HOW INNOCENT ARE YOU?:
THE INTERSECTION OF PRIVILEGED COMMUNICATIONS
AND THE ACTUAL INNOCENCE EXCEPTION
IN FEDERAL HABEAS CORPUS

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I. INTRODUCTION

“Richard Kimble has been tried and convicted for the murder of his wife. But laws are made by men, carried out by men. And men are imperfect. Richard Kimble is innocent. Proved guilty, what Richard Kimble could not prove was that moments before discovering his wife’s body, he encountered a man running from the vicinity of his home. A man with one arm. A man he had never seen before. A man who has not yet been found. Richard Kimble ponders his fate as he looks at the world for the last time. And sees only darkness.”

*The Fugitive* (ABC 1963)

“I know Krusty’s innocent, and I think I can prove it. But I need your help.”

Bart Simpson, *The Simpsons: Krusty Gets Busted*  
(Fox television broadcast April 29, 1990)

“Hey! The missing evidence in the Kelner case! My God, he really was innocent!”

*The Naked Gun: From the Files of Police Squad!*  
(Paramount Pictures 1988)

It is a tragic reality of our criminal justice system that innocent people are sometimes convicted of crimes. Hopefully, a prisoner who is actually innocent of his crime will be exonerated in the multitiered course of direct and collateral appeals in our state and federal courts. But, in rare cases, the innocent man remains incarcerated. His options dwindling, he marks the days to the end of his sentence, or even his life. In fiction, divine or fortuitous intervention always saves the day. Dr. Kimball had his errant passenger train, and Krusty the Clown had his precocious spiky-haired advocate. But in the real world, innocent individuals are left with a less glamorous path to liberation—a final chance to demonstrate their innocence before a federal judge. Of course, many convicts profess their innocence at the end of their appeals but not all of them are truly innocent. How are the courts to separate the wheat from the chaff?
The procedural rigors of these “actual innocence” claims may be illustrated by the case of Gregory Lott. In 1987, Lott was convicted and sentenced to death for the brutal beating and murder of an elderly man. Lott’s conviction was affirmed by his state court of appeals and by his state supreme court on direct appeal, and his collateral claims for relief in state post-conviction proceedings were unsuccessful. Lott filed a federal habeas corpus claim in 1997, asserting that his due process rights were violated by the prosecution’s failure to produce exculpatory evidence at his trial. The circuit court of appeals refused to hear these procedurally defaulted claims. This left Lott essentially one option—if he could make a showing to the court that he is “actually innocent” of the murder, then the court would have to consider his due process claim and might grant him a new trial. He attempted just that in a second federal habeas corpus petition filed in 2004—arguing that new evidence proved his innocence.

Up to this point, Lott’s post-conviction journey was fairly typical of a prisoner in his situation. But Lott’s case soon departed from the “typical” path of an actual innocence claim when the state filed a discovery request aimed at his trial lawyer. Specifically, the state wanted to depose his lawyer on the subject of Lott’s innocence. The district court granted the motion on the grounds that the court has a duty to examine “all of the evidence” relevant to an actual innocence claim. Lott opposed this discovery as violative of his attorney-client privilege and sought a writ of mandamus from the circuit court of appeals to prevent the discovery.

If a federal court has the responsibility to examine all evidence relevant to a claim of actual innocence, regardless of admissibility at trial, should Lott be allowed both to press his innocence claim and to assert his attorney-client privilege here? Society has a strong interest in protecting the attorney-client privilege, but the government also has a strong interest in limiting the use of habeas corpus review. Which driving policy concern is more important, the government’s interest in limiting eleventh-hour review to the “truly deserving” prisoners that are actually innocent of their crimes or society’s interest in encouraging candid communication between attorneys and their clients?

1. The recitation of facts here is a simplified account of the procedural history of the case of Gregory Lott. See infra discussion Part IV; see also Petition for Writ of Certiorari, Houk v. Lott, 126 S. Ct. 1772 (2006) (No. 05-962), 2006 WL 247818.
2. Id. at 7, *7-*8.
3. Id. at 8-9, *8-*9.
4. Id. at 9, *9.
5. Id. at 9-10, *9-*10.
6. Id. at 10, *10. In evaluating such a claim of actual innocence, a federal court is authorized to “consider the probative force of relevant evidence that was either excluded or unavailable at trial.” Schlup v. Delo, 513 U.S. 298, 327-28 (1995); see infra Parts II.B and IV.
8. Id. at 12-13, *12-*13.
9. Id.
10. Id. at 13, *13.
11. Id. at 14, *13-*14.
This Comment attempts to balance the policy concerns between two seemingly unrelated movements in the law—the modern effort to limit the abuse of federal habeas corpus review and the established need to protect confidential communications through the attorney-client privilege. Disparate though they may be, these movements have the potential to cross paths; indeed, they recently have intersected in the petitions of prisoners asserting their “actual innocence” in seeking relief from the federal courts under § 2254 and § 2255 of Title 28 of the United States Code.

Part II of this Comment begins by examining the history and expansion of federal habeas corpus relief. Next, it observes the efforts of Congress and the Supreme Court to curtail access to federal habeas courts and the policy considerations driving that effort. Finally, this Part discusses some of the exceptions to the rules and principles limiting access to habeas corpus—specifically those involving claims of actual innocence.

Part III focuses on the attorney-client privilege. First, this Part examines the policy justifications that provide the impetus for the privilege. Next, it discusses the limits of the privilege, including waivers and exceptions. This Part then specifically explores the contours of implied waiver and, finally, details the present role of the attorney-client privilege within habeas corpus.

Part IV examines and discusses In re Lott,12 the only case, to date, that has grappled with the implied waiver of attorney-client privilege where a habeas petitioner is asserting an actual innocence claim.

Part V proposes that federal courts should, as a matter of fairness, require that assertions of actual innocence by a habeas petitioner equate to an implicit waiver of the attorney-client privilege with his trial counsel. This Part argues that an implicit waiver will advance the goals of habeas corpus limitations without doing harm to the goals supporting the attorney-client privilege and will not lead to the erosion of other areas protected by the privilege.

