

**ENSURING ACCESS TO JUSTICE FOR  
NON-ENGLISH-SPEAKING CRIMINAL DEFENDANTS:  
DENIAL OF ACCESS TO OTHER-LANGUAGE LEGAL  
MATERIALS OR ASSISTANCE AS AN EXTRAORDINARY  
CIRCUMSTANCE FOR EQUITABLE TOLLING**

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I. INTRODUCTION

The United States has long been heralded a “melting pot,” a blend of multiple cultures striving toward the same goal: the American Dream. America continually strives to be the land of the free, the land of diversity, and the land of acceptance—except for those who do not speak English. In the United States, language barriers have become an increasing problem for non-English-speaking residents, citizens and non-citizens alike. In the year 2000, nearly 18% of the population ages five and over spoke a language other than English in their homes, while 8.1% of the same population spoke English “less than very well.”<sup>1</sup> What that means for those 8.1% of people living in the United States is that, day to day, they may face barriers to obtaining the services they need to function in society,<sup>2</sup> from going to the grocery store to navigating public transportation, or even receiving proper medical treatment.<sup>3</sup>

Non-English-speaking individuals in the United States also face tremendous burdens in obtaining assistance in the criminal justice system.<sup>4</sup> Many procedural safeguards protect “language minorities,”<sup>5</sup>

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<sup>1</sup> Hyon B. Shin, *Language Use and English Speaking Ability: 2000*, Census 2000 Brief (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 543 (2004).

<sup>4</sup> *Id.* (discussing the indistinguishable “babble of voices” that “language minorities” face in the legal process, from retaining legal advice they can understand to obtaining “meaningful courtroom justice”).

such as the Federal Court Interpreters Act and accompanying state interpreter statutes.<sup>6</sup> These safeguards are critical in providing “meaningful courtroom justice”<sup>7</sup> for language minorities, but often they are not enough.

Within the criminal justice system, an indigent, non-English-speaking criminal defendant needs significant aid in the preparation of a post-conviction proceeding. Every criminal defendant is entitled to an attorney by the Sixth Amendment of the U.S. Constitution both for trial and for a direct appeal.<sup>8</sup> Once a defendant has exhausted his direct appeal, however, he no longer has the right to an attorney, and if he does not have the means to employ one, he must attack his conviction *pro se*.<sup>9</sup> Because there is no right to counsel in a post-conviction proceeding, more than ninety percent of prisoners petitioning for habeas corpus represent themselves.<sup>10</sup>

The writ of habeas corpus is a criminal defendant’s last chance to obtain relief in our criminal justice system.<sup>11</sup> This opportunity is equally important to both English-speaking and non-English-speaking criminal defendants alike, as it is the only way for prisoners who have exhausted all remedies in state court to appeal to a federal court for relief from an unconstitutional incarceration.<sup>12</sup> The “Great Writ,”<sup>13</sup> however, has been significantly narrowed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>14</sup> which significantly narrowed prisoners’ ability to obtain that relief by enacting a one-year statute of limitations<sup>15</sup> and by severely limiting any successive attempts for habeas corpus relief,<sup>16</sup> thus allowing most prisoners only one chance to obtain relief.

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<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, Federal Court Interpreters Act, 28 U.S.C. § 1827 (2006).

<sup>7</sup> Rearick, *supra* note 3, at 544.

<sup>8</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987) (holding that the right to appointed counsel extends only to the first appeal of right).

<sup>9</sup> *See id.*; *see also* 21 U.S.C. § 848(q)(4)(B) (2006), *repealed by* Pub. L. No. 109-177 (Mar. 9, 2006) (previously provided that any defendant facing the death penalty was entitled to counsel in federal habeas proceedings).

<sup>10</sup> Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1558 (1997).

<sup>11</sup> *Id.* at 1514. “[T]he writ of habeas corpus is a crucial link in our governmental structure, providing a necessary avenue of redress for individual rights when the criminal justice system has foreclosed all other options.” *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>15</sup> 28 U.S.C. § 2244(d) (2006).

<sup>16</sup> *Id.* § 2244(b); *see infra* notes 57–60 and accompanying text.

