# *Lee v. Lampert*: The Ninth Circuit Finds No Actual Innocence Exception To The AEDPA's One-Year Statute of Limitations On An Original Habeas Petition

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## I. INTRODUCTION AND FACTUAL BACKGROUND

In *Lee v. Lampert*,[1] a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that it would not recognize an "actual innocence"[2] exception to the statute of limitations for federal habeas relief.[3] In doing so, it decided against creating a "judge-made" exception to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244 (2006).[4]

A jury in Oregon convicted Richard Lee of first-degree sexual abuse and sodomy.[5] Lee appealed, and the Oregon Court of Appeals affirmed the conviction.[6] Alleging ineffective assistance of counsel, Lee timely filed for state postconviction relief, but the Oregon trial court

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[1] 610 F.3d 1125 (9th Cir. 2011) (*vacated, reh'g granted en banc*, Lee v. Lampert, No. 09-35276, 2011 U.S. App. LEXIS 2382 (Feb. 11, 2011)).

[2] To successfully plead actual innocence, a petitioner must show that his conviction resulted from "a constitutional violation." Schlup v. Delo, 513 U.S. 298, 327 (1995). To do so, a petitioner must demonstrate "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The petitioner must raise "sufficient doubt about [his] guilt to undermine confidence in the result of the trial." Arthur v. Allen, 452 F.3d 1234, 1245 (11th Cir. 2006) (quotations and citation omitted). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998).

[3] *Lee*, 610 F.3d at 1129.

[4] *Id.*

[5] The district court opinion describes that Richard Lee was accused of molesting a child that an acquaintance had been babysitting. Lee v. Lampert, 607 F. Supp. 2d 1204 (D. Or. 2010). The child's testimony disclosed that Lee had, on several occasions, purportedly engaged in child sexual abuse and sodomy. *Id.* at 1208–09.

[6] *Lee*, 610 F.3d at 1126.

denied his petition.[7] After the Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review, state postconviction proceedings became final on September 24, 2001.[8] Lee twice petitioned the federal district court for habeas relief, alleging ineffective assistance of counsel.[9] The district court granted the habeas petition the second time, because it found that Lee had not only established ineffective assistance of counsel, but that he had also established actual innocence.[10] The State of Oregon appealed the grant of the habeas petition, contending that Lee's original habeas petition was time-barred.[11] As the Ninth Circuit summarized the state's position, "[a]ll told, Lee filed his federal habeas petition well after the one-year statute of limitations had expired."[12] Lee responded that the district court had properly applied an actual innocence exception to the one-year statute of limitations.[13] The Ninth Circuit disagreed, and held that there is no actual innocence exception to the statute of limitations for federal habeas relief.[14]

## II. STATUTORY LANGUAGE AND CIRCUIT SPLIT

The AEDPA establishes a one-year limitations period during which a state prisoner can bring a federal habeas corpus petition.[15] The AEDPA includes "three very specific exceptions" to the primary date for the running of the statute of limitations, that is, the date on which direct review becomes final.[16] In short, the exceptions involve "state-created impediments, new constitutional rights, and diligent discovery of new

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1127.
[11] *Id.*
[12] Lee v. Lampert, 610 F.3d 1125, 1128 (9th Cir. 2011).
[13] *Id.* at 1127.
[14] *Id.*
[15] 28 U.S.C. § 2244(d)(1). In 1867, during Reconstruction, Congress expanded federal habeas corpus jurisdiction to extend to cases challenging the lawfulness of *state* custody. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at 1157, 1213 (6th ed. 2009). Between 1867 and 1996, while Congress did not fundamentally reshape federal habeas corpus jurisdiction, "decisional law wove an intricate web of rules that changed significantly over time." *Id.* The Warren Court espoused a broad definition of habeas jurisdiction, while the Burger and Rehnquist Courts narrowed the jurisdiction and tightened procedural requirements. *Id.* In the AEDPA, Congress enacted provisions, such as the statute of limitations provisions at issue in *Lee*, that significantly restricted the availability of the writ of habeas corpus in postconviction cases. *See generally* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).
[16] *Lee*, 610 F.3d at 1127 (citing David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003); Felder v. Johnson, 204 F.3d 168, 172 (5th Cir. 2000)).

