: (1) the actions of a rational factfinder versus a reasonable one, and (2) what any factfinder could do versus what any factfinder would likely do. The first of these differences is of little or no moment from a legal perspective;[299] the Supreme Court even used the word "reasonable" in *Jackson* itself when describing what inferences to draw when applying its rational factfinder standard.[300]

The second reflects an actual difference, but a minute one: because the *Schlup* inquiry turns on whether there is *any* reasonable factfinder who is likely to find guilt, the court must consider the likely actions of the reasonable juror who draws the most conclusions in favor of the government. In other words, the petitioner must show that it is more likely than not that every reasonable juror—including the juror who happens to draw all reasonable inferences from the available evidence in favor of the government's case—would not find the defendant guilty. Accordingly, while the *Schlup* inquiry does not directly require courts to assume that jurors draw all reasonable inferences in the government's favor, its focus on whether there is any reasonable juror who would find the defendant guilty has essentially the same effect.

Thus, assuming that both inquiries are considering the same evidence in a particular case, the only way in which the *Schlup* and *Jackson* inquiries can reach different results is if a reasonable juror, drawing all reasonable inferences in favor of the government, *could* find the defendant guilty, but is unlikely to actually do so. This is a very small distinction: it turns on the difference between what the most government-friendly reasonable juror could potentially do (without becoming unreasonable) and what that juror is likely to do.

But even that formulation overstates the difference between the two standards. Once that government-friendly juror draws her inferences from the available evidence, she has decided what she thinks transpired and how certain she is of her conclusion; therefore, her legal verdict should be determined. In other words, once the juror has evaluated the evidence and drawn her factual

298. *Schlup*, 513 U.S. at 327, 329.

299. *Cf.* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 1452 n.5 (M.D.N.C. 1995) ("[T]he [Supreme] Court has used the words 'reasonable relation' and 'rational relation' interchangeably . . . ." (citing Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 85 (1988); W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981); Friedman v. Rogers, 440 U.S. 1, 17 (1979))).

300. *Jackson*, 443 U.S. at 319 ("[The *Jackson*] standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.").

inferences, she has either determined beyond a reasonable doubt that the defendant committed all of the elements of the charged offense or she has not.[301] If the former, she must return a verdict of guilty; if the latter, she must return a verdict of not guilty. Consequently, the distinction between "could" and "would" collapses in this context.

3. *Probabilistic distinction*

Lastly, the Supreme Court has also stated that the nature of the two inquiries is different. It has stated that the *Jackson* standard considers whether the finder of fact had the legal power to enter a guilty verdict.[302] The Court has contrasted this with the *Schlup* inquiry, which focuses "on the likely behavior of the trier of fact."[303] Thus, according to the Court, the *Jackson* inquiry is a binary one—either there was sufficient evidence before the factfinder to sustain a verdict of guilty, or there was not[304]—whereas the *Schlup* inquiry is a probabilistic exploration of what a reasonable trier of fact is likely to do.[305]

The same logic that constrains the magnitude of the presumptive distinction also limits the magnitude of the probabilistic distinction. This is because the *Schlup* inquiry does not hinge on whether most reasonable jurors would find the defendant guilty, but whether any single reasonable juror exists who would find the defendant guilty. In practice, courts applying *Schlup* and courts applying *Jackson* examine the behavior of the same juror: *Jackson* essentially asks whether, given the evidence before that juror and his decision to convict the defendant, the juror could be rational. *Schlup* makes the same inquiry, but in reverse—does a reasonable juror exist who would be likely to convict the defendant based on the available evidence? If one reasonable juror out of one million would find the defendant guilty, relief is not available under either *Schlup* (because a reasonable juror exists who would find the defendant guilty) or *Jackson* (because a rational juror could find the defendant guilty).

In *Schlup* itself, the Supreme Court attempted to use all of these distinctions to differentiate between the application of the *Schlup* and *Jackson* standards to the facts of Schlup's case:

> We believe that the Eighth Circuit's [ruling] below illustrates th[e] difference [between *Schlup* and *Jackson*]. . . . [T]he majority noted that "two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly ad-

301. *Schlup*, 513 U.S. at 330 ("Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not.").

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

> missible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility."
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> . . . .
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> . . . Schlup's evidence includes the sworn statements of several eyewitnesses that Schlup was not involved in the crime. Moreover, Schlup has presented [witness] statements . . . that cast doubt on whether Schlup could have participated in the murder . . . . Those new statements may, of course, be unreliable. But if they are true—as the Court of Appeals assumed [in its ruling]—it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. Under a proper application of [*Schlup*], petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict.[306]

The beginning of the Court's argument here is based on the evidentiary distinction. As discussed above, this is a legitimate distinction and, since very little of the evidence exculpating Schlup was introduced at his trial, caused the standards to reach different results. The Court's other distinctions rely on a legal sleight of hand: when applying the *Schlup* standard, the Court assumed that the new evidence was correct and that a factfinder would treat it as such because the lower court (erroneously) made the same assumption, but the Court did not make that assumption when applying the *Jackson* standard.[307] Courts applying *Schlup* are not supposed to make any such assumption; without it, this purported difference between the *Jackson* and *Schlup* standards disappears.[308]

Even if one is not convinced that the *Schlup* and *Jackson* standards are nearly equivalent, it is indisputable that the *Schlup* standard is an extremely high one.[309] Courts have often referred to it as "exacting,"[310] "demanding,"[311]

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306. *Id.* at 331 (quoting Schlup v. Delo, 11 F.3d 738, 741 (8th Cir. 1993)).

307. Nor could it meaningfully do so; because the *Jackson* standard only considers the power of the jury to convict, based on the evidence presented at trial, it does not incorporate new evidence that was not presented at trial. *See* McDaniel v. Brown, 130 S. Ct. 665, 672 (2010) ("[T]he 'purpose of a *Jackson* analysis is to determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process.'" (quoting Brief of Respondent at 2, *McDaniel*, 130 S. Ct. 665 (No. 08-559))); *see also supra* notes 265-93 and accompanying text.

308. *See, e.g.*, Sacco v. Greene, No. 04 Civ. 2391(CLB), 2007 WL 432966, at *7 (S.D.N.Y. Jan. 30, 2007) ("[The *Schlup*] standard is essentially equivalent to the *Jackson* standard.").

309. *See, e.g.*, Stuart Taylor, Jr., *Probably Innocent, Almost Executed*, LEGAL TIMES, Jan. 1, 1996, at 25, *available at* http://stuarttaylorjr.com/content/probably-innocent-almost-executed (describing meeting *Schlup*'s standard as a "virtually impossible task").