This narrowing of habeas corpus relief created a strong barrier for indigent criminal defendants wishing to bring their claims.<sup>17</sup> Understanding the procedural and substantive law well enough to bring one's post-conviction claim within the one-year statute of limitations is a daunting task for someone with no legal education.<sup>18</sup> For someone who does not understand English, bringing a post-conviction claim for relief is nearly impossible not simply because of his lack of legal background, but also because his lack of English language understanding would prevent him from learning about any of the legal background he would need to file a claim.<sup>19</sup> If a non-English-speaking criminal defendant is deprived of access to legal materials or legal assistance in his own language he will be unable to understand not only how to apply for habeas relief but also how to comply with the strict requirements of the AEDPA.<sup>20</sup>

The Ninth Circuit recently addressed this issue in *Mendoza v. Carey*.<sup>21</sup> It was the first circuit court to hold that a criminal defendant who does not speak or understand English might be entitled to equitable tolling of the AEDPA's one-year statute of limitations if, while incarcerated, he was denied legal materials or legal assistance in his own language.<sup>22</sup> The court thus created a new "extraordinary circumstance"<sup>23</sup> under which an other-language defendant might obtain equitable tolling if he exerted reasonable diligence in attempting to obtain the legal materials or assistance necessary for him to know of the statute of limitations.<sup>24</sup> This holding—that lack of library access or legal assistance in another language should constitute a ground for equitable tolling—seemingly conflicts with the recent holding of

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<sup>17</sup> Sessions, *supra* note 10, at 1568 ("The AEDPA . . . seriously impedes these unjustly incarcerated men and women from vindicating their federal rights in federal courts.").

<sup>18</sup> *Id.* at 1567 ("Congress cannot reasonably expect petitioners to understand the complexities of their own cases, as well as those of the habeas procedural system, by the time the statute of limitations runs out."); see also Thomas C. O'Bryant, *Pro Se Litigation Ten Years After AEDPA: The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 306 (2006) (describing the difficulties of a pro se prisoner seeking relief prior to the AEDPA).

<sup>19</sup> See *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006).

<sup>20</sup> See *id.*

<sup>21</sup> 449 F.3d 1065 (9th Cir. 2006).

<sup>22</sup> *Id.* at 1069.

<sup>23</sup> *Id.* at 1071.

<sup>24</sup> *Id.* at 1069–70.

the Supreme Court in *Kane v. Espitia*<sup>25</sup> that a pro se defendant has no positive Sixth Amendment right to law library access.<sup>26</sup>

Despite the holding in *Kane*, a non-English-speaking criminal defendant should be entitled to law library access or legal assistance in his own language, based on the Supreme Court's earlier ruling in *Lewis v. Casey*.<sup>27</sup> While *Lewis* does not spell out a positive right to access for other-language criminal defendants, it does require that every prisoner have the capability to bring his claim to court.<sup>28</sup> Because an other-language defendant is barred from bringing his claim by the "extraordinary circumstance"<sup>29</sup> of denial of access to materials or assistance in his own language, he is arguably being denied the constitutional right under *Lewis* to have his claim heard.<sup>30</sup> A possible constitutional deprivation undoubtedly satisfies the requisite extraordinary circumstance required for equitable tolling; thus, if an other-language prisoner asserts due diligence in attempting to obtain that material or assistance, he should be entitled to equitable tolling of the AEDPA.<sup>31</sup> Equity also calls for this same result; it is unjust that someone who speaks another language and who has no knowledge of the AEDPA should be denied his claim simply because he was deprived of access to materials or assistance in his own language.

To address the significance of the holding of *Mendoza v. Carey* in light of recent changes to habeas corpus law, Part II of this Comment analyzes the Writ of Habeas Corpus and the significant narrowing of its relief by the AEDPA. Part III then analyzes the Supreme Court's jurisprudence on law library access in general. Part IV addresses *Mendoza v. Carey*'s holding in light of seemingly conflicting Supreme Court jurisprudence, and why other jurisdictions, as well as the Supreme Court, should allow for equitable tolling of the AEDPA for non-English-speaking criminal defendants who have been denied access to legal materials or legal assistance in their own languages. Finally, Part V discusses the policy reasons supporting equitable tolling in this circumstance.

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<sup>25</sup> 546 U.S. 9 (2005).

<sup>26</sup> *Id.*

<sup>27</sup> 518 U.S. 343 (1996).

<sup>28</sup> *Id.* at 355.