facts."[17] The Ninth Circuit pointed out that "[n]otably absent from this enumeration of exceptions is an 'actual innocence'" exception.[18]

The circuits are split on the issue of whether there is an actual innocence exception to the AEDPA's statute of limitations for federal habeas relief.[19] Four circuits—the First, Fifth, Seventh, and Eighth—have held that there is no actual innocence exception that serves as a "gateway through the AEDPA's statute of limitations to the merits of a petitioner's constitutional claims in original habeas petitions.[20] The Ninth Circuit's reasoning in *Lee* closely tracks the reasoning of the other circuits that have similarly found no actual innocence exception to the statute of limitations in the AEDPA.[21]

Only one circuit—the Sixth—has held that such an exception exists.[22] Two circuits—the Eleventh and Second—have declined to decide the question.[23] The Sixth Circuit based its decision on statutory interpretation. But, as compared with those circuits that found no actual innocence exception in the AEDPA, the Sixth Circuit found it statutorily *insignificant* that Congress did *not* specifically list actual innocence among the enumerated exceptions in § 2244.[24] Rather, the Sixth Circuit

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[17] § 2244(d)(1)(B)–(D).

The AEDPA specifies that the one-year period runs from the latest of four dates:

> (A) the date on which the judgment became final by the conclusion *direct review* or the expiration of the time for seeking such review;
> (B) the date on which the *impediment* to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the *constitutional* right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the *factual predicate* of the claim or claims presented could have been discovered through the exercise of *due diligence*.

§ 2244(d)(1)(A)–(D) (emphasis added).

[18] *Lee*, 610 F.3d at 1127.

[19] *See infra* notes 20 to 21 and accompanying text.

[20] *See* Escamilla v. Jungwirth, 426 F.3d 868, 871–72 (7th Cir. 2005); David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002); Flanders v. Graves, 299 F.3d 974, 976–78 (8th Cir. 2002), *cited in Lee*, 610 F.3d at 1128.

[21] *See Lee*, 610 F.3d at 1129. For the Ninth Circuit's analysis in *Lee*, *see infra* notes 34 to 63 and accompanying text.

[22] *See* Souter v. Jones, 395 F.3d 577, 585 (6th Cir. 2005), *cited in Lee*, 610 F.3d at 1129.

[23] *See* Johnson v. Fla. Dep't of Corr., 513 F.3d 1328, 1333–34 (11th Cir. 2008); Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004).

[24] *Souter*, 395 F.3d at 597–98 ("While it is true that Congress included an actual innocence exception to the procedural bars on successive habeas petitions and evidentiary

reasoned by analogy to the manner in which various circuits have interpreted the AEDPA's failure to mention equitable tolling: "[W]e note that despite the fact that the statute fails to mention tolling, the majority of the courts of appeals which have addressed the issue, including this one, have held that the doctrine of equitable tolling applies to the one-year limitations period.[25] The Sixth Circuit started with the presumption that "Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence."[26] The court then reasoned that in enacting the AEDPA, Congress was aware of the Supreme Court's decision in *Schlup v. Delo*,[27] where the Court held that a showing of actual innocence, defined as "more likely than not that no reasonable juror would vote to convict," was sufficient to overcome a procedurally deficient habeas petition.[28]

Furthermore, the Sixth Circuit found Congress' adoption of a more narrow[29] actual innocence exception in the AEDPA's successive-petition and evidentiary-hearing provisions "indicative, not of Congress's desire to *exclude* the exception with regards to the limitations period, but rather of its intent to limit the scope of the exception in those two specific areas."[30] In fact, according to the Sixth Circuit, "[t]he more reasonable inference to be drawn from the absence of an exception in § 2244(d)(1) is that Congress intended not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default."[31] The Sixth Circuit also found an actual innocence exception consistent with the AEDPA's underlying principles of curbing the abuse of the statutory habeas writ, and addressing the "acute problems of unnecessary delay and abuse in capital cases."[32]

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hearings but not to the one-year limitations period, that does not give rise to the negative implication that the absence of an exception was intended.").