310. *See, e.g.*, Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 427 (6th Cir. 2003); Majoy v. Roe, 296 F.3d 770, 775 (9th Cir. 2002); Burton v. Dormire, 295 F.3d 839, 846 (8th Cir. 2002); Thompson v. Pollard, No. 06-C-1129, 2010 WL 5060494, at *2 (E.D. Wis. Dec. 6, 2010); Mason v. Hardy, No. 10 C 1682, 2010 WL 3034703, at *1 (N.D. Ill. Aug. 3, 2010); Hunt v. Lamarque, No. C-04-03925 RMW, 2010 WL 2229764, at *6-7 (N.D. Cal. June 2, 2010); Alfaro v. Woodring, No. CR. 03-401 WBS KJM, 2009 WL 1155668, at *2 (E.D. Cal. Apr. 29, 2009); Jefferson v. Bell, No. 3:06-0429, 2007 WL 2746948, at *16 (M.D. Tenn. Sept. 20, 2007); Baker v. Yates, No. 04-CV-1533 H(BLM), 2007 WL 2156072, at *33 (S.D.

and "stringent."[312] It is much higher than the standard for an acquittal at trial, which would constitute an "acquittal" for purposes of the Double Jeopardy Clause.[313] With rare exception,[314] a criminal jury can only enter a guilty verdict if each juror concludes that the prosecution has established the defendant's guilt beyond a reasonable doubt,[315] while relief is not available to a petitioner under *Schlup* if one reasonable juror out of one million would find him guilty.[316]

Courts have repeatedly stressed how unusual a successful claim of actual innocence is, stating that only "truly extraordinary"[317] and "rare"[318] cases satis-

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Cal. July 25, 2007); Pitts v. Folino, No. 06-3718, 2007 WL 2071903, at *1 (E.D. Pa. July 12, 2007).

311. *See, e.g.*, House v. Bell, 547 U.S. 518, 538 (2006); Cunningham v. Dist. Attorney's Office for Escambia Cnty., 592 F.3d 1237, 1274 (11th Cir. 2010); Pudelski v. Wilson, 576 F.3d 595, 606 n.2 (6th Cir. 2009); Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

312. *See, e.g.*, McCray v. Vasbinder, 499 F.3d 568, 576 (6th Cir. 2007); Gomez v. Jaimet, 350 F.3d 673, 680 (7th Cir. 2003); *see also* Howard v. Wolfe, 199 F. App'x 529, 533 (6th Cir. 2006) (an "extraordinary standard"); Gonzales v. Jordan, 37 F. App'x 432, 436 (10th Cir. 2002) (a "high standard"); Whalen v. Randle, 37 F. App'x 113, 121 (6th Cir. 2002) ("a very high bar"); United States v. Sorrells, 145 F.3d 744, 750 (5th Cir. 1998) ("undoubtedly . . . a strict standard of review").

313. *See, e.g.*, Mattis v. Vaughn, 80 F. App'x 154, 159 (3d Cir. 2003) ("The *Schlup* standard for proving actual innocence is far more demanding than establishing the existence of a reasonable doubt.").

314. Louisiana and Oregon are the only states that allow criminal convictions by non-unanimous juries in certain instances. *The Shame of Non-Unanimous Jury Verdicts*, RAIVIO, KOHLMETZ & STEEN PC (Feb. 2, 2011), http://www.rkslawyers.com/blog/2011/02/the-shame-of-non-unanimous-criminal-jury-verdicts.shtml. Both states sometimes allow conviction when ten of twelve jurors agree. LA. CONST. art. I, § 17; OR. CONST. art. I, § 11.

315. *See In re* Winship, 397 U.S. 358, 361-64 (1970) (holding that, in criminal cases, the Due Process Clause requires that guilt be proved beyond a reasonable doubt); *cf.* United States v. Pepe, 501 F.2d 1142 (10th Cir. 1947) (discussing the reasonable doubt standard and its importance).

316. *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) ("[The] petitioner must show that it is more likely than not that no reasonable juror would have convicted him . . . ."); *see also* Carriger v. Stewart, 132 F.3d 463, 484-85 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("For a petitioner to pass through the *Schlup* gateway, he must persuade us that every imaginary juror . . . would vote to acquit him . . . ."). Assuming that only one reasonable juror in a million would convict a particular defendant, the chance that twelve randomly selected reasonable jurors would all vote to convict that defendant is so vanishingly small—one in 10^{72}—that it becomes difficult to conceptualize. The probability of conviction in such a scenario is effectively zero.

317. *See, e.g.*, House v. Bell, 547 U.S. 518, 537 (2006) (quoting *Schlup*, 513 U.S. at 327); *see also* Herrera v. Collins, 506 U.S. 390, 426-27 (1993) (O'Connor, J., concurring) ("[C]laims of actual innocence . . . must be reserved for the truly extraordinary case . . . ."); Pudelski v. Wilson, 576 F.3d 595, 606 n.2 (6th Cir. 2009) ("[The *Schlup*] exception . . . is exceedingly narrow and is reserved for extraordinary cases . . . ."); Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008) ("[*Schlup*'s] miscarriage of justice exception is limited to those *extraordinary* cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt."); United States *ex rel.* Bell v. Pierson, 267 F.3d 544, 552 (7th Cir. 2001) ("[T]he [*Schlup*] standard . . . assures that the petitioner's case must be extraordinary . . . ." (internal quotation marks omitted)).

fy the *Schlup* standard. The numbers support this contention. A recent study examined over 2750 federal habeas petitions brought by state prisoners and found that only one petitioner made a successful *Schlup* claim.[319] And while thousands of federal habeas petitioners have raised *Schlup* claims,[320] I have only been able to locate approximately thirty instances in which a petitioner convinced a court of her innocence.[321] Even this number overstates the frequency of success, as it includes several cases in which a petitioner secured a determination that she was innocent and the determination was subsequently reversed or vacated.[322] This corresponds to a success rate of approximately one half of one percent (0.5%).[323] In comparison, the chance that a state criminal defen-

318. *See, e.g.*, Houck v. Stickman, 625 F.3d 88, 96 (3d Cir. 2010) ("[*Schlup* is a] 'rare' remedy that is only available in an 'extraordinary' case . . . ." (quoting *Schlup*, 513 U.S. at 321)); Cooper v. Brown, 510 F.3d 870, 923 app. A (9th Cir. 2007) (describing *Schlup* in a similar manner); Gomez v. Jaimet, 350 F.3d 673, 680 (7th Cir. 2003) (describing the actual innocence exception as "extremely rare"); Wilkerson v. Cain, 233 F.3d 886, 889 (5th Cir. 2000) (describing *Schlup* in a similar manner).

319. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 15, 17, 48-49 (2007), *available at* http://law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639.

320. As of October 11, 2011, a search for federal cases citing *Schlup* for a headnote relating to its actual innocence standard returns 6272 opinions on Westlaw and 6505 opinions on LexisNexis. Some petitions generate more than one opinion. *See, e.g.*, Johnson v. Norris, 999 F. Supp. 1256, 1257, 1265 (E.D. Ark. 1998) (finding actual innocence and granting petition), *rev'd*, 170 F.3d 816 (8th Cir. 1999). Nonetheless, this data likely understates the number of *Schlup* claims because many are without merit and are easily resolved in unpublished opinions or orders that are not included in these databases. *Cf.* Paradis v. Arave, No. CIV. 95-0446-S-EJL, 2000 WL 307458, at *1 (D. Idaho Mar. 14, 2000) (granting *Schlup* relief; not available on LexisNexis); Negron v. Torres-Suarez, No. 95-1967 (CCC-JAC), 1999 U.S. Dist. LEXIS 7194, at *1 (D.P.R. May 11, 1999) (granting *Schlup* relief; not available on Westlaw); Morris v. Norris, No. PB-C-94-88, 1995 WL 870309, at *1 (E.D. Ark. June 1, 1995) (denying *Schlup* relief).