II. THE ROLE OF ACTUAL INNOCENCE IN HABEAS CORPUS

Habeas corpus has evolved significantly over its long history. Although this Comment is concerned specifically with the role of actual innocence in several discrete species of habeas claims, it is necessary to briefly examine the history of the “great writ” to appreciate the role of actual innocence in modern habeas corpus jurisprudence.13

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12. 424 F.3d 446 (6th Cir. 2005).
13. For a detailed discussion of the history of federal habeas corpus, see RANDY HERZT & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4(d), at 42-82 (5th ed. 2005).
A. History of the Great Writ

Habeas corpus was originally available only to remedy jurisdictional defects in the legal process. Until the early twentieth century, habeas courts were permitted only to consider whether the particular court that sentenced a petitioner had exercised proper jurisdiction over him. Gradually, the scope of habeas corpus review was expanded to allow claims of constitutional violations distinct from jurisdictional matters. Initially, the Supreme Court defined this constitutional review in a way that allowed it to preserve the “jurisdictional approach” to habeas corpus jurisprudence. However, in Waley v. Johnston, the Court dropped the rubric of “jurisdiction” and acknowledged that habeas courts may properly address claims of “disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.”

In the days when the substance of habeas review was limited to jurisdiction, there were no external restrictions on the number of separate or successive claims that could be filed by an individual petitioner. This caused the courts no trouble at the time because a petitioner was naturally limited by the fact that he could only raise the jurisdictional claim once to each court—once the petitioner ran out of courts, he ran out of habeas chances. But as the scope of the writ was expanded, so too were the strategic options available to petitioners. Prisoners, especially those facing a prolonged sentence or awaiting execution, were able to lob successive habeas claims like an entrenched soldier pitching hand grenades at an approaching tank in the hope that the next grenade might fortuitously land in the right spot and disable its tracks.

In response to a variety of significant policy concerns, federal courts and the Legislature recognized a need to limit the availability of successive habeas claims. The most frequently cited justifications for restricting access to extra-jurisdictional habeas corpus are finality, judicial economy, and federalism. Finality, it is said, serves many purposes—for example, the states’ interest in deterring crime and punishing and/or rehabilitating those
who do commit crime—that would certainly be compromised by unfettered access to federal habeas corpus.\textsuperscript{27} The impetus for conserving judicial resources through restrictive habeas procedures is the ever-present concern that the federal courts will be overloaded with more repetitive, and often frivolous, claims than it can absorb.\textsuperscript{28} Also, the separation of powers between the states and the federal government is thought to be threatened by all forms of federal habeas review—restriction of that review is one way for the courts to maintain balanced separation.\textsuperscript{29}

One of the ways that the Supreme Court (and Congress) has limited the availability of federal habeas corpus review is through the “procedural default” doctrine that bars claims not properly raised in state court.\textsuperscript{30} Under this doctrine, a petition may be denied if the petitioner failed to comply with a state procedural rule when presenting his constitutional claim to the state courts.\textsuperscript{31} Professors Hertz and Liebman explain that the procedural default principle prohibits review when five requirements are satisfied:

1. A petitioner has actually violated an applicable state procedural rule.

2. The procedural violation provides an “adequate” and “independent” state ground for denying petitioner’s federal constitutional claim.

3. The highest state court to rule on the claim clearly and unambiguously relied on the procedural violation as its reason for rejecting the claim.


\textsuperscript{28} See, e.g., Herrera v. Collins, 506 U.S. 390, 426 (1993) (O’Connor, J., concurring) (“Unless federal proceedings and relief—if they are to be had at all—are reserved for ‘extraordinarily high’ and ‘truly persuasive demonstration[s] of ‘actual innocence’ that cannot be presented to state authorities, the federal courts will be deluged with frivolous claims of actual innocence.”) (quoting id. at 417 (majority opinion)) (citation omitted); McCleskey, 499 U.S. at 491-92 (“Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. . . . If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action.”); Kuhlmann, 477 U.S. at 454 n.16; Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (“It must prejudice the occasional meritorious application to be buried in a flood of worthless ones.”).

\textsuperscript{29} See, e.g., McCleskey, 499 U.S. at 491 (“Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.”); Kuhlmann, 477 U.S. at 454 n.16 (“Federal habeas review creates friction between our state and federal courts . . . .”)


\textsuperscript{31} See Keeney, 504 U.S. at 6.
(4) The state has adequately and timely asserted the default as a bar to federal habeas corpus relief.

(5) The petitioner cannot “excuse” the default by showing either:

(A) that there was “cause” for the default and “prejudice” therefrom; or

(B) that the case falls within a category of cases the Supreme Court has denominated “fundamental miscarriages of justice.”

Another of the many limits on the availability of federal habeas review is the restriction of same-claim successive petitions (often simply referred to as “successive petitions”) and new-claim successive petitions (also known as “abusive petitions” or “abuse of the writ”). These restrictions were later codified in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA establishes an outright prohibition on same-claim successive petitions. AEDPA’s requirements for new-claim successive petitions are as follows:

(b)(2) 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—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(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,

32. 2 HERTZ & LIEBMAN, supra note 13, § 26.1, at 1250-51 (emphasis added) (footnotes omitted).
33. Id. § 28.1, at 1391-96.
35. 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” (emphasis added)); see also infra Part II.B for the Supreme Court’s approach to successive petitions before AEDPA. But see infra Part II.C.
36. Of course, successive petitions were regulated well before AEDPA was passed in 1996, see 2 HERTZ & LIEBMAN, supra note 13, § 28.3(c), at 1424-43, but all successive petitions arising since are governed by AEDPA; see id. § 28.3(d)-(e), at 1443-63.
Both the procedural default and the successive petition restrictions contain multiple exceptions. It is within two of these exceptions—the “fundamental miscarriage of justice” exception to a state-based procedural default\(^{37}\) and the “clear and convincing evidence” exception to AEDPA’s prohibition of successive claims\(^{39}\)—that “actual innocence” comes into consideration.

It is worth noting the origin of these exceptions. During the latter part of the twentieth century, the Supreme Court began tempering its habeas corpus reforms in the interest of “fairness,” with an eye toward “persons whom society has grievously wronged.” But what did it mean to be “grievously wronged?” Troubled by the fact that “a convicted defendant who pressed a constitutional claim on collateral attack was ‘usually asking society to redetermine an issue that ha[d] no bearing on the basic justice of his incarceration,’” the Supreme Court developed a notion that one is grievously harmed only if he is incarcerated through a “miscarriage of justice.”\(^{44}\) Obviously, the execution or continued incarceration of an innocent person constitutes a miscarriage of justice.