[25] *Id.* at 598 (collecting cases).

[26] *Id.* (citations omitted).

[27] 513 U.S. 298 (1995).

[28] *Souter*, 395 F.3d at 598 (construing *Schlup*, 513 U.S. at 298).

[29] Congress required that the factual predicate of the claim could not have been discovered earlier and a showing "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. §§ 2244(b)(2)(B); 2254(e)(2).

[30] *Souter*, 395 F.3d at 599.

[31] *Id.*

[32] *Id.* (citing H.R. CONF. REP. NO. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 945). Also, "[i]nclusion of an actual innocence exception to the limitations provisions does not foster abuse and delay, but rather recognizes that in extraordinary cases the societal interests of finality, comity, and conservation of scarce judicial resources 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Id.* at 600 (citing Murray v. Carrier, 477 U.S. 478, 495 (1986)).

## III. THE NINTH CIRCUIT'S ANALYSIS IN LEE V. LAMPERT

In deciding which position to take, the Ninth Circuit first analyzed the Supreme Court's decision in *Schlup*,[33] which predated the passage of the AEDPA.[34] In *Schlup*, the Court stated that "the individual interest in avoiding injustice is most compelling in the context of actual innocence."[35] Further, it is 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."[36] Applying these principles, the Court held that a showing of actual innocence provides a "gateway" for the petitioner to pursue his constitutional claims despite a procedural bar.[37] Since *Schlup*, and after the passage of the AEDPA, the Court has recognized the actual innocence gateway.[38]

Against the background of the *Schlup* actual innocence "gateway," the petitioner in *Lee*, having shown actual innocence, sought to have the claims in his original habeas petition heard on the merits despite the untimeliness of his original habeas petition.[39] The petitioner presented an argument similar to that of the Sixth Circuit,[40] that the *Schlup* actual innocence exception was "a default [exception] that need not be mentioned."[41] The Ninth Circuit characterized such a position as "historical speculation."[42] According to the court, because the AEDPA created statute of limitations *after* the Court's decision in *Schlup*, the "actual innocence" exception does not apply to federal statutes of limitations.[43] Because *Schlup* applied to the statute of limitations on second or successive habeas petitions, there was "no preexisting actual innocence exception in the statute of limitations context for Congress to leave untouched."[44] The Ninth Circuit buttressed its reasoning by

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[33] 513 U.S. 298 (1995).

[34] Lee v. Lampert, 610 F.3d 1125, 1131 (9th Cir. 2011).

[35] *Schlup*, 513 U.S. at 324 (internal quotation marks omitted).

[36] *Id.* at 325 (internal quotation marks omitted).

[37] *Id.* at 315.

[38] *See, e.g.*, House v. Bell, 547 U.S. 518, 555 (2006) (a petition who "satisf[ies] the gateway standard set forth in *Schlup*" has the right to proceed "with procedurally defaulted constitutional claims").

[39] *Lee*, 610 F.3d at 1128.

[40] *See supra* notes 25 to 33 and accompanying text.

[41] *Lee*, 610 F.3d at 1131.

[42] *Id.* ("Lee gets his history wrong.").