321. *See infra* Appendix. An amicus brief filed in support of Paul House, which listed a number of cases in which petitioners either secured an evidentiary hearing under *Schlup* or established their innocence, aided the compilation of this list. Brief for Former Prosecutors and Professors of Criminal Justice as Amici Curiae Supporting Petitioner app. B at 6a-7a, *House*, 547 U.S. 518 (No. 04-8990).

322. *See infra* Appendix (listing one case in which the Supreme Court vacated a finding of actual innocence because the district court had not considered whether the petitioner could have shown cause and prejudice instead; one case in which an appeals court, sitting en banc, reversed a panel's finding of actual innocence; and seven cases in which circuit courts reversed district courts' findings of actual innocence).

323. If one estimates, based on the LexisNexis and Westlaw data cited above, *see supra* note 320, that there have been approximately six thousand petitions requesting relief under *Schlup*, the thirty-two successful cases found in the Appendix (including those cases in which a petitioner's actual innocence finding was subsequently reversed or vacated) represent roughly one-half of one percent (0.5%) of the total number of petitions. While the cases listed in the Appendix probably do not include all the cases in which petitioners succeeded under *Schlup*, the estimated total of six thousand petitions is conservative.

dant who goes to trial will be acquitted is closer to twenty-five percent[324]—odds that are approximately fifty times better than those a *Schlup* petitioner faces.[325]

Moreover, treating a finding of actual innocence under *Schlup* as an acquittal is fully in accord with the principles of the Double Jeopardy Clause. As the Supreme Court has repeatedly stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[326]

This passage recognizes three separate evils that the Double Jeopardy Clause is designed to guard against: First, it is unfair to allow the state, with its superior resources, to force the defendant into a war of attrition in which she must defend herself in repeated proceedings. Second, it recognizes the harms that a defendant suffers from being prosecuted, including embarrassment, disruption, and anxiety. Lastly, repeated prosecutions increase the likelihood that an innocent person will nonetheless be found guilty. It is hard to find an example that presents these potential problems more squarely than the reprosecution of an individual who secured habeas relief after making a successful *Schlup* claim.

The Double Jeopardy Clause protects defendants against the threat of multiple proceedings. The defendant's interest in not being subjected to multiple trials is so strong that if a mistrial is declared over a defendant's objections, the Double Jeopardy Clause bars retrial unless declaring a mistrial was manifestly

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324. *See, e.g.*, DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE FELONY PROCESSING FINAL REPORT, INDICTMENT THROUGH DISPOSITION, JANUARY-DECEMBER 2009, at 19 tbl.8 (2010), *available at* http://criminaljustice.state.ny.us/pio/annualreport/nys-felony-process-report2009.pdf (stating that, in New York state in 2009, 1478 defendants were convicted of felonies after trials and 562 were acquitted after trial, corresponding to an acquittal rate of 27.5%). Note that most criminal cases are not resolved through trials. *See id.*

325. These numbers are not directly comparable because the population of criminal defendants who go to trial likely differs from the population of petitioners who seek *Schlup* relief. Nonetheless, the magnitude of the difference in success rates is instructive.

326. Green v. United States, 355 U.S. 184, 187-88 (1957); *see also* Yeager v. United States, 129 S. Ct. 2360, 2365-66 (2009) (quoting *Green*, 355 U.S. at 187-88); Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 307 (1984) (same); Bullington v. Missouri, 451 U.S. 430, 445 (1981) (same); United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980) (same); Crist v. Bretz, 437 U.S. 28, 35 (1978) (same); Arizona v. Washington, 434 U.S. 497, 504 n.13 (1978) (same); Abney v. United States, 431 U.S. 651, 661-62 (1977) (same); Serfass v. United States, 420 U.S. 377, 387-88 (1975) (same); United States v. Jenkins, 420 U.S. 358, 370 (1975) (same), *overruled by* United States v. Scott, 437 U.S. 82 (1978); Benton v. Maryland, 395 U.S. 784, 795-96 (1969) (same).

necessary.[327] Most individuals who pass through *Schlup*'s actual innocence gateway have been through numerous lengthy legal proceedings. These proceedings, which typically include a trial, direct appeals, and both state and federal habeas corpus proceedings,[328] can easily span more than a decade.[329] A tremendous amount of time and labor is required to prepare for and conduct all of these proceedings,[330] and most individuals lack the requisite financial resources to retain counsel throughout them all.[331] Most individuals who have obtained *Schlup* relief were represented by private counsel working pro bono,[332] by a nonprofit legal services organization,[333] by federal public defenders,[334] or by

327. *See* United States v. Perez, 22 U.S. (9 Wheat.) 579, 579-80 (1824). The prototypical example of manifest necessity is a hung jury, as was the case in *Perez*. *Id.*; *see also* Oregon v. Kennedy, 456 U.S. 667, 672 (1982). Courts have also identified other scenarios that meet the manifest necessity standard. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 498, 517 (1978) (improper remarks by defense counsel that prejudiced the prosecution); Illinois v. Somerville, 410 U.S. 458, 459 (1973) (technical error that would render defendant's conviction invalid could not otherwise be corrected). When a mistrial is declared upon defendant's motion, the Double Jeopardy Clause only forbids retrial if the mistrial was precipitated by prosecutorial or judicial misconduct intended to create a mistrial. *See Kennedy*, 456 U.S. at 676.

328. *See supra* notes 18-19 and accompanying text.

329. For example, the Tennessee Supreme Court affirmed House's conviction on direct appeal in 1987, but nineteen years passed before the Supreme Court found him actually innocent in 2006. House v. Bell, 547 U.S. 518, 533, 555 (2006); *see also* Thompson v. Keohane, 516 U.S. 99, 119 (1995) (Thomas, J., dissenting) ("Federal habeas courts[] often review[] the cold record as much as a decade after the initial determination . . . .").

330. Ronald J. Tabak, *The Private Bar's Efforts to Secure Proper Representation for Those Facing Execution*, 29 JUST. SYS. J. 356, 363 (2008) ("It takes an extraordinary amount of time and effort to review the existing trial and appellate record, to investigate facts that can be raised in state post-conviction and federal habeas corpus proceedings, and to research and apply the relevant substantive and procedural law bearing on all claims that can be raised in these proceedings.").

331. Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1558 (1997) ("[M]ost habeas petitioners, due to their lack of financial resources, are unable to retain counsel to help them with their filings." (footnote omitted)).