<sup>29</sup> See *Mendoza v. Carey*, 449 F.3d 1065, 1071 (9th Cir. 2006).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

## II. THE INTERACTION BETWEEN THE GREAT WRIT AND THE AEDPA

The Great Writ is derived from common law in thirteenth-century England,<sup>32</sup> but it was ingrained in U.S. history when it was made immortal in the Constitution.<sup>33</sup> In 1867, the federal writ of habeas corpus was extended to state prisoners as well, making federal relief available for anyone incarcerated in a state prison against federal law.<sup>34</sup> The Supreme Court expanded the writ in its decisions, making it “a mighty river that served as a powerful force in the preservation of personal liberties.”<sup>35</sup> The purpose of habeas corpus relief, and the reason for its perpetual existence in our legal system, is to allow prisoners to present claims of constitutional violations that occurred during trial and that therefore make the incarceration unconstitutional.<sup>36</sup>

After 1976, in a number of decisions, the Supreme Court began to curb the availability of federal habeas relief,<sup>37</sup> both by limiting the writ procedurally and by limiting the number of successive claims a petitioner might bring.<sup>38</sup> Despite this judicial restriction of the writ, however, there was never a statute of limitations during which a prisoner had to bring his claim for relief, nor was there a statutory restriction on successive attempts at habeas relief—that is, until the AEDPA was enacted in 1996.<sup>39</sup>

The AEDPA, the first law enacted to create a statute of limitations for bringing a petition for habeas corpus relief, was enacted on April 24, 1996,<sup>40</sup> in the wake of the Oklahoma City Bombing pepe-

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<sup>32</sup> James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 415 (2001).

<sup>33</sup> U.S. CONST. art. 1, § 9, cl. 2 (“The Privilege of the Writ of the Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>34</sup> Max Rosenn, *State Prisoner Use of Federal Habeas Corpus Procedures: The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 341 (1983).

<sup>35</sup> *Id.* at 353.

<sup>36</sup> Karen M. Marshall, Note, *Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 37 AKRON L. REV. 549, 554 (2004).

<sup>37</sup> See, e.g., *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding that a prisoner could bring claims only after “total exhaustion” of all state claims); see also *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (holding that a prisoner bringing a constitutional claim to federal court without first bringing it to an unsympathetic state court must demonstrate “cause and actual prejudice” in order to have his claim heard).

<sup>38</sup> See Rosenn, *supra* note 34, at 355–63 (describing “the Ebb Tide” of habeas jurisprudence created by the Supreme Court’s significant curbing of the right to relief under habeas corpus).

<sup>39</sup> Liebman, *supra* note 32, at 416.

<sup>40</sup> Sessions, *supra* note 10, at 1514.

trated by Timothy McVeigh.<sup>41</sup> The AEDPA was promoted as a means of making sure that McVeigh would receive swift and “effective” punishment for the tragedy he caused.<sup>42</sup> Despite McVeigh’s status as a federal prisoner, ironically the AEDPA severely limits habeas corpus review for state prisoners, and the one-year statute of limitations had no effect on McVeigh’s situation.<sup>43</sup> Congress’s purported goal, other than assuring the public that McVeigh would be executed, was “to reduce the abuse of habeas corpus that results from delayed and repetitive findings.”<sup>44</sup> Its effect, however, is to procedurally deprive many criminal defendants of the ability to attack their state sentences on federal constitutional grounds.<sup>45</sup>

While theoretically one year should be ample time in which a criminal defendant may prepare his claim to present to the court, upon closer analysis the AEDPA presents a harsh barrier to compliance for criminal defendants.<sup>46</sup> The one-year statute of limitations begins to run when the prisoner has exhausted all of his remedies at the state level,<sup>47</sup> which means that it begins to run as soon as a direct appeal of his sentence is no longer possible.<sup>48</sup> To attempt to allow time for state remedy of the constitutional violation, the AEDPA provides for statutory tolling when the prisoner has “properly filed” an application for state post-conviction relief.<sup>49</sup> Until the prisoner does so, however, the time begins to run.<sup>50</sup> After the prisoner has “properly filed” his application for state post-conviction relief, the AEDPA’s statute of limitations tolls until a decision is rendered.<sup>51</sup> If the state denies the prisoner relief, the time begins to run again, and the prisoner is then left with only the time that remained prior to filing his

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<sup>41</sup> Liebman, *supra* note 32, at 413 (“AEDPA . . . was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh’s twisted patriotism and disdain for ‘collateral damage,’ the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.”).

<sup>42</sup> *Id.* at 412.

<sup>43</sup> *Id.* at 414.

<sup>44</sup> H.R. REP. NO. 104-23, at 9 (1995) (Conf. Rep.).

<sup>45</sup> Liebman, *supra* note 32, at 414 (“AEDPA’s many complications and interpretive conundrums . . . are a nightmarish obstacle course for unrepresented . . . non-capital petitioners.”).