In the midst of these reforms, Judge Henry J. Friendly of the Second Circuit Court of Appeals published a seminal paper proposing that a petitioner should be required to demonstrate that he is “actually innocent” of the crime before being allowed to petition for certain forms of habeas corpus.\(^{45}\) This actual innocence requirement would not apply in traditional habeas cases that challenge only the jurisdiction of the convicting court and in cases where “[t]he original judgment is claimed to have been perverted, and collateral attack is the only avenue for the defendant to vindicate his rights,” “the state has failed to provide proper procedure for making a defense at trial and on appeal,” or the rare situations where a new “constitutional development[ ] relating to criminal procedure” is deemed by the Supreme

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\(^{38}\) 2 Hertz & Liebman, supra note 13, § 26.1, at 1250-51.


\(^{40}\) Because “habeas corpus has traditionally been regarded as governed by equitable principles,” fairness was an entirely appropriate consideration. Fay v. Noia, 372 U.S. 391, 438 (1963).

\(^{41}\) Id. at 441.


\(^{43}\) See, e.g., McCleskey v. Zant, 499 U.S. 467, 494 (1991) (“These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.” (emphasis added)).


Court to apply retroactively. Judge Friendly argued that habeas corpus did not always have to be available for a petitioner who could have raised his constitutional claim at trial or on appeal—it could be held in reserve for those cases where it would be truly unjust to continue the incarceration or go forward with the execution. This premise was ultimately assimilated and applied by the Supreme Court.

B. Actual Innocence as a “Gateway” to the Consideration of a Barred Constitutional Claim

The Supreme Court continued to restrict access to forms of habeas corpus after Judge Friendly’s provocative article. In *Murray v. Carrier*, the Court held that a petitioner seeking review for a claim that was procedurally defaulted in state court “must show cause for the procedural default and prejudice attributable thereto” before that claim could be entertained in federal court. But, fearing this would unduly prejudice some wrongly convicted petitioners, the Court also recognized that “[i]n appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’” Accordingly, the Court imported and expanded a notion that had been suggested several years prior in the closing paragraphs of *Engle v. Isaac*—that the cause and prejudice requirement may be circumvented, in an exceptional case, to avoid a fundamental miscarriage of justice. Thus, *Carrier* established that a petitioner may avoid procedural default by showing that a “fundamental miscarriage” of justice would occur if his conviction were upheld. And, of course, it would be a fundamental miscarriage of justice to keep an innocent man in jail.

On the same day, in *Kuhlmann v. Wilson*, the court also applied the cause and prejudice/miscarriage of justice analysis to successive habeas claims—claims where the petitioner is raising an issue that had been addressed in a previous habeas petition. The Court further explained that the

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46. *Id.* at 151-54.
47. *Id.* at 154.
48. *See* Kuhlmann v. Wilson, 477 U.S. 436, 448 n.8 (1986) (“In balancing the competing interests implicated by affording federal collateral relief to persons in state custody, federal courts should not exercise habeas corpus jurisdiction over a certain category of constitutional claims, whether or not those claims are meritorious.” (emphasis added)).
50. *Id.* at 485.
51. *Id.* at 495 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).
52. 456 U.S. 107 (1982).
53. *Carrier*, 477 U.S. at 495.
54. *Id.* at 496 (“[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” (emphasis added)).
55. 477 U.S. 436 (1986). The relevant portion of *Kuhlmann* was decided by a plurality of justices, but its analysis has been repeatedly accepted and applied by the Court in subsequent decisions. *See*, e.g., Sawyer v. Whitley, 505 U.S. 333, 339 (1992); McCleskey v. Zant, 499 U.S. 467, 495 (1991).
56. *Kuhlmann*, 477 U.S. at 454 (“[W]e conclude that the ‘ends of justice’ require federal courts to
miscarriage of justice inquiry (i.e., the analysis of actual innocence) is not limited to the “new” evidence presented by the petitioner and the evidence that was previously adduced at trial. In the words of the Court, “the question whether the prisoner can make the requisite showing [of actual innocence] must be determined by reference to all probative evidence of guilt or innocence.” In doing so, the Court effectively suspended both the exclusionary rule and the ordinary rules governing admissibility of evidence when evaluating a claim of actual innocence.

Five years later, in McCleskey v. Zant, the Court extended the same precepts to abusive claims. Using now-familiar language, the Court held that if a petitioner “cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.” The Court went on to say, as in Kuhlmann, that a fundamental miscarriage of justice requires a “colorable showing of factual innocence.” Finally, the Court explained that it was appropriate to extend the doctrine of actual innocence to this area because it would protect the interests of the “rare” petitioner who was wrongly convicted, without harming the considerations of finality and stability that initially led the Court to prohibit abusive writs.

To this point in the history of actual innocence, the burden placed on the petitioner was uncertain. Beginning with Carrier, the Court stated that a petitioner must demonstrate that he was “probably innocent” of the crime for which he was convicted in order to defeat the procedural bar preventing him from asserting his habeas claim. The Court began to define in later cases what kinds of evidence should be considered, but it did nothing more to quantify how much evidence was necessary to pass through the gateway of actual innocence. However, in Sawyer v. Whitley, the Court took a major step in that direction. In Sawyer, the Court was examining actual innocence as applied to a petitioner claiming he was “innocent of the death penalty”—petitioner was challenging the factual basis of aggravating circumstances used in the sentencing phase of his trial and arguing several

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57. Id. at 454 n.17.
58. Id. (citing Friendly, supra note 45, at 160).
60. An “abusive claim” is a second or subsequent habeas claim that raises a new issue that could have been relied upon in a previous petition but, for whatever reason, was not presented in the previous petition. See generally 2 Hertz & Liebman, supra note 13, § 28.3, at 1408-63.
61. McCleskey, 499 U.S. at 494-95.
62. Id. at 495 (quoting Kuhlmann, 477 U.S. at 454) (internal quotation marks omitted).
63. Id. at 496.
67. Id. at 338.
mitigating factors that were not considered therein.\(^{68}\) The Court limited the inquiry just to the aggravating circumstances\(^{69}\) and held that “to show ‘actual innocence’ [a petitioner asserting he is innocent of the death penalty] must show by clear and convincing evidence that . . . no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”\(^{70}\) In the following years, some lower courts imported this clear and convincing standard into simpler Carrier-style gateway claims involving procedural default and successive or abusive petitions.\(^{71}\) In 1995, the Court ruled in Schlup v. Delo to resolve a split that had developed among the circuits over the appropriate level of proof in these claims of actual innocence.\(^{72}\) The Court opined that the Sawyer “clear and convincing” standard applied only to petitions that challenged the capital sentence of a petitioner who is not questioning his underlying murder conviction.\(^{73}\) According to the Court, its holdings in Carrier, Kuhlmann, and McCleskey were still valid and required only that the petitioner was “probably” innocent of the crime—something akin to the familiar “preponderance” or “greater weight” of the evidence standards in civil litigation.\(^{74}\)

Thus, a petitioner who cannot show cause and prejudice may still assert an abusive,\(^{75}\) successive,\(^{76}\) or procedurally defaulted habeas claim of constitutional defect if he is able to demonstrate, in the face of all relevant evidence, that he is probably innocent of the crime for which he was convicted.