332. For example, private attorney John Smietanka worked pro bono to represent the petitioner in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). E-mail from John A. Smietanka to author (Jan. 21, 2012, 3:21 PM) (on file with author); *see also* Garcia v. Portuondo (*Garcia II*), 459 F. Supp. 2d 267, 270 (S.D.N.Y. 2006) (identifying Garcia's counsel as Willkie Farr & Gallagher, LLP, which took his case pro bono); Martin Klotz, *Wall Street Journal Profiles Firm's Extraordinary Work in High-Profile Pro Bono Habeas Case*, WILLKIE FARR & GALLAGHER, LLP (June 15, 2007), http://www.willkie.com/firm/news_detail.aspx?id=328085005 (identifying Willkie Farr & Gallaher's work on Garcia's case as being pro bono).

333. *See, e.g.*, Carriger v. Stewart, 132 F.3d 463, 465 (9th Cir. 1997) (en banc) (identifying an attorney from the Arizona Capital Representation Project as Paris Carriger's counsel); *see also* ARIZ. CAP. REPRESENTATION PROJECT, http://azcapitalproject.org (last visited Mar. 9, 2012) (identifying the group as "a non-profit legal service organization that assists indigent persons facing the death penalty in Arizona through direct representation, consulting services, training and education").

334. *See, e.g.*, Silva v. Wood, 14 F. App'x 803, 803 (9th Cir. 2001) (identifying a federal public defender as Silva's counsel).

some combination of these three.[335] Further prosecution by the state will inevitably require significant time and effort by the accused and their counsel, who have already been forced to spend so much time and effort on the matter.[336] This resource problem is exacerbated because freed prisoners may have poor employment opportunities, may have been unable to work while incarcerated, and may have other financial problems.[337]

While a prosecution is likely to cause any defendant to suffer embarrassment, disruption, and anxiety, these concerns are particularly acute for successive prosecutions of successful *Schlup* petitioners. If the state has released the petitioner from incarceration before her trial, she faces the challenging task of readjusting to society after years of imprisonment.[338] Forcing her to relive the events that preceded her imprisonment will only make this task more difficult. Relatedly, a petitioner who is freed after a finding of innocence must still explain the years she spent imprisoned on employment applications and in other places.[339] Some will remain convinced of her guilt,[340] and further prosecution by state authorities may significantly increase the magnitude of this problem. A successful *Schlup* petitioner will often suffer more anxiety from the threat of prison or capital punishment than other defendants will, as the state has only recently released the *Schlup* petitioner from a long period of incarceration.[341]

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335. *See, e.g.*, House v. Bell, 547 U.S. 518, 521 (2006) (listing a federal public defender as Paul House's counsel of record, but also listing attorneys from Holland & Knight LLP and the NAACP Legal Defense and Educational Fund as counsel). "During Mr. House's federal post-conviction proceedings, he was represented by Stephen Kissinger of the Federal Defender's Office and George Kendall of Holland & Knight LLP. The Innocence Project has advised House's legal team on DNA-related issues." Press Release, Innocence Project, Paul House Fully Cleared in 1986 TN Death Row Conviction (Jan. 11, 2012), *available at* http://www.innocenceproject.org/Content/Paul_House_Fully_Cleared_in_1986_TN_Death_Row_Conviction_Case_is_a_profound_reminder_that_our_system_of_justice_must_give_people_every_reasonable_opportunity_to_prove_their_innocence.php.

336. Tabak, *supra* note 330, at 363.

337. *See, e.g.*, *Not Guilty, but Not off the Hook*, GRAND RAPIDS PRESS, Feb. 2, 2006, at A1 ("After 13 years in prison, Larry Souter . . . owes $38,000 in back child support. . . . [T]he debt accumulated while he was locked up, wrongly convicted of murder.").

338. *New Group Seeks to Help Those Fresh out of Prison*, ATHENS NEWS (June 12, 2008), http://www.athensnews.com/ohio/article-22545-new-group-seeks-to-help-those-fresh-out-of-prison.html.

339. *See, e.g.*, John Agar, *Wronged Man Seeks New Life*, GRAND RAPIDS PRESS, Jan. 7, 2006, at A1 ("[Larry Souter] can't fill out a job application without having to explain those lost years.").

340. *See, e.g.*, Carey, *supra* note 247 ("The evidence against [the freed *Schlup* petitioner] was overwhelming . . . . Nothing has changed on [his] guilt . . . ."); Cami Reister, *"A Sad Day for the System" After Inmate Freed*, GRAND RAPIDS PRESS, Apr. 3, 2005, at B2 (quoting the victim's mother as calling the evidence exonerating one successful *Schlup* petitioner "a bunch of lies").

341. *See generally* CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT (2001), *available at* http://aspe.hhs.gov/hsp/prison2home02/haney.pdf (discussing the psychological effects of being incarcerated and how they affect adjustment into day-to-day life after release).

This discussion of the negative mental and life impact of a second prosecution on the petitioner assumes that the state has released the petitioner from prison before her trial. This need not be the case; a successful habeas petitioner is often granted a conditional writ of habeas corpus, which requires the state either to free the petitioner or to retry her within a fixed period of time.[342] If the state chooses the latter option, the petitioner may remain behind bars until the completion of her trial. The embarrassment, disruption, and anxiety induced by such an outcome are likely to be enormous.

Similarly, the risk that repeated prosecutions might result in the conviction of an innocent person is especially large in the context of a successful *Schlup* petitioner. To pass through *Schlup*'s actual innocence gateway, a petitioner must produce compelling evidence that establishes her innocence with a high degree of certainty. Most defendants cannot do this; as the Supreme Court noted in *Schlup*, "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare."[343] Thus, individuals who have passed through *Schlup*'s actual innocence gateway are more likely to be innocent than the population of criminal defendants as a whole. In addition, given that they have previously been convicted, they are more likely to be social outsiders whom jurors may be quicker to convict than other members of the community.[344]

But even if a future prosecution is unlikely to be fruitful because the defendant possesses strong evidence of her innocence, there is a strong chance that she has already suffered the greatest wrong that the Double Jeopardy Clause is designed to guard against—that is, she has already been convicted of a crime that she did not commit and has spent years of her life imprisoned as a result. It would be deeply troubling to deny her the protection of the Double Jeopardy Clause, thereby subjecting her to the risk of being wrongfully convicted a second time.

C. *Possible Arguments Against Treating a Finding of Actual Innocence Under* Schlup *as an Acquittal*

There are several arguments that one might raise as to why a finding of actual innocence under *Schlup* should not constitute an acquittal under the Double Jeopardy Clause. One might argue that it is conceptually inappropriate for a

342. *See, e.g.*, House v. Bell, No. 3:96-cv-883, 2007 U.S. Dist. LEXIS 94176, at *1 (E.D. Tenn. Dec. 20, 2007) (granting conditional writ of habeas corpus, requiring state to retry House within 180 days or free him).