<sup>46</sup> O’Bryant, *supra* note 18, at 307.

<sup>47</sup> 28 U.S.C. § 2244(d)(1) (2006).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 2244(d)(2).

<sup>50</sup> Liebman, *supra* note 32, at 417.

<sup>51</sup> *Id.*

application—meaning 365 days minus the time he took before he “properly filed” his state post-conviction application.<sup>52</sup>

An application is “properly filed” within the meaning of the statute only “when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.”<sup>53</sup> The “properly filed” requirement severely challenges criminal defendants in that, if their post-conviction appeal has not been properly filed in state court, the clock continues to tick.<sup>54</sup> Even if a defendant believes that he has filed a timely state post-conviction appeal, and has taken all necessary steps to do so, the AEDPA time may still be running.<sup>55</sup> By the time he has discovered that his post-conviction appeal has been improperly filed, he may have lost any right to bring his claim, or may not have a reasonable amount of time in which to apply for habeas relief.<sup>56</sup>

The AEDPA also allows most prisoners only one opportunity for habeas relief.<sup>57</sup> In most instances, prisoners have one year in which to bring their claims, and if they fail in court, or if they miss the one-year deadline, they are not entitled to relief despite the fact that they may have suffered legitimate constitutional wrongs.<sup>58</sup> The statute directs federal courts to dismiss any “second or successive habeas corpus application . . . that was presented in a prior application.”<sup>59</sup> If the prisoner wishes to bring a new claim that has not previously been presented, the statute directs courts to dismiss the claim unless either (1) the Supreme Court provides a new constitutional right that is made retroactive or (2) underlying facts of the new claim, which must be able to prove the defendant innocent of the underlying offense by clear and convincing evidence, could not have been discovered in that year with due diligence.<sup>60</sup> These strict limitations provide most defendants with just one chance to obtain relief and just one year in which they may file for it.

Because of these harsh and final consequences and because of the importance of the writ of habeas corpus to our criminal justice system, a majority of the circuits have allowed for equitable tolling of the AEDPA in “extraordinary circumstances” where the defendant

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<sup>52</sup> *Id.*

<sup>53</sup> *Artuz v. Bennet*, 531 U.S. 4 (2000).

<sup>54</sup> *O’Bryant*, *supra* note 18, at 305–06.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* 28 U.S.C. § 2244(b) (2006).

<sup>58</sup> *Id.* § 2244(d).

<sup>59</sup> *Id.* § 2244(b)(1).

<sup>60</sup> *Id.* § 2244(b)(2).

has been diligently pursuing his claim.<sup>61</sup> The Supreme Court has never addressed whether equitable tolling applies in the context of the AEDPA, but in *Pace v. DiGuglielmo*<sup>62</sup> the Court assumed arguendo that equitable tolling did apply in order to deny the petitioner his relief.<sup>63</sup> The Court articulated that “[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”<sup>64</sup> Despite the Supreme Court’s reluctance to acknowledge a right to equitable tolling under the AEDPA, most circuits<sup>65</sup> have allowed for equitable tolling using the “extraordinary circumstances” test the Court acknowledged in *Pace*.<sup>66</sup>

Extraordinary circumstances for the purpose of equitable tolling is a very strict standard that should be applied only when “the principles of equity would make the rigid application of a limitation period unfair.”<sup>67</sup> Examples of extraordinary circumstances in an AEDPA statute of limitations case include an attorney’s misrepresentation to his client that he had timely filed a complaint,<sup>68</sup> prison officials’ intentional tampering with a pro se petitioner’s habeas petition and legal papers which prevented the prisoner from filing on time,<sup>69</sup> and a prisoner’s failure to receive notice of denial of his state review for nearly four months.<sup>70</sup>

Until *Mendoza v. Carey*,<sup>71</sup> the presence of a language barrier had not been identified as an “extraordinary circumstance” that would qualify a petitioner for equitable tolling, no matter how diligently a petitioner has been seeking his claim.<sup>72</sup> In *Cobas v. Burgess*,<sup>73</sup> the Sixth

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<sup>61</sup> See, e.g., *Miller v. N.J. State Dep’t of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998); see also *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000); *Phillips v. Donnelly*, 216 F.3d 508, 510 (5th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 329–30 (4th Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998), *cert denied*, 119 S. Ct. 210 (1998); *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 899 (1998).

<sup>62</sup> 544 U.S. 408 (2005).

<sup>63</sup> *Id.* at 418 n.8.

<sup>64</sup> *Id.* at 418.