\(\footnotesize{68}\) For a detailed discussion of aggravating and mitigating factors used in capital sentencing, see \textit{Barry Latzer, Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment} (1998).

\(\footnotesize{69}\) Perhaps the Court thought it is less speculative to evaluate whether a “reasonable juror” would accept an aggravating factor than to consider how a jury would try to balance the panoply of both aggravating and mitigating factors.

\(\footnotesize{70}\) \textit{Sawyer}, 505 U.S. at 336 (emphasis added).


\(\footnotesize{72}\) 513 U.S. 298.

\(\footnotesize{73}\) \textit{Id.} at 324.

\(\footnotesize{74}\) \textit{Id.} at 327-28.

\(\footnotesize{75}\) These standards were modified to some extent by the AEDPA in 28 U.S.C. § 2244(b)(2) (2000), \textit{see supra} notes 34-39 and accompanying text—resulting in what some commentators now refer to as a “cause and innocence” standard—but innocence still plays a major role in navigating the world of abusive writs, and federal courts still reference the cases and procedures discussed in Part II.B. For a thorough analysis of the effects of AEDPA on abusive writs of habeas corpus, see 2 \textit{Hertz & Liebman, supra} note 13, § 28.3, at 1408-63.

\(\footnotesize{76}\) Successive petitions too were modified by the AEDPA in 28 U.S.C. § 2244(b)(1), which claims to prohibit them unequivocally. However, the Supreme Court declined to answer whether the prohibition of § 2244(b)(1) is constitutionally permissible when it did the same for § 2244(b)(2) in \textit{Felker v. Turpin}, 518 U.S. 651 (1996). Since the inception of the AEDPA, the lower courts have struggled with the application of § 2244(b)(1) and sometimes seek ways to interpret claims as “new” in order to avoid the harsh bar of § 2244(b)(1). For a complete discussion, see 2 \textit{Hertz & Liebman, supra} note 13, § 28.4, at 1463-66. Regardless, both because of the unsettled state of affairs in this area and because the Court’s analysis in \textit{Kuhlmann} is quite relevant to its contemporaneous and subsequent decisions on actual innocence, it is very relevant to consider successive petitions in the context of this Comment.
C. Actual Innocence as a Stand-Alone Claim

It may also be possible for a petitioner to assert his actual innocence as a stand-alone basis for an otherwise prohibited habeas corpus claim. Generally speaking, a petition for habeas corpus must be accompanied by an independent constitutional violation to warrant consideration in federal court.77 However, in Herrera v. Collins,78 the Supreme Court addressed a freestanding claim of actual innocence in a petitioner’s second attempt at federal habeas. Chief Justice Rehnquist, writing for the Court, held that the proper remedy for “claims of innocence based on new evidence, discovered too late in the day to file a new trial motion” is not federal habeas but executive clemency.79 However, in the very next stroke of his pen, he made the following statement:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.”80

The Chief Justice was careful to state that the Court was not therein creating a new cause of action,81 and the other Justices were quick to either agree that no freestanding actual innocence claim was being recognized82 or argue that one should be.83 Nonetheless, after Herrera petitioners began asserting freestanding claims of actual innocence in federal habeas petitions, citing Herrera in their briefs. Without ever expressly recognizing such a cause of action, the Supreme Court has acknowledged and referenced “Herrera claims” in subsequent cases, without further defining the “extraordinarily high” threshold showing of actual innocence that would be required to prevail in such a claim.84 This type of actual innocence claim (if

77. See, e.g., Townsend v. Sain, 372 U.S. 293, 317 (1963) (“Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant’s detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).
79. Id. at 417.
80. Id. (emphasis added).
81. Id.
82. See id. at 420, 427-28 (O’Connor, J., concurring).
83. Id. at 429 (White, J., concurring); id. at 430 (Blackmun, J., dissenting).
it truly exists) is something very different from those of the Carrier or even Sawyer pedigree. There, actual innocence provides a gateway through which the petitioner must pass in order to assert an independent claim of constitutional violation. Here, innocence is itself the claim. It is not clear exactly what remedy would be afforded to a petitioner that actually carried the “extraordinarily high” burden—it could range from a commuted sentence to a new trial or even an outright release.

D. Summary of Actual Innocence Jurisprudence

Over the last twenty years, several things have become clear about actual innocence in federal habeas corpus. First, actual innocence originated as an effort to safeguard against constitutional injustices resulting from the increasingly restrictive barriers to some forms of habeas corpus that were established by Congress and the Supreme Court in the middle of the last century. These barriers were erected in response to valid and important concerns about the abuse and degradation of habeas corpus as a remedy. Second, it is clear that federal courts may consider the actual innocence of a habeas petitioner in a number of scenarios. Third, the petitioner’s burden in proving his actual innocence varies depending upon the nature of his claim. A petitioner asserting his actual innocence as a gateway through which he may present an otherwise successive, abusive, or procedurally defaulted habeas claim, as in Carrier or Schlup, must show that he is “probably innocent.” A petitioner asserting his innocence to bring an otherwise precluded claim against his capital sentence without challenging the underlying murder conviction, as in Sawyer, must present “clear and convincing” evidence that he is “innocent of death.” A petitioner asserting a freestanding claim of innocence under Herrera must meet an “extraordinarily high” threshold before his claim is considered. Lastly, federal courts are not bound by the exclusionary rule when reviewing actual innocence claims. Courts may consider, at the very least, evidence that was wrongly admitted, wrongly excluded, and recently discovered.

85. See supra notes 64-70 and accompanying text.
86. See supra notes 49-53 and accompanying text.
87. See supra notes 29 and accompanying text.
88. See supra Part II.B-C.
III. IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” Its oft-cited purpose is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” The common law notion of privileges applies with full force to the federal courts through Federal Rule of Evidence 501. Since Congress has explicitly opted to retain a common law approach to privileges, it is within the province of the federal courts to “continue the evolutionary development of testimonial privileges” in areas under their jurisdiction in light of their “reason and experience.”