343. Schlup v. Delo, 513 U.S. 298, 324 (1995).

344. For example, "[successful *Schlup* petitioner Paul] House and his mother were outsiders to Union County. . . . [They had] moved there from outside Knoxville. . . . Both were mistrusted by some locals . . . . That same distrust may have figured in his easy conviction." Hastings, *supra* note 233. House's lawyer explained that House "didn't fit with these people. And these people are very, very loyal to each other." *Id.*

Schlup claim to constitute an acquittal, either because it is merely procedural rather than substantive or because it is a "probabilistic" standard. Alternatively, one might argue that this result would inappropriately impinge on federalist principles, as embodied in the Double Jeopardy Clause's "dual sovereign" doctrine. Finally, one might argue that according successful *Schlup* petitioners protection under the Double Jeopardy Clause will ultimately hurt the wrongfully convicted by creating a chilling effect that will make courts less likely to find petitioners actually innocent. This Subpart addresses each of these arguments in turn.

1. *Conceptual objections*

There are two possible conceptual challenges to treating a finding of actual innocence under *Schlup* as an acquittal under the Double Jeopardy Clause. First, one might argue that such a finding lacks independent substantive meaning; it merely allows a state prisoner to pursue substantive relief through a federal habeas petition. Accordingly, one might reason that it should not have substantive consequences under the Double Jeopardy Clause.

It is true that a *Schlup* claim does not entitle the petitioner to any substantive relief. The Supreme Court specifically distinguished *Schlup*'s "procedural" claim of innocence from a "substantive" claim of innocence like the one advanced in *Herrera v. Collins*.[345] In *Herrera*, the petitioner argued that the execution of someone who is innocent violates the Eighth Amendment's prohibition on cruel and unusual punishment even if the execution follows a trial that is entirely free of constitutional error.[346] If a court found that a substantive innocence claim exists,[347] and a petitioner established his innocence to the requisite degree,[348] he would then become entitled to relief without having to make any further showings.[349]

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345. 506 U.S. 390, 404 (1993).

346. *Id.* at 398-400.

347. The Supreme Court has never acknowledged the availability of a substantive claim of actual innocence. In *Herrera* itself, the Court noted that such a claim would require the petitioner to establish innocence to an extraordinarily high degree of certainty, and since Herrera had not done so, the Court declined to rule on the existence of such a claim. *Id.* at 417 (noting the Court assumed the existence of the claim for the sake of argument in deciding case); *see also In re* Davis, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) ("This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. Quite to the contrary, we have repeatedly . . . express[ed] considerable doubt that any [such] claim [exists] . . . ."); Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1280 (2010) (discussing cases and arguing in favor of a substantive claim of actual innocence).

348. The Supreme Court has provided two reasons why a *Herrera* claim, assuming it exists, requires a higher standard of proof than a *Schlup* claim. First, a *Herrera* claim, unlike a *Schlup* claim, would provide a substantive ground for relief. *Schlup*, 513 U.S. at 315. "More importantly," a *Schlup* claim accompanies an assertion of error at trial, whereas a

However, there does not seem to be any legal or policy reason why a *Schlup* claim's procedural nature should prevent it from being an acquittal under the Double Jeopardy Clause. The Supreme Court has consistently held that the touchstone for the Double Jeopardy Clause is whether the court's ruling has resolved factual elements of the offense in the defendant's favor.[350] It has also repeatedly stated that the ruling's label has no bearing on this inquiry.[351] Nothing in this legal standard requires the court's ruling to have independent substantive effect. The government raised similar arguments in *Smalis v. Pennsylvania* and *Smith v. Massachusetts*, asserting that the rulings at issue were not acquittals for purposes of the Double Jeopardy Clause because they were procedural rulings that merely resolved legal, as opposed to factual, questions.[352] In each instance, the Supreme Court soundly rejected the government's arguments.[353] Nor, as the discussion above illustrates, is there any policy reason to draw a distinction between procedural and substantive rulings in this context.[354] Thus, this argument is unpersuasive.

A second argument is that a finding of innocence under *Schlup* should not constitute an acquittal because *Schlup* is a "probabilistic" standard. This argument seems misplaced. The Supreme Court has repeatedly stated that a ruling that the evidence presented at trial was insufficient to sustain a conviction is an acquittal entitled to Double Jeopardy Clause protection.[355] As previously dis-

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Herrera claim concedes that trial was error-free. *Id.* at 315-16. Thus, a *Herrera* claim requires "evidence of innocence . . . strong enough to make [the petitioner's] execution 'constitutionally intolerable' *even if* his conviction was the product of a fair trial." *Id.* at 316. In contrast, a *Schlup* petitioner must only produce evidence that creates "sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial." *Id.*

349. *See, e.g.*, Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997) (en banc).

350. *See* Smith v. Massachusetts, 543 U.S. 462, 468 (2005); Price v. Vincent, 538 U.S. 634, 640 (2003); Smalis v. Pennsylvania, 476 U.S. 140, 142-43 (1986); Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 309 (1984); United States v. Scott, 437 U.S. 82, 97 (1978); Sanabria v. United States, 437 U.S. 54, 71 (1978); Burks v. United States, 437 U.S. 1, 10, 16 (1978); Lee v. United States, 432 U.S. 23, 30 (1977); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); United States v. Sisson, 399 U.S. 267, 270 (1970); *see also* Sorola v. Texas, 493 U.S. 1005, 1007 (1989) (Brennan, J., dissenting from denial of writ of certiorari); Rodrigues v. Hawaii, 469 U.S. 1078, 1079 (1984) (Brennan, J., dissenting from denial of writ of certiorari); Swisher v. Brady, 438 U.S. 204, 226 (1978) (Marshall, J., dissenting).

351. *See Smith*, 543 U.S. at 468; *Price*, 538 U.S. at 640; *Smalis*, 476 U.S. at 142-43; United States v. DiFrancesco, 449 U.S. 117, 142 (1980); *Scott*, 437 U.S. at 97; *Sanabria*, 437 U.S. at 71; *Lee*, 432 U.S. at 30; *Martin Linen Supply Co.*, 430 U.S. at 571; *see also Sorola*, 493 U.S. at 1007 (Brennan, J., dissenting from denial of writ of certiorari); *Swisher*, 438 U.S. at 226 (Marshall, J., dissenting); *United States v. Wilson*, 420 U.S. 332, 336 (1975); *Sisson*, 399 U.S. at 270.

352. *See Smith*, 543 U.S. at 468; *Smalis*, 476 U.S. at 143-44.

353. *See Smith*, 543 U.S. at 467-69; *Smalis*, 476 U.S. at 144.

354. *See supra* Part III.B.

355. *See, e.g.*, McDaniel v. Brown, 130 S. Ct. 665, 672 (2010); Lockhart v. Nelson, 488 U.S. 33, 39 (1988); *Scott*, 437 U.S. at 90-91; *Burks*, 437 U.S. at 18.

cussed in Part III.B, in practice the only significant difference between *Schlup*'s "probabilistic" inquiry into reasonable jurors' likely behavior and *Jackson*'s "binary" inquiry into what rational jurors have the power to decide is that the two inquiries look at different evidence. In this respect, a determination of innocence under *Schlup* is entitled to greater legal weight than a finding of insufficient evidence under *Jackson* because the *Schlup* determination incorporates all relevant evidence, while the *Jackson* determination does not.