<sup>65</sup> See, e.g., *LaCava v. Kyler*, 398 F.3d 271, 275–76 (3d Cir. 2005); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998).

<sup>66</sup> 544 U.S. at 418.

<sup>67</sup> *LaCava*, 398 F.3d at 275–76 (quoting *Miller v. N.J. State Dep’t of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998)).

<sup>68</sup> *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 242 (3d Cir. 1999).

<sup>69</sup> *Valverde v. Stinson*, 224 F.3d 129, 133–34 (2d Cir. 2000).

<sup>70</sup> *Phillips v. Donnelly*, 216 F. 3d 508, 511 (5th Cir. 2000).

<sup>71</sup> 449 F.3d 1065 (9th Cir. 2006).

<sup>72</sup> See *Perez v. Sherrer*, 2006 U.S. Dist. LEXIS 16575, \*17 (D.N.J. Mar. 17, 2006) (“[O]ne’s coming from a foreign or ethnic backgrounds [sic] where English is not

Circuit was the first to address the issue and held that “[a]n inability to speak, write and/or understand English, in and of itself, does not *automatically* give a petitioner reasonable cause for failing to know about the legal requirements for filing his claims.”<sup>74</sup> In that case, however, it was questionable whether the petitioner had problems with the English language, and he had also received assistance from other prisoners in preparing his claim.<sup>75</sup> The court, therefore, was not presented with a situation where a language barrier had prevented a prisoner from complying with the AEDPA.

In *United States v. Montano*,<sup>76</sup> the Eleventh Circuit addressed the issue briefly in a footnote and agreed with *Cobas* that the defendant’s “language difficulties” could not qualify as an extraordinary circumstance for the purposes of equitable tolling.<sup>77</sup> The petitioner in that case, however, was represented by an attorney and had claimed that his problems with the English language prevented him from discovering the challenge on his own.<sup>78</sup> Similarly, in *United States v. Cordova*,<sup>79</sup> the Tenth Circuit held that “[I]ack of familiarity with the English language does not rise to the level of a rare or exceptional circumstance which would warrant equitable tolling of the AEDPA limitations period.”<sup>80</sup> In that case, the petitioner attempted to argue that he should be granted equitable tolling because it took him over two years to become familiar enough with the English language to file a claim for habeas relief.<sup>81</sup>

*Mendoza* is easily distinguishable from all three of these opposing cases. Unlike the petitioner in *Cobas*, the petitioner in *Mendoza* was unable, despite his efforts, to receive assistance from other inmates in preparing his claim until after the AEDPA deadline had passed.<sup>82</sup>

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the primary language cannot qualify as ‘extraordinary circumstances.’ A substantial part of inmate population does come from such backgrounds, but this limitation does not give rise to equitable tolling.”); *see also* *Perez v. Johnson*, 2001 U.S. Dist. LEXIS 23727, \*12 (N.D. Tex. June 21, 2001), *aff’d*, 2001 U.S. Dist. LEXIS 23725 (N.D. Tex. July 6, 2001) (“Petitioner’s lack of familiarity with the English language does not rise to the level of a rare or exceptional circumstance which would warrant equitable tolling of the AEDPA limitation period.”).

<sup>73</sup> 306 F.3d 441 (6th Cir. 2002).

<sup>74</sup> *Id.* at 444 (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> 398 F.3d 1276 (11th Cir. 2005).

<sup>77</sup> *Id.* at 1280 n.5.

<sup>78</sup> *Id.*

<sup>79</sup> 1999 U.S. App. LEXIS 32289 (10th Cir. Dec. 13, 1999).

<sup>80</sup> *Id.* at \*4.

<sup>81</sup> *Id.* at \*4–5.

<sup>82</sup> *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006).

Unlike the petitioner in *Montano*, the petitioner in *Mendoza* did not have access to an attorney to prepare his petition.<sup>83</sup> In addition, the petitioner in *Mendoza* was not arguing for more time to grasp the English language—an entirely abstract concept, as was argued in *Cordova*—but rather, that the prison should afford him the opportunity to pursue his legal claim with materials or assistance in his own language.<sup>84</sup>

While the Sixth, Tenth, and Eleventh Circuits are currently in opposition to *Mendoza's* premise—that an other-language defendant might be entitled to equitable tolling of the AEDPA—their cases all lack one important aspect: the law library or legal assistance that was requested by petitioner in *Mendoza*.<sup>85</sup> While all three circuits agree, and *Mendoza* also reinforces the notion, that language barriers alone are not an extraordinary circumstance, none of the courts addresses whether access to legal materials in one's own language is necessary to comply with the AEDPA, whether it is out of the petitioners' control, and whether it is so extraordinary as to preclude their seeking of habeas relief.