The very existence of the attorney-client privilege represents a conscious balancing of two competing interests—the search for truth and the desire to foster positive attorney-client interaction. But, because the privilege does act to withhold truth from the finder of fact, it is proverbially held to apply only where necessary to advance the right to counsel. Nevertheless, the general applicability of the attorney-client privilege is both uncontroversial and ubiquitous—it is beyond cavil that the privilege attaches to communications between a criminal defendant and his trial counsel and remains in full force almost indefinitely. Thus, a habeas peti-

95. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“The privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer’s being fully informed by the client.”); see also Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (“[The attorney-client privilege] is founded upon the necessity in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).
96. FED. R. EVID. 501.
98. Id. at 10.
99. See Swidler, 524 U.S. at 412 (O’Connor, J., dissenting) (“The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence.”); see also T. Maxfield Bahner & Michael L. Gallion, Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity, 65 DEF. COUNS. J. 199, 200 (1998) (“[T]he attorney-client privilege does prevent discovery of potentially relevant communications, but society has subordinated the search for truth to a preferred value: the full and free right to assistance of counsel.” (quoting George A. Davidson & William H. Voith, Waiver of the Attorney-Client Privilege, 64 OK. L. REV. 637, 638 (1986))).
100. “[T]he rules of privilege . . . are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive: rather than facilitating the illumination of truth, they shut out the light.” MCCORMICK, supra note 93, § 72, at 298-301.
101. “A privilege should operate . . . only where ‘necessary to achieve its purpose,’ and an invocation of the attorney-client privilege should not go unexamined ‘when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise.” Swidler, 524 U.S. at 412 (O’Connor, J., dissenting) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)) (citations omitted).
102. See id. at 408-09
103. The attorney-client privilege survives the death of the privilege holder. See id. at 408-10.
tioner, like all other litigants, generally has the “right to refuse to disclose and to prevent any other person from disclosing confidential communications between the [petitioner] and the attorney” before, during, and well after the pendency of his claim.

Of course, a confidential communication between a defendant and his attorney need not remain cloistered for all time—the barrier of the attorney-client privilege may be waived. Such a waiver may be expressly affected by the defendant or implied by his actions. Judge Alex Kozinski of the Ninth Circuit Court of Appeals states that an express waiver occurs where a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public. Disclosures that effect an express waiver are typically within the full control of the party holding the privilege; courts have no role in encouraging or forcing the disclosure—they merely recognize the waiver after it has occurred.

Contrast this notion with the doctrine of implied waiver, which “allocates control of the privilege between the judicial system and the party holding the privilege.” As Judge Kozinski again describes, “[t]he court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials if it wishes to go forward with its claims implicating them.” Put differently, the court “strike[s] a bargain with the holder of the privilege by letting him know how much of the privilege he must waive in order to proceed with his claim.” Implicit waiver may come about in a number of ways, but it most commonly arises where a litigant has asserted a claim, cause, or defense that requires he disclose privileged information.

104. BLACK’S LAW DICTIONARY 554 (2d pocket ed. 2001).
105. See generally MCCORMICK, supra note 93, § 93, at 371-77.
106. Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003) (citations omitted); id. at 719 n.4 (“Despite the somewhat misleading nomenclature, an ‘express’ waiver need not be effectuated by words or accompanied by the litigant’s subjective intent. Rather, the privilege may be waived by the client’s, and in some cases the attorney’s, actions, even if the disclosure that gave rise to the waiver was inadvertent. To avoid confusion, some commentators use the term ‘waiver by voluntary disclosure’ to distinguish this type of waiver from ‘implied waiver’, or ‘waiver by claim assertion.’” (citations omitted)); see also United States v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999) (holding that courts must evaluate “whether ‘allowing the privilege would deny the opposing party access to information vital to its defense.’” (quoting Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995))).
108. Bittaker, 331 F.3d at 720 (“The court thus gives the holder of the privilege a choice: if you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.”).
109. Id.
110. Privileged Communications, supra note 107, at 1630-31 (identifying the pleading of claims as one of three situations invoking the fairness consideration).
Federal courts have found implicit waiver of privilege in a variety of different claims that, on their face, implicate privileged communications. The prototypical example arises in an ineffective assistance of counsel claim or an advice of counsel defense. In these areas, which are relatively straightforward and well settled, “the pleading places at issue the subject matter of a privileged communication in such a way that the party holding the privilege will be forced to draw upon the privileged material at trial in order to prevail.” Here, the courts do little more than anticipate what would later constitute an express waiver—once the holder of the privilege presents evidence necessary to support one of these claims, he will have revealed the confidential communications to third parties not bound by the privilege.

But, courts have also found implicit waiver in subtler situations—situations where waiver would not materialize under the “anticipatory waiver” approach discussed above—by focusing on the fairness to the party responding to the claim of the privilege holder. An early example of the fairness approach to implicit waiver, *Hearn v. Rhay*—now applied by a majority of courts—used a three-part test to identify situations where allowing the privilege to remain intact would be “manifestly unfair to the opposing party”:

1. assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
2. through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
3. application of the privilege would have denied the opposing party access to information vital to his defense.

Where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

111. *E.g.*, Bittaker, 331 F.3d at 722.
113. *Privileged Communications*, supra note 107, at 1638-39 (“When the party asserting the privilege bears the burden of proof on an issue and can meet that burden only by introducing evidence of a privileged nature, waiver is clearly warranted at the discovery stage.”).
114. *Id.* at 1639.
117. *Hearn*, 68 F.R.D. at 381.
118. *Id.* The *Hearn* test has been criticized by some commentators and distinguished by some courts for its willingness to subject absolute privileges to individualized balancing. See *Privileged Comunications*.
In *Hearn*, the defendant prison administrators asserted that they were acting in good faith and, as government employees, they were immune from the civil suit brought by the plaintiff seeking damages for violation of his due process rights and his "Eighth Amendment right to be protected from cruel and unusual punishment." The plaintiff sought discovery of privileged communications between the defendants and the Washington State Attorney General to rebuff the claim of good faith. The court applied the three-part test and ultimately found that the defendants had waived their privilege by asserting their good faith defense. Many federal courts have applied some form of fairness analysis both before and after the three-part *Hearn* test came into vogue.