Moreover, nothing in the Supreme Court's Double Jeopardy Clause jurisprudence requires that a ruling not be probabilistic in order to be an acquittal. The key question is whether the court's ruling is a resolution of facts in the defendant's favor. The Supreme Court has identified actual innocence in the *Schlup* context with factual innocence[356] and has emphasized the factfinding nature of the inquiry.[357] Thus, this argument fails as well.

2. *Federalism objections*

Under our federalist constitutional system, both the states and the federal government are sovereign authorities with power to define crimes and to prosecute and imprison offenders.[358] Conduct that constitutes both a state crime and a federal crime is therefore subject to prosecution by both the state and federal governments. As the Supreme Court has explained, "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[359]

Because each state and the federal government are independent sovereigns, the outcome of one government's prosecution does not affect the other government's right to prosecute.[360] Thus, if a person is found guilty by a state

356. Bousley v. United States, 523 U.S. 614, 623 (1998) ("It is important to note . . . that 'actual innocence' means factual innocence, not mere legal insufficiency."); *see also* Calderon v. Thompson, 523 U.S. 538, 559 (1998); Sawyer v. Whitley, 505 U.S. 333, 339 (1992); Smith v. Murray, 477 U.S. 527, 537 (1986).

357. *See* House v. Bell, 547 U.S. 518, 560 (2006) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

358. The states have wider discretion in criminalizing activity because they have a general police power. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (noting that the states have such a power). The federal government's ability to criminalize is more limited because it lacks such a general police power. *See id.* at 566. Nonetheless, there are numerous federal crimes. *See* 18 U.S.C. § 2-2725 (2006 & Supp. IV 2010).

359. United States v. Lanza, 260 U.S. 377, 382 (1922); *see also* Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101, 104-05 (1943); Hebert v. Louisiana, 272 U.S. 312, 314 (1926).

360. *See* Abbate v. United States, 359 U.S. 187, 192-93 (1959); Bartkus v. Illinois, 359 U.S. 121, 131-32 (1959); Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410, 420 (1847); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 31 (1820).

court, that verdict does not preclude a federal prosecutor from prosecuting that individual for the equivalent federal crime. The same rule applies to a state prosecution that follows a federal conviction. Similarly, if a person is acquitted of a crime established by one sovereign, the Double Jeopardy Clause generally does not forbid the other sovereign from prosecuting that individual for violating its criminal laws, even if both crimes are based on the same conduct.[361] This doctrine is known as the "dual sovereign" doctrine.[362]

As a legal formalist matter, classifying a finding of actual innocence under *Schlup* as an "acquittal" does not implicate the dual sovereign doctrine. The dual sovereign doctrine protects the federal and state governments' coequal rights to define what constitutes criminal conduct and prosecute offenders.[363] By its terms, it does not apply to successive prosecutions by the same government (here, the state).[364] The fact that a defendant was acquitted by a federal court instead of a state one therefore should not render the Double Jeopardy Clause inapplicable.

Moreover, if a finding of innocence under *Schlup* did not constitute an acquittal because of the dual sovereign doctrine, then neither would a finding under *Jackson* that the evidence was insufficient to support a conviction. The Supreme Court has never implied that the dual sovereign doctrine applies to *Jackson*,[365] and such a result would be directly contrary to a large body of the Court's double jeopardy jurisprudence.

The Court has twice held,[366] and repeatedly stated,[367] that the Double Jeopardy Clause precludes a second trial after a finding by a reviewing court that the evidence introduced at trial was insufficient to sustain the verdict. On other occasions, its analysis has strongly implied that a federal court that grants relief under *Jackson* to a state prisoner seeking habeas relief "acquits" that petitioner for double jeopardy purposes. In *Tibbs v. Florida*,[368] the Court considered

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361. *See Lanza*, 260 U.S. at 382. An exception exists if one sovereign is merely acting as a tool of the other. *See Bartkus*, 359 U.S. at 123-24.

362. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985). *See generally Lanza*, 260 U.S. at 381-82 (discussing the theory behind this doctrine). The doctrine also permits prosecutions for different crimes based on the same conduct to proceed in different states, *see Heath*, 474 U.S. at 88 (holding that defendant who solicited interstate kidnapping could be tried and convicted in both states), and in both federal court and tribal court, United States v. Wheeler, 435 U.S. 313, 332 (1978).

363. *See* ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTION: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS § 3.04 (2001).

364. *See Heath*, 474 U.S. at 88.

365. *But cf.* Lockhart v. Nelson, 488 U.S. 33, 37 n.6 (1988).

366. Greene v. Massey, 437 U.S. 19, 24 (1978); Burks v. United States, 437 U.S. 1, 18 (1978).

367. *See, e.g.*, Smalis v. Pennsylvania, 476 U.S. 140, 142 (1986); Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 298, 306, 308-09 (1984); Hudson v. Louisiana, 450 U.S. 40, 42-43 (1981).

368. 457 U.S. 31 (1982).

whether a finding that a guilty verdict was against the weight of the evidence should be treated differently from a finding that a verdict was based on insufficient evidence.[369] Petitioner Tibbs argued, inter alia, that treating them differently would undermine the rule that a finding of insufficient evidence is an acquittal because it would encourage judges reviewing the trial to "base reversals on the weight, rather than the sufficiency, of the evidence."[370] As the Eleventh Circuit described it:

> The Supreme Court responded that *Jackson v. Virginia* would place some restraints on that temptation. *Jackson v. Virginia* recognized that a federal habeas corpus court could enforce the Due Process prohibition against any conviction based on legally insufficient evidence. The clear implication of the Supreme Court's remarks in *Tibbs* is that a federal habeas corpus court's finding of insufficiency would carry double jeopardy consequences. If such were not the case, the difference between a *Jackson v. Virginia* insufficiency finding and a weight-of-the-evidence finding would be meaningless because in either case the defendant could be retried.[371]

As recently as 2010, immediately after the Court discussed a *Jackson* claim that the petitioner raised in federal court with respect to a state conviction, it reiterated that "reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, [and therefore] bars a retrial."[372] In light of the Court's case law, it is unsurprising that every circuit to consider whether the Double Jeopardy Clause prevents a state from retrying a defendant when a federal court has ruled the evidence insufficient to support a conviction under *Jackson* has concluded that it does.[373]

Further, the practical considerations that support the dual sovereign doctrine are not implicated by a finding of actual innocence under *Schlup*. If prosecution for a state offense prevented the federal government from prosecuting a federal crime based on the same conduct, each state could effectively nullify, or at least severely limit, federal criminal law within its borders by prosecuting violators for a state crime and either imposing lenient sentences or acquitting them outright. Such a result would be at odds with the design of our federalist system.[374] Similarly, allowing the results of a federal prosecution to limit a state's ability to act could seriously impinge on the state's ability to create and

369. *Id.* at 44-45, 45 n.21.

370. *Id.* at 44.

371. Young v. Kemp, 760 F.2d 1097, 1105 n.9 (11th Cir. 1985).

372. McDaniel v. Brown, 130 S. Ct. 665, 672 (2010).

373. *See* Foxworth v. Maloney, 515 F.3d 1, 2 (1st Cir. 2008); Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991) (Posner, J.); *Young*, 760 F.2d at 1105 n.9; Lydon v. Justices of the Bos. Mun. Court, 698 F.2d 1, 7 (1st Cir. 1982), *rev'd on other grounds*, 466 U.S. 294 (1984); Carter v. Estelle, 691 F.2d 777, 783-84 (5th Cir. 1982).