[43] *Id.*

[44] *Id.*; *Cf. id.* at 1137 (Smith, J., concurring) ("In *Schlup*, the Supreme Court determined whether a showing of actual innocence excuses a procedural default involving a second or successive petition. It did not address the necessary showing for obtaining habeas relief on grounds of actual innocence. Thus, *Schlup* provides no authority guiding a court's AEDPA determination of the merits of the petition." (internal citations omitted)).

pointing out that Congress explicitly enumerated three exceptions to the statute of limitations, and therefore did not rely on courts to read them in.[45]

The Ninth Circuit also distinguished the Supreme Court's recent decision in *Holland v. Florida*,[46] in which the Court held that the AEDPA's statute of limitations period is subject to equitable tolling.[47] As the Ninth Circuit stated, *Holland* reiterated the well-recognized principle that nonjurisdictional statutes of limitation, like in the AEDPA, are "subject to a rebuttable presumption in favor of equitable tolling."[48] The Ninth Circuit distinguished *Lee* from *Holland*.[49] The court pointed out that unlike in *Holland*, there was "no presumption that nonjurisdictional statutes are normally subject to an actual innocence exception."[50] Furthermore, the actual innocence exception is not a "species of equitable tolling, such that the presumption in favor of equitable tolling entails a presumption in favor of an actual innocence exception."[51] In fact, as the court noted, the actual innocence exception is quite unlike equitable tolling, which functions to extend a statutory period for a particular amount of time.[52] Furthermore, the actual innocence exception is unrelated to addressing the failure to meet a deadline for reason of extraordinary circumstances, which is the aim of equitable tolling.[53]

The Ninth Circuit also turned to the statutory language in the AEDPA, finding "significant" the omission of an actual innocence exception from the enumerated list of exceptions.[54] Drawing from the First Circuit's analysis in *David v. Hall*,[55] the court reasoned that since § 2244(d) consists of no less than six paragraphs that define its one-year limitations period "*in detail and adopting very specific exceptions*," it is unlikely that Congress conceived that the courts would add new exceptions, and "even more doubtful that it would have approved of such an effort."[56] Drawing on the interpretive canon of statutory construction, *expressio unius est exclusio alterius* (the express mention of one thing

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[45] *Id.* at 1131 (majority opinion).
[46] 130 S. Ct. 2549 (2010).
[47] *Lee*, 610 F.3d at 1128.
[48] *Id.* (citing *Holland*, 130 S. Ct. at 2559–64). In *Holland*, the Court found insufficient information to rebut the presumption. *Holland*, 130 S. Ct. at 2559–64.
[49] *Lee*, 610 F.3d at 1129.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] 318 F.3d 343, 346 (1st Cir. 2003).
[56] *Lee*, 610 F.3d at 1129 (emphasis added) (citing *David*, 318 F.3d at 346).

excludes all others), the court found it unwise to craft an additional exception when the AEDPA's statutory language was so clear on its face.[57] Relying primarily on statutory construction, the Ninth Circuit thus found "[t]hat Congress created three exceptions to the general rule that the limitations period begins upon the conclusion of direct review indicates that it did not intend other exceptions, and there is no evidence to the contrary."[58] The court also found that an actual innocence requirement would render the due diligence requirement in § 2233(d)(1)(D) "superfluous" and "inconsistent with the statutory scheme" because "[a] petitioner could discover such facts and then, if they established actual innocence, hold them until he felt the time was right, then availing himself of the actual innocence exception and avoiding the diligence requirement." [59]

The court also called attention to the AEDPA's actual innocence exception in § 2244(b)(2)(B), which governs the filing of second or successive habeas petitions, merely two subsections above the statute of limitations section.[60] As the Ninth Circuit indicated, "Congress clearly knew how to provide an escape hatch," but declined to do so in § 2244(d)(1), thus buttressing the position that there is no actual innocence exception to the statute of limitations for federal habeas relief.[61] Finally, in a footnote, the Ninth Circuit determined that it would be unconstitutional for it to find an actual innocence exception because "federal courts do not have inherent power to issue the writ of habeas corpus."[62]

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[57] *Id.* ("The one-year limitations period established by § 2244(d) contains no explicit exemption for petitions claiming innocence, and we decline to add one.") (footnote omitted) (citing Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002)).

[58] *Id.* at 1129–30.