When addressing privileges of any sort, courts must also be concerned with the scope of the exclusion at issue. Because all privileges act to limit the consideration of relevant and probative evidence by fact-finders, courts have long followed the aphorism that privileges are to be construed narrowly. Conversely, privileges must also have enough breadth to preserve the societal interests that were deemed important enough to recognize the privilege in the first place. Accordingly, it follows that waiver of a privilege should also be construed narrowly.

A final issue for a court addressing an implied waiver (especially waiver of the privilege—one between a client and his attorney) is whether the court’s action will adversely effect the clarity and reliability of the privilege at large. Obviously, a client will be less willing to engage in frank discussion with his attorney if he suspects a court will later devise an exception to his privilege or announce that the privilege has been waived in some unforeseen way. Accordingly, many courts and commentators favor a predictable bright-line approach to exceptions and waivers in order to encourage beneficial reliance by the privilege holder. However, others are will-

120. Id. at 578.
121. Id. at 583.
122. See, e.g., *Henderson v. Heinze*, 349 F.2d 67, 70-71 (9th Cir. 1965) (holding that a petitioner had implicitly waived his attorney-client privilege as to communications with his counsel before "knowingly fore[going] the privilege of seeking to vindicate his federal claims in the state courts" by raising a new search and seizure claim in a federal habeas corpus petition (quoting *Fay v. Noia*, 372 U.S. 391, 438-39 (1963)) (internal quotation marks omitted)).
123. See supra note 107, at 1641. But cf. *Bahner & Gallion*, supra note 99, at 204 ("Overemphasizing a few outdated opinions that have stretched the *Hearn* test, critics have placed too much emphasis on aberrations. The suggestion that the *Hearn* test is uncontrollable is inaccurate, given the abundance of case law that has molded this doctrine. Unlike other suggested approaches, it has been refined and fleshed out by courts to a precise scope for more than a quarter of a century.").
124. See *Bahner & Gallion*, supra note 99, at 204 n.23.
125. See supra notes 100-101 and accompanying text.
126. See *Bittaker v. Woodford*, 331 F.3d 715, 721-24 (9th Cir. 2003) (waiver arising from ineffective assistance of counsel claim in habeas corpus extends only to litigation of that particular claim); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-304 (6th Cir. 2002) (addressing the scope of selective waiver).
127. E.g., *id.* at 409; *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege,
To date, only one case has specifically addressed the role of the attorney-client privilege in an actual innocence claim. In what may be the seminal case on the issue, In re Lott, a divided panel of Sixth Circuit judges declared that the privilege is not waived by a habeas petitioner asserting actual innocence as a gateway to a defaulted constitutional claim.134

Lott was litigating his second habeas petition,135 presenting a constitutional claim that the government had illegally withheld exculpatory evidence under Brady v. Maryland.136 To bring this new-claim successive petition under AEDPA, he had to demonstrate that he was “probably innocent” of the crime.137 Accordingly, Lott professed his actual innocence and offered as proof a newly discovered statement of the murder victim to the police shortly before his death.138 The statement included a physical description of the murderer that did not match Lott’s physical characteristics.139 To rebut this evidence, the state of Ohio sought a discovery order allowing it to depose Lott’s trial counsel on the matter of Lott’s professed

or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”); In re Grand Jury Investigation, 399 F.3d 527, 535 (2d Cir. 2005); Privileged Communications, supra note 107, at 1640-41.
129. Privileged Communications, supra note 107, at 1640.
130. See supra notes 99-104 and accompanying text.
131. See supra notes 105-110 and accompanying text.
132. See supra note 125.
133. See supra notes 126-129 and accompanying text.
134. 424 F.3d 446, 456 (6th Cir. 2005).
135. Id. at 447.
136. Id.
137. See supra Part II.B.
139. Id.
innocence. To justify its discovery request, the state relied on the following language from *Schlup v. Delo*:

In assessing the adequacy of petitioner’s showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on “actual innocence” allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, . . . we believe that Judge Friendly’s description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner’s innocence “in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.”

Specifically, the government claimed to be seeking information communicated to the trial counsel about Lott’s confession to the police. The fact that there was a confession, and even the substance of that coerced confession, is clearly within the purview of a court reviewing a subsequent habeas claim—regardless of the fact that it was excluded from the jury’s consideration at trial. However, the government sought to depose his trial counsel in order to address the weight of the confession. Thus, the government appeared to make a colorable claim to discover “relevant evidence that was either excluded or unavailable at trial.”

Lott opposed this discovery, emphasizing that it would pierce both the attorney-client privilege and the work product doctrine. Notwithstanding, the district judge granted the government’s discovery order. The judge held that, in raising his claim of actual innocence, Lott had impliedly waived his attorney-client privilege. Lott appealed immediately to the Sixth Circuit for a writ of mandamus to overturn the discovery order.

The Sixth Circuit issued the writ. Writing for the majority, Judge Merritt focused on the importance of the attorney-client privilege.
concentrated on the traditional requirement that, to imply a waiver of attorney-client privilege, the defendant usually has to place the attorney’s conduct directly in controversy.

The privilege is held to be waived when a client attacks the quality of his attorney’s advice through, for example, a civil defendant’s pleading of an advice-of-counsel defense or a criminal defendant’s appeal on grounds of inadequate legal representation. The doctrine is also invoked to waive . . . the psychiatrist-patient privilege of a criminal defendant pleading an insanity defense. These allegations have one thing in common: the pleading places at issue the subject matter of a privileged communication in such a way that the party holding the privilege will be forced to draw upon the privileged material at trial in order to prevail.152

The majority also relied on Bourjaily v. United States153 and the text of Federal Rules of Evidence 104(a) and 1101(d) to draw a distinction between admissible information and privileged information stating that “suspending the rules of admissibility while preserving the rules of privilege is not an unusual event.”154 They went on to cite the policy concerns justifying the privilege: “The policies underlying privilege counsel strongly against expanding the scope of implied waiver. It is important to cabin the implied waiver of privileges to instances where the holder of the privilege has taken some affirmative step to place the content of the confidential communication into the litigation.”155 The majority further claimed that “the contention of a habeas petitioner that he is innocent is not all that different from a criminal defendant’s assertion that he is not guilty of a crime,”156 and then speculated that “[b]reaking down the privilege in this case where the content or consequence of the confidential communications is not at issue would undermine the privilege at other stages of the proceedings where the party asserts innocence as a defense.”157

Chief Judge Boggs, the lone dissenter, employed the opposite approach in almost every respect. While the majority focused on the history and justification of the attorney-client privilege, he stressed the policy concerns158