374. *See* U.S. CONST. art. VI, cl. 2.

enforce criminal laws within its borders, which would erode an important facet of state power.[375]

Schlup claims do not give state governments the potential to thwart federal law enforcement. While federal review of state convictions does implicate issues of federalism,[376] state petitioners' right to seek federal habeas corpus relief is well established, and is constrained by various statutes and judicial doctrines that protect federalist principles.[377] As previously discussed, *Schlup* claims are very rarely successful because of their extremely high burden of proof.[378] Even if successful *Schlup* claims were more common, a petitioner may bring such a claim only after exhausting other avenues of relief, which takes many years. The successful *Schlup* petitioners I identified spent an average of just under thirteen and a half years incarcerated before they established their innocence under *Schlup*.[379] The shortest incarceration time was approximately five years.[380] Thus, according Double Jeopardy Clause protection to successful *Schlup* petitioners has minimal impact on states' sovereign power to define crimes and punish offenders.

One might also object to according a successful *Schlup* petitioner Double Jeopardy Clause protection on the theory that doing so would require states to commit significant resources to defending prior convictions. This concern is almost certainly overblown. While prisoners raise numerous claims of actual innocence each year, the vast majority clearly lack merit, and these cases are easily disposed of. On the rare occasions when a claim appears to have merit, states have plenty of warning and opportunity to bolster their cases: First, the defendant's filings will demonstrate the merits of the defendant's case, if any. Second, federal habeas petitions are often referred to a magistrate judge, who will make a nonbinding recommendation to the district court judge. The district court judge considers the recommendation, along with any objections that the

375. *Cf.* Heath v. Alabama, 474 U.S. 82, 93 (1985) ("To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'" (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959))).

376. *See* Schlup v. Delo, 513 U.S. 298, 318 (1995); Engle v. Isaac, 456 U.S. 107, 134 (1982).

377. *See, e.g.*, 28 U.S.C. § 2254(b)(1), (c) (2006); Jaycox v. Quarterman, No. V-05-106, 2008 WL 728186, at *2 (S.D. Tex. Mar. 18, 2008).

378. *See Schlup*, 513 U.S. at 324; *see also supra* notes 309-25, sources cited therein, and accompanying text.

379. *See infra* Appendix. A spreadsheet showing the relevant calculations is also on file with the author. The median term of incarceration was nearly identical, and the mode number of years incarcerated was also thirteen. These numbers do not include petitioners whose findings of actual innocence were reversed or vacated.

380. *See* Bragg v. Norris, 128 F. Supp. 2d 587, 587-90 (E.D. Ark. 2000) (granting habeas relief in December 2000 to a petitioner convicted in January 1996).

parties make to it, before issuing a ruling.[381] Further, judges tend to indicate when they find a claim of innocence may be credible, and are generally willing to delay ruling if the state requests additional time to respond to the proffered evidence. Lastly, most findings of innocence under *Schlup* are made by federal district courts; in such cases, the state is guaranteed the opportunity to improve its arguments or bring forth evidence of guilt on appeal.[382]

In a larger sense, this objection arguably misses the point. The Double Jeopardy Clause was intended to force the state to channel its efforts and make its case the first time, while protecting defendants who secure acquittals.[383] The Double Jeopardy Clause represents a firm determination that it is preferable to make the state spend more resources on some trials than it otherwise might, and for some guilty defendants to escape conviction, than to allow the state to make repeated attempts to secure a conviction.[384] These principles translate directly into this context.

3. *Chilling effect objections*

Finally, one might object to protecting successful *Schlup* petitioners under the Double Jeopardy Clause out of concern that doing so might discourage courts from finding petitioners actually innocent. The theory is that, in close cases, courts might be unwilling to make a finding of innocence under *Schlup*

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381. *See, e.g.*, Garcia v. Portuondo (*Garcia II*), 459 F. Supp. 2d 267, 274, 278-79 (S.D.N.Y. 2006).

382. Among the cases collected in the Appendix, seven of twenty-three (thirty percent) involved district court findings of innocence under *Schlup* that were reversed on appeal. This figure excludes *Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007) (en banc), since an appellate court, not the district court, made the finding of actual innocence; it also excludes *Dretke v. Haley*, 541 U.S. 386 (2004), since the Court's decision in that case vacated the district court's finding of actual innocence for reasons unrelated to the merits of the petitioner's actual innocence claim.

383. *See supra* Part III.B.

384. *See* Burks v. United States, 437 U.S. 1, 11 & n.6 (1978). In addition to the Double Jeopardy Clause, there are many other instances in which our criminal laws allow some guilty individuals to go free in order to serve some other policy goal. *See, e.g.*, Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009) ("The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free . . . .'" (quoting Herring v. United States, 555 U.S. 135, 141 (2009))); Barker v. Wingo, 407 U.S. 514, 522 (1972) (noting that a violation of the Sixth Amendment's right to a speedy trial can mean "that a defendant who may be guilty of a serious crime will go free, without having been tried"); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[W]e do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . [The reasonable doubt standard is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

knowing that, if they are mistaken, the state cannot retry the defendant.[385] Thus, habeas petitioners as a whole might be better served if a finding of innocence did not constitute an acquittal, since courts would make more findings of innocence.

While this argument is persuasive in other contexts,[386] it seems unlikely to apply here. *Schlup*'s innocence standard is an extremely high one. When a court makes a finding of innocence under *Schlup*, it is not expressing uncertainty about the petitioner's guilt, but rather confidence in her innocence. If the court thought that any reasonable factfinder might find the defendant guilty, it would not grant the petitioner *Schlup* relief. Thus, a court is unlikely to be concerned that its ruling will prevent the state from convicting a guilty person. This argument is therefore unpersuasive.

CONCLUSION

This Article ends, as it began, with a discussion of the postexoneration prosecutions of Paul House, Paris Carriger, and Lloyd Schlup.[387] These three proceedings met very different ends.

House was ultimately spared another day in court after he was granted habeas relief. In the course of gathering evidence to retry House, the State of Tennessee conducted DNA tests on a hair found in the victim's hand, blood found under her fingernails, and cigarette butts found near her body.[388] When none of the DNA on any of these items matched House's, and additional witnesses came forward to exculpate House, the State eventually abandoned the prosecution.[389]

Carriger's luck was almost as good as House's. After the Ninth Circuit granted Carriger's habeas petition,[390] Arizona eventually offered him a plea bargain: by pleading no contest, he could receive a sentence of time served and be released from prison.[391] Prosecutors said they offered the deal because a key

385. *Cf.* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1187-88 (2008) (arguing that a rule of automatic reversal may encourage appellate courts to overlook legal errors that do not produce bad outcomes).

386. *See id.* at 1188 ("Scholars have observed this phenomenon in studying outcomes of *Batson v. Kentucky* appeals, in which defendants claim that the prosecution discriminated against prospective jurors." (footnote omitted)).