[59] *Id.* at n.4 (citation omitted).

[60] *Id.* at 1130. Section 2244(b)(2)(B) of the AEDPA is as follows:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . .
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, *no reasonable factfinder would have found the applicant guilty of the underlying offense*.

28 U.S.C. § 2254(b)(2) (emphasis added).

[61] *Lee*, 610 F.3d at 1130 (citations omitted).

[62] *Id.* at n.3 (citing Schlup v. Delo*,* 513 U.S. 298, 350 (1995) (Scalia, J., dissenting)) (other citations omitted).

## IV. THE NEED FOR RESOLUTION

The Ninth Circuit describes a "chao[tic]" landscape prior to its decision.[63] District courts in the Ninth Circuit were sharply divided regarding the existence of an actual innocence exception.[64] The court stressed that the lack of clarity regarding the AEDPA's application, both inter- and intra-circuit, "creates troubling inconsistency."[65]

Inconsistent applications of the AEDPA mean that the rights of state prisoners depend on the twist of fate of what judge hears their case, and where their prison is located. For example, addressing inconsistent district court opinions within the Ninth Circuit itself, and emphasizing the need for resolution of the issue at the circuit court level, the court succinctly described the gravity of the decision: "The rights of state prisoners in Oregon depend on which judge hears their cases. The rights of state prisoners in California depend on the happenstance of the location of their state prison. Such chaos calls out for our resolution."[66]

Clarifying the "actual innocence" exception is also important for the efficient allocation of judicial resources. Acting on the assumption that an actual innocence exception *exists*, district courts expend judicial resources on evaluating the merits of each habeas petition involving a claim of actual innocence. As the Ninth Circuit stated, "[e]ach evaluation requires the submission of exhibits, oral argument, evidentiary hearings, and numerous rulings."[67] Furthermore, under the decision in *Lee*, and those of the majority of circuits addressing this issue, an absurd statutory scheme results—a petitioner's successive habeas petition may be heard on the merits if the petitioner meets *Schlup's* actual innocence gateway, but a time-barred first habeas petition will not be heard on the merits, even if petitioner meets the gateway, until the petitioner completes the appeals process and files a second petition.[68] As the Actual Innocence Network argues, "[t]he [*Lee*] decision . . . creates strong incentives to increase the number of habeas filings . . . ."[69]

To avoid unfairness to prisoners and to resolve prevailing inconsistencies in the application of the AEDPA, the Supreme Court

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[63] *Id.* at 1134.

[64] *See Id.* at 1135 n.16.

[65] *Id.* at 1134.

[66] *Id.*

[67] Lee v. Lampert, 610 F.3d 1125, 1135 (9th Cir. 2011). *See also* Nickerson v. Roe, 260 F. Supp. 2d 875, 889 (N.D. Ca. 2003) (recounting four days of hearings over three months, two hundred exhibits, and post-hearing briefing).

[68] Brief for The Actual Innocence Network at Amicus Curiae Supporting Petitioner's Petition for Rehearing And Rehearing En Banc at 3, Lee v. Lampert, 610 F.3d 1125 (9th Cir. 2011) (No. 09-35276), 2011 U.S. App. LEXIS 2382.

[69] *Id.*

should decide whether there is an actual innocence exception to the statute of limitations for federal habeas relief. The Ninth Circuit, in *Lee v. Lampert*, held that in a case where a defendant can prove that he did not commit the crime, but where the evidence to prove that crime does not come into his hands until more than a year after the evaluation of his remedies, he cannot avail of an "actual innocence" exception to the one-year statute of limitations. As one commentator noted: "Time ran out and that's that. Like the grocery clerk with a checklist, the rules say one year and one year it is."[70]

[70] Scott H. Greenfield, *The Least Dangerous Branch*, SIMPLEJUSTICE.US, (July 7, 2010 7:25AM), http://blog.simplejustice.us/2010/07/07/the-least-dangerous-branch.aspx.