151. Id. at 452-56.
152. Id. at 453 (quoting Privileged Communications, supra note 107, at 1638).
154. Lott, 424 F.3d at 455.
155. Id.
156. Id. at 456.
157. Id. In making these statements, Judge Merritt apparently ignored the manifold differences between a claim of innocence in a defaulted habeas appeal and at the original trial. Specifically, he failed to consider the fact that a habeas petitioner does not have a presumption of innocence—by virtue of his conviction, the burden of proof shifts onto the now-convicted defendant in an actual innocence claim to prove his innocence. See Schlup v. Delo, 513 U.S. 298, 326 n.42, 329 (1995).
158. Lott, 424 F.3d at 462 (Boggs, C.J., dissenting) (“Under the court’s decision today, the privilege will also be used to oppose finality and comity by prolonging the fair disposition of [habeas] claims and encouraging their proliferation.”).
justifying the restriction of access to habeas corpus that were discussed earlier in Part II.B. And while the majority clearly favored the rudimentary “anticipated waiver” approach to privileges, Chief Judge Boggs employed the fairness analysis. He heavily cited the Supreme Court’s guidance on the actual innocence line of cases and viewed the attorney-client privilege only through the lens of Schlup. In essence, his dissent contained three major points: (1) a petitioner asserting actual innocence under Schlup is also required to forfeit a variety of protections equal to or greater than the attorney-client privilege in order to make out his case, (2) a policy allowing a petitioner to hold relevant evidence in reserve while championing an actual innocence claim is contrary to the Supreme Court’s guidance that such claims should be reserved for the rare cases that are “truly deserving” of the exception, and (3) requiring a petitioner asserting his actual innocence to waive his attorney-client privilege would do no harm to the purposes of the privilege itself.

V. SHOULD THE WAIVER EXIST?

So, should a habeas petitioner be required to waive his attorney client privilege before arguing his actual innocence claim? As stated in the introduction of this Comment, this question must be answered by reference to the policy concerns that justify both the existence of the attorney-client privilege and the actual innocence exception to habeas restrictions. Four areas discussed above bear heavily on this question: first, the stated purposes of the limitations of access to some forms of federal habeas enacted in the latter half of the twentieth century; second, the purposes that lead to the

159. See supra note 114 and accompanying text.
160. Lott, 424 F.3d at 453.
161. Lott, 424 F.3d at 458-59 (Boggs, C.J., dissenting).
162. See supra Part II.B.
163. Lott, 424 F.3d at 457-64 (Boggs, C.J., dissenting). Although his dissent here would ultimately call for an implied waiver of the attorney-client privilege, to say the Chief Judge was undervaluing or speaking out against the privilege would be myopic. More appropriately, he made a value choice between the policy concerns of the privilege and the interests of the government in dealing with subsequent habeas petitions. Id. at 464. Just several years prior, Chief Judge Boggs similarly had to weigh these competing interests. In In re Columbia/HCA Healthcare Corporation Billing Practices Litigation, he (again writing in dissent) argued for a policy-based decision that would expand the rights of the holder of the attorney-client privilege by allowing parties to selectively waive privilege against some parties but not others. 293 F.3d 289, 310-12 (6th Cir. 2002) (Boggs, C.J., dissenting).
164. Lott, 424 F.3d at 460 (Boggs, C.J., dissenting) (“If trial protections guaranteed by the Fourth, Fifth, and Sixth Amendments of the Constitution are waived by habeas petitioners making claims of actual innocence, one must pause to wonder why the attorney-client privilege is not, as well. It may not be hyperbolic to suggest, as the [majority] does, that the attorney-client privilege is foundational to the adversary system, but the Bill of Rights is no less foundational to our courts or society.” (citation omitted)).
165. Id. at 459.
166. Id. at 461 (“It frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review. The purposes of the privilege are not harmed by this ruling.”).
actual innocence exception to some of those limitations; third, the considerations that justify the existence of the attorney-client privilege; and lastly, the policies that govern the waiver of that privilege.

As examined in Part II.A, both the federal courts and the Legislature made a conscious decision to limit access to certain forms of federal habeas corpus. Citing concerns of finality, comity, conservation of judicial resources, and federalism, they implemented various procedures that allow for the dismissal of certain species of habeas claims from the federal courts. 167 Through the last several decades, the courts have highlighted the continued viability of these policy concerns. 168 With the 1996 implementation of the AEDPA, Congress further restricted access to federal habeas review. 169

Obviously, a wrongly convicted person languishing in the penitentiary (possibly even on death row) would suffer a serious injustice if he were deprived of the chance to finally prove his innocence with newly discovered evidence. This person might not be able to show the “cause-and-prejudice” 170 that would ordinarily allow his claim to be heard. 171 The courts and the legislature were not blind to this situation; it was precisely this dreadful possibility that lead to the exception of actual innocence. 172 The actual innocence exception was intended as a selective escape valve—in the rare case that a truly innocent person is still incarcerated after exhausting all his direct appeals and his first round of state and/or federal collateral attacks, his constitutional claim may still be heard if he can pass through the gateway of actual innocence. 173 The courts are understandably particular about this exception—if passage through this gateway is too easily granted then the ends sought through restricting access to habeas will never be realized. If the gateway appears too attainable then at least one of the goals, conservation of judicial resources, will be doomed—any and every prisoner at this procedural stage will send up an actual innocence claim just on the offhand chance that it might work. But, all the goals of the restrictive policy are still achieved if the gateway is open only to those genuinely innocent of the crime for which they were convicted.

Therefore, how hard should it be to pass through the gateway? Over time, the Supreme Court has struck a different balance for different procedural settings. 174 In a “typical” actual innocence situation, where the petitioner is trying to pass through the gateway in order to bring a constitutional claim, the petitioner must show that he is “probably innocent”—analogous to the preponderance of the evidence burden familiar in most forms of civil

167. See supra notes 24-29 and accompanying text.
169. See supra notes 34-39 and accompanying text.
171. See supra notes 49-50 and accompanying text.
172. See supra notes 51-57 and accompanying text.
173. See supra notes 52-56 and accompanying text.
174. See supra Part II.D.
litigation. In a capital case, where the petitioner is claiming only that he should not have been sentenced to death, not that he is innocent of the murder, the petitioner must show by “clear and convincing” evidence that he is “innocent of death.” In a stand-alone Herrera-style claim of actual innocence (if such a thing exists), the burden is “extraordinarily high”—perhaps akin to the burden usually borne by the state in prosecutions: beyond a reasonable doubt. But the question remains: What defines the body of evidence examined when a petitioner is trying one of these claims? It is clear that this body is not limited to the trial record. The Court often refers to all the relevant evidence of the guilt or innocence of the petitioner. It seems logical that the process would be the same in each of the three styles of actual innocence claims. Both sides would conduct discovery, with the consent of the habeas court, to develop all the relevant evidence. The evidence would then be presented before the court in an evidentiary hearing, and the judge would weigh the body of evidence against the standard of proof required for whichever type of claim was at issue. This brings us to the truly burning question: Should privileged communications from the petitioner to his trial lawyer be included in the definition of all of the evidence? What harm would result to the interests that society tries to protect through the privilege rules?