387. *See supra* Introduction.

388. Beth Rucker & Duncan Mansfield, *Charges Dropped Against Former TN Death Row Inmate*, SEATTLE TIMES (May 12, 2009, 11:38 AM), http://seattletimes.nwsource.com/html/nationworld/2009210222_apuslegallimbo.html.

389. *Id.*; Satterfield, *supra* note 15.

390. Technically, it remanded to the district court with instructions to grant the writ. Carriger v. Stewart, 132 F.3d 463, 482 (9th Cir. 1997) (en banc).

391. Carroll, *supra* note 2.

witness had died years before.[392] Carriger accepted the plea bargain and secured his freedom.[393] He now travels the country speaking out against the death penalty.[394]

Lloyd Schlup was less fortunate. When Missouri state prosecutors charged him with murder for the second time, they again sought the death penalty.[395] After having come within hours of being executed on two separate occasions, Schlup decided that he and his family could not bear that stress a second time.[396] On the eve of trial, he accepted a plea bargain under which he received a life sentence.[397] He remains in prison to this day.[398] As part of the plea bargain, Schlup was required to take the witness stand and testify that he was guilty of murdering Arthur Dade.[399] The final headlines on his story were not "Man Nearly Executed Twice Found Innocent" or "Man Exonerated After Decade of Imprisonment" but instead "Killer Who Escaped Execution over New 'Evidence' Pleads Guilty."[400]

This Article presents a compelling argument that a finding of actual innocence under *Schlup v. Delo* or its brethren is a resolution of some or all of the factual elements of the offense in the petitioner's favor and therefore constitutes an acquittal for purposes of the Double Jeopardy Clause. Accordingly, a petitioner who passes through the *Schlup* actual innocence gateway and then secures a writ of habeas corpus is entitled to protection against retrial. This result follows directly from a careful parsing of the *Schlup* standard and the definition of "acquittal" that the Supreme Court has established in the Double Jeopardy Clause context. It is also fully consistent with the policies and principles underlying the Double Jeopardy Clause.

But perhaps the best argument for this result is simply the unfortunate story of Lloyd Schlup. The man whose Supreme Court victory established the modern actual innocence standard was himself denied his rightful exoneration by a skeptical state prosecutor willing to seek the death penalty.[401] The Double Jeopardy Clause was designed to prevent the state from using its superior re-

392. Carey, *supra* note 247 (attributing statement to Maricopa County Attorney Rick Romley).

393. *Id.*

394. Vito J. Leo, *Ex-Death Row Inmate Speaks Out*, WORCESTER TELEGRAM & GAZETTE, Sept. 23, 2003, at B1.

395. O'Brien, *supra* note 10, at 1047-48.

396. *Id.* at 1036, 1046-48.

397. *Id.*; *see also* O'Neil, *supra* note 9. The facts are slightly better than they appear because Schlup was already serving a life sentence for unrelated crimes, and prosecutors designed the deal to have no impact on the date on which Schlup became eligible for parole. *See* O'Brien, *supra* note 10, at 1047.

398. O'Brien, *supra* note 10, at 1048; E-mail from Sean D. O'Brien to author (Jan. 21, 2012 3:24 PM) (on file with author) (confirming that Lloyd Schlup remains in prison).

399. O'Brien, *supra* note 10, at 1047; O'Neil, *supra* note 9.

400. O'Neil, *supra* note 9.

401. O'Brien, *supra* note 10, at 1047-48.

sources to grind down those who have already been found innocent.[402] Schlup's tragic tale presents a compelling reminder that these venerable ideals remain relevant in modern times.

APPENDIX

FEDERAL CASES IN WHICH A PETITIONER ESTABLISHED "ACTUAL INNOCENCE" UNDER *SCHLUP V. DELO*, 513 U.S. 298 (1995)

House v. Bell, 547 U.S. 518 (2006)
Souter v. Jones, 395 F.3d 577 (6th Cir. 2005)
Finley v. Johnson, 243 F.3d 215 (5th Cir. 2001)
Silva v. Wood, 14 F. App'x 803 (9th Cir. 2001)
Gall v. Parker, 231 F.3d 265 (6th Cir. 2000)
Fairman v. Anderson, 188 F.3d 635 (5th Cir. 1999)
Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc)
Larsen v. Adams, 642 F. Supp. 2d 1124 (C.D. Cal. 2009)
Peterson v. United States, No. 6:97-cv-1340-Orl-19, 2007 U.S. Dist. LEXIS 52952 (M.D. Fla. July 23, 2007)
Perez v. United States, 502 F. Supp. 2d 301 (N.D.N.Y. 2006)
Lisker v. Knowles, 463 F. Supp. 2d 1008 (C.D. Cal. 2006)
Eastridge v. United States, 372 F. Supp. 2d 26 (D.D.C. 2005)
Stocker v. Warden, No. 02-2077, 2004 U.S. Dist. LEXIS 5395 (E.D. Pa. Mar. 25, 2004)
Garcia v. Portuondo, 334 F. Supp. 2d 446 (S.D.N.Y. 2004)
Nickerson v. Roe, 260 F. Supp. 2d 875 (N.D. Cal. 2003)
Brown v. Crosby, 249 F. Supp. 2d 1285 (S.D. Fla. 2003)
Paradis v. Arave, No. CIV. 95-0446-S-EJL, 2000 WL 307458 (D. Idaho Mar. 14, 2000)
Watkins v. Miller, 92 F. Supp. 2d 824 (S.D. Ind. 2000)
Bragg v. Norris, 128 F. Supp. 2d 587 (E.D. Ark. 2000)
Reasonover v. Washington, 60 F. Supp. 2d 937 (E.D. Mo. 1999)
Negron v. Torres-Suarez, No. 95-1967 (CCC-JAC), 1999 U.S. Dist. LEXIS 7194 (D.P.R. May 12, 1999)
Jose v. Johnson, No. CIV. 97-500-KI, 1999 WL 1120374 (D. Or. Dec. 7, 1999)
Schlup v. Bowersox, No. 4:92CV443 JCH, 1996 U.S. Dist. LEXIS 8887 (E.D. Mo. May 2, 1996)

402. Green v. United States, 355 U.S. 184, 187-88 (1957).

FEDERAL CASES REVERSING OR VACATING AN EARLIER FINDING OF "ACTUAL INNOCENCE" UNDER *SCHLUP V. DELO*, 513 U.S. 298 (1995)

Dretke v. Haley, 541 U.S. 386 (2004)
Sharpe v. Bell, 593 F.3d 372 (4th Cir. 2010)
Smith v. Baldwin, 510 F.3d 1127 (9th Cir. 2007) (en banc)
McCray v. Vasbinder, 499 F.3d 568 (6th Cir. 2007)
Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004)
United States *ex rel.* Bell v. Pierson, 267 F.3d 544 (7th Cir. 2001)
Johnson v. Norris, 170 F.3d 816 (8th Cir. 1999)
Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1998)
McCoy v. Norris, 125 F.3d 1186 (8th Cir. 1997)