### III. SUPREME COURT JURISPRUDENCE REGARDING LAW LIBRARY ACCESS FOR CRIMINAL DEFENDANTS

A positive right to law library access for criminal defendants did not exist until the Supreme Court's decision in *Bounds v. Smith*.<sup>86</sup> The Court examined whether the right of access to courts required prisoners to have law library access in order for them to bring legal claims.<sup>87</sup> Ultimately, the Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”<sup>88</sup> The Court also announced that “habeas corpus and civil rights actions are of ‘fundamental importance . . . in our constitutional scheme,’” thus highlighting the importance of habeas review in “protect[ing] our most valued rights.”<sup>89</sup> As

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<sup>83</sup> *Id.* at 1067–68. *Mendoza* ultimately was only able to file both for his state relief and for his federal habeas relief with the aid of Spanish-speaking inmates who prepared the claims for him. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1068; see *supra* notes 71–84 and accompanying text.

<sup>86</sup> 430 U.S. 817 (1977).

<sup>87</sup> *Id.* at 817.

<sup>88</sup> *Id.* at 828.

<sup>89</sup> *Bounds*, 430 U.S. at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)).

a basis for its decision, the Court used its prior case law on access to courts,<sup>90</sup> based on Equal Protection and Due Process rights.<sup>91</sup>

The right created in *Bounds* was one for “meaningful” access to the courts for indigent prisoners, but the decision did not make clear how the states were supposed to provide it.<sup>92</sup> The Court suggested the establishment of “adequate law libraries” but made clear that “alternative means,” such as assistance from those trained in the law, were not only acceptable but also encouraged to help indigent prisoners achieve access.<sup>93</sup>

This right was relied on for nearly twenty years until the Supreme Court again reviewed the concept of law library access for prisoners in *Lewis v. Casey*<sup>94</sup> and significantly narrowed its *Bounds* holding. In *Lewis*, based largely on standing issues, the Court announced that *Bounds* did not establish an affirmative right to a law library or legal assistance: “[t]he right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*.”<sup>95</sup> The Court refuted any notion that *Bounds* created “an abstract, freestanding right to a law library or legal assistance,”<sup>96</sup> and recast the right merely as a right to bring the grievance the prisoner wishes to present.<sup>97</sup> In reframing this issue as the “right of access to the courts,”<sup>98</sup> the Court briefly touched on non-English-speaking and illiterate criminal defendants, and stated that prison officials need to provide them only with the capability to bring their claims while announcing an extremely deferential standard: “we leave it to prison officials to determine how best to ensure that inmates with language problems have a

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<sup>90</sup> *Id.* at 828–30.

<sup>91</sup> *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (noting that the right articulated in *Bounds* has been described as a “consequence of due process, as an aspect of equal protection, or as an equal protection guarantee”) (internal quotations and citations omitted).

<sup>92</sup> John Matosky, Note, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 297 (1998).

<sup>93</sup> *Bounds*, 430 U.S. at 830–31.

<sup>94</sup> 518 U.S. 343 (1996).

<sup>95</sup> *Id.* at 350.

<sup>96</sup> *Id.* at 351.

<sup>97</sup> *Id.* at 354–55. In reframing the issue, the Court noted that:

*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.

*Id.* at 355.

<sup>98</sup> *Id.* at 350.

*reasonably adequate opportunity* to file nonfrivolous legal claims challenging their convictions or conditions of confinement.”<sup>99</sup>

The Court dismissed many of the claims, finding that the claims failed to allege “actual injury—that is, actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.”<sup>100</sup> Where injury was shown on behalf of both the illiterate and non-English-speaking prisoners, it was not “systemwide,” and, therefore, the injunctive relief requested—a more effective law library system or assistance—was unreasonable and unnecessary.<sup>101</sup>

In addition, the Court required that any measure a state adopts to grant relief must comply with the reasonableness standard<sup>102</sup> as set forth in *Turner v. Safley*.<sup>103</sup> In examining prisoners’ rights to marry and to communicate with inmates in other prisons, *Turner* held that prison regulation impinging on inmates’ constitutional rights “is valid if it is reasonably related to legitimate penological interests.”<sup>104</sup> The Court must look to the impact of how accommodating a prisoner’s constitutional right will burden the prison guards, the other inmates, and the prison’s resources.<sup>105</sup> Only if an inmate can point to an alternative solution that will further the right at “*de minimis* cost to valid penological interests” will the court find a violation of the reasonableness standard.<sup>106</sup>