Privileges, by their very nature, are contrary to one of the paramount goals of our system of justice—the quest for truth. All privileges keep relevant and reliable information from the fact-finder. The fact that privileges exist at all is a testament to the importance of the other goals they serve. As previously stated, the traditional purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” But, because it does hurt the quest for truth, a privilege (even the attorney-client privilege) should apply only where necessary to achieve its purpose. Even in some situations where the purposes of the privilege would be well served, the privilege must yield in favor of a more important judicial interest. And, just as there are exceptions to the habeas corpus restrictions discussed above, there are exceptions to the protection of the attorney-client privilege. As discussed in Part III, there are

178. It is worth reiterating that this variety of actual innocence is unlike all the others; it is possibly more akin to a substantive due process claim, but the Court in Herrera expressly declined to so define it in the majority opinion. Id. at 408 n.6. Regardless, the analysis of whether the petitioner is actually innocent is materially the same as the other species. Accordingly, it is a proper subject of discussion here.
179. See supra notes 57-58 and accompanying text.
some occasions where it simply would be unfair or unjust to allow information to remain privileged—hence, the privilege may be implicitly waived.

There are significant concerns about the use of the implied waiver doctrine. Courts and commentators agree that its application should be consistent and should yield predictable results. Unpredictable application can obviously harm the goals of the attorney-client privilege. An unpredictable safeguard against unwanted disclosure is little better than no safeguard at all. If the doctrine is applied unpredictably, or too expansively, it can seriously undermine the stated purposes for recognizing an attorney-client privilege in the first place.

After weighing all of these goals, and the corresponding concerns about how to attain them, it seems clear that the attorney-client privilege should not stand in the way of an actual innocence inquiry in a federal habeas corpus proceeding. A petitioner seeking to assert his actual innocence in any of the three situations discussed above should be required to waive his attorney-client privilege for the limited purpose of ascertaining his guilt or innocence of the particular conviction he is attacking.

This requirement comports with the policy considerations voiced by the Supreme Court over the actual innocence exception—it will ensure that the exception remains available for the “rare” and “truly exceptional” situations warranting this kind of review while appropriately eliminating the non-meritorious petitions. The small number of petitions that meet these actual innocence requirements will do nothing to seriously hamper other goals like finality and comity.

Also, this requirement poses no danger to the goals of the attorney-client privilege. As noted by Chief Judge Boggs, it is ridiculous to think that a defendant might refrain from candid and forthright discourse with his lawyer for fear that if he is convicted, and if all of his direct appeals fail, and if his collateral appeals in state court fail, and if his claims become procedurally defaulted or his first round of federal collateral appeals fail, then he may have to waive privilege to proceed. The actual innocence privilege waiver would do nothing to discourage communication between a defendant and his lawyer.

An obvious criticism of any reduction in the ambit of the attorney-client privilege is that it could lead to other unforeseen and inappropriate reductions. This “slippery slope” argument is always a valid consideration but poses no concern here for several reasons. First, there would be no individualized balancing or guesswork in its application. Unlike other fairness approaches, like the widely-accepted Hearn test, this privilege waiver does not require a court to balance the needs of the government against the needs of an individual petitioner—there is no leeway for a court to “stretch”

182. See supra note 127 and accompanying text.
183. See supra notes 126-127 and accompanying text.
184. See supra note 1676.
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this waiver on the facts of a particular case.\footnote{Of course, it is possible that a court could apply this waiver (or adopt it by analogy) in a different and possibly inappropriate context, but that risk applies to any doctrine of waiver and is no reason not to recognize the substantial advantages of the actual innocence privilege waiver.} Second, this waiver would be predictable in its application and consistent in its results. By avoiding the individualized “balancing” calculus of the \textit{Hearn} test, the risk of inconsistent and sporadic implementation is avoided—this waiver would apply in every species of actual innocence claims discussed supra and in no other situations. Application is simple—any petitioner wishing to proceed with an actual innocence claim must consent to the waiver. Third, the scope of the waiver is sufficiently narrow to avoid any extraneous prejudice to the petitioner. The waiver covers only the relevant communications regarding the particular conviction at issue in the petition and would be available only in those cases where the district court uses its discretion to grant discovery. The waiver could not be used to explore other allegations or convictions, as they bear no relevance to guilt or innocence on the challenged conviction.

The predictability and fairness of this waiver approach make it superior to existing approaches that require individual balancing or that distinguish between the different species of actual innocence claims. The Supreme Court has clearly stated that all versions of the actual innocence exception should be reserved for those petitioners who are truly innocent of their crimes.\footnote{See, e.g., Herrera v. Collins, 506 U.S. 390, 426-27 (1993) (O’Connor, J., concurring).} To draw a distinction between, for instance, a \textit{Sawyer}-style claim and a \textit{Carrier}-style claim with respect to waiver would fly in the face of that mandate. If the actual innocence privilege waiver should apply in any one of these situations, it should be applied in all of them.

VI. CONCLUSION

At the time of this writing, no court outside of the Sixth Circuit has directly addressed the possibility of an actual innocence privilege waiver. The State of Ohio filed for certiorari with the Supreme Court, but the petition was not entertained.\footnote{Houk v. Lott, 126 S. Ct. 1772 (2006).} Perhaps, in time, the highest court will weigh in. In the interim, this issue is likely to arise again in the federal district courts and circuit courts of appeal. Although the issue is settled for now in the Sixth Circuit, other federal courts that grapple with this issue should consider the reasoning of the Sixth Circuit’s Chief Judge and examine the policy considerations that drive both halves of this issue.

By adopting the actual innocence privilege waiver, the federal courts can ensure that meritorious claims of innocence are duly considered, undeserving claims are discouraged, and that efforts to promote finality, comity, separation of powers, and conservation of scant judicial resources are preserved.

\textit{Marcus R. Chatterton}