The final case that is necessary to understand Supreme Court jurisprudence on law library access is *Kane v. Espitia*,<sup>107</sup> in which the Court held that there is no positive Sixth Amendment right to law library access for a pro se criminal defendant.<sup>108</sup> The defendant in that case was seeking habeas corpus relief, which requires that the relief denied be “contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>109</sup> The Court held that the Sixth Amendment right to counsel, which, under *Faretta v. California*,<sup>110</sup> provides for the

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<sup>99</sup> *Id.* at 356 (emphasis added).

<sup>100</sup> *Lewis*, 518 U.S. at 348 (internal quotations and citations omitted).

<sup>101</sup> *Id.* at 360.

<sup>102</sup> *Id.* at 361.

<sup>103</sup> 482 U.S. 78 (1987).

<sup>104</sup> *Id.* at 89.

<sup>105</sup> *Id.* at 90.

<sup>106</sup> *Id.* at 91.

<sup>107</sup> 546 U.S. 9 (2005).

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Id.* (citations omitted).

<sup>110</sup> 422 U.S. 806 (1975).

right to represent oneself, does not provide a positive right to access a law library.<sup>111</sup> The *Kane* defendant relied solely upon *Faretta*,<sup>112</sup> which in no way alludes to law library access.<sup>113</sup> Because the defendant never raised the issue before the Court, the decision is silent on the “right of access to courts” standard as established by the interplay between *Bounds* and *Lewis*.<sup>114</sup>

The result of this jigsaw puzzle of Supreme Court jurisprudence is that there is no absolute right to law library access, as it was originally construed from *Bounds*.<sup>115</sup> *Lewis* significantly narrowed *Bounds* by disclaiming its earlier holding regarding the right of law library access,<sup>116</sup> and *Kane* essentially ruled out a positive right to that access based on the Sixth Amendment.<sup>117</sup> Although there is no positive right to law library access under Supreme Court jurisprudence, prisoners must still be capable of bringing their claims before the courts based on *Lewis*,<sup>118</sup> subject to the reasonableness standard of *Turner*.<sup>119</sup>

#### IV. MENDOZA AND LEWIS:

##### DENIAL OF THE CAPABILITY TO BRING ONE’S CLAIM SHOULD QUALIFY AS AN “EXTRAORDINARY CIRCUMSTANCE”

In *Mendoza v. Carey*,<sup>120</sup> the Ninth Circuit held that the “combination of 1) a prison law library’s lack of Spanish-language legal materials, and 2) a petitioner’s inability to obtain translation assistance before the one-year deadline, could constitute extraordinary circumstances.”<sup>121</sup> In this prisoner’s case, there were “no Spanish books, no Spanish-English legal dictionaries, and no postings about the AEDPA time limitations in any language.”<sup>122</sup> The court declared that the denial of those materials, along with the lack of any “other source” of translation, could constitute an extraordinary circumstance.<sup>123</sup> The court then remanded the case for a factual finding as to whether the prisoner had exhausted all remedies available to him

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<sup>111</sup> *Kane*, 546 U.S. at 10.

<sup>112</sup> *Id.*

<sup>113</sup> *Faretta*, 422 U.S. 806.

<sup>114</sup> *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

<sup>115</sup> *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

<sup>116</sup> *Lewis*, 518 U.S. at 350.

<sup>117</sup> *Kane v. Espitia*, 546 U.S. 9, 10 (2005).

<sup>118</sup> 518 U.S. at 350.

<sup>119</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>120</sup> 449 F.3d 1065 (9th Cir. 2006).

<sup>121</sup> *Id.* at 1069.

<sup>122</sup> *Id.* at 1067.

<sup>123</sup> *Id.* at 1070.

in attempting to gather the other-language materials or assistance.<sup>124</sup> The *Mendoza* court applied the same rationale it had used in *Whalem/Hunt v. Early*,<sup>125</sup> where an English-speaking prisoner who had no access to any material, even a poster announcing the AEDPA one-year statute of limitations, could be granted equitable tolling if, in fact, he had asserted due diligence in pursuing his claim.<sup>126</sup>

The petitioner in *Mendoza* argued that during his first three months of incarceration he had requested materials but had been told that he would not be able to access any Spanish materials until he was transported to another prison.<sup>127</sup> The petitioner also claimed that he visited the library at his second prison several times only to discover that there were no books, materials, or forms available in Spanish, nor were there Spanish-speaking clerks or librarians.<sup>128</sup> Based on this lack of access and assistance in his language, he claimed that he had no way to know that he needed to comply with the one-year statute of limitations.<sup>129</sup> According to the petitioner, he was finally able to prepare any applications for post-conviction relief only by approaching inmates for assistance.<sup>130</sup> Because the trial court dismissed the petition as untimely without an evidentiary hearing, the prisoner's allegations could not be established.<sup>131</sup> However, the *Mendoza* court recognized that if the facts he alleged were true, this might qualify as the requisite due diligence necessary for equitable tolling.<sup>132</sup>

The *Mendoza* court immediately dismissed the notion that its decision might appear to conflict with the Supreme Court's ruling in *Kane* that there is no positive Sixth Amendment right to law library access.<sup>133</sup> Careful not to contradict that decision, the *Mendoza* court refused to announce a positive right to law library access.<sup>134</sup> As long as the prisoner is able to obtain access to materials or assistance in his

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<sup>124</sup> *Id.* at 1071.

<sup>125</sup> 233 F.3d 1146 (9th Cir. 2000).

<sup>126</sup> *Id.* at 1147-48.

<sup>127</sup> 449 F.3d at 1067.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1068.

<sup>130</sup> *Id.* at 1067.

<sup>131</sup> *Id.* at 1071.

<sup>132</sup> *Id.* (“[H]e has alleged facts that, if true, may entitle him to equitable tolling.”).

<sup>133</sup> *Mendoza*, 449 F.3d at 1070 (“Our conclusion is completely consistent with the Supreme Court’s recent decision addressing law library access rights.”).

<sup>134</sup> *Id.* at 1070 n.5 (“[W]e announce no rule affirmatively requiring that prisons provide legal materials in Spanish.”).

own language, including translation assistance from another prisoner, equitable tolling will not be available.<sup>135</sup>

The *Mendoza* court recognized and agreed with the Sixth Circuit decision in *Cobas v. Burgess*<sup>136</sup> that the inability to understand English does not automatically justify equitable tolling.<sup>137</sup> The court also agreed that the presence of a fellow inmate who can translate, read, and write English, and who assists petitioner in preparing his habeas petition, renders equitable tolling inapplicable.<sup>138</sup>

Although careful to avoid conflict with *Kane*, the *Mendoza* court failed to delve deeper into Supreme Court jurisprudence to provide a substantive justification for the equitable tolling. As discussed above, *Lewis* provides that there is a right of access to courts and that prisoners must be provided the opportunity to bring their claims.<sup>139</sup> By denying non-English-speaking prisoners access to other-language legal materials, legal assistance, or translation, the prison authorities essentially deprive prisoners of their ability to bring their claims in a timely manner, which, because of the strict ramifications of the AEDPA, prevents them from bringing their claims at all.

This appears to be a *Lewis* violation and therefore could arguably offend the constitutional right of access to courts.<sup>140</sup> If this violation is serious enough to amount to a constitutional violation, then it logically follows that this violation should automatically trigger equitable tolling because a constitutional violation is something out of the control of the prisoner that hindered his ability to obtain relief.<sup>141</sup> In order to prove a constitutional violation of the right of access to courts

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<sup>135</sup> *Id.* at 1070.

<sup>136</sup> 306 F.3d 441 (6th Cir. 2002).

<sup>137</sup> *Mendoza*, 449 F.3d at 1070.

<sup>138</sup> *Id.* at 1069–70.

<sup>139</sup> *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

<sup>140</sup> *Id.* at 356. The Court specifically addressed the scenario where an other-language defendant is unable to bring his claim:

When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish “adequate law libraries or adequate assistance from persons trained in the law.”

*Id.* (citations omitted).

<sup>141</sup> *LaCava v. Kyler*, 398 F.3d 217, 276 (3d Cir. 2005); *see also* *Hubler v. Ortiz*, 190 Fed. Appx. 727, 729 (10th Cir. 2006) (noting that the AEDPA limitations period is “subject to equitable tolling in extraordinary circumstances, such as where ‘a constitutional violation [will] result[] in the conviction of one who is actually innocent or incompetent’”) (citations omitted).

set forth by *Lewis*, a prisoner would have to show that he had been actually injured by the prison's actions or regulation—in other words, that he was prevented by the prison officials from bringing his claim before the court.<sup>142</sup> A petitioner who does not speak any English and is deprived of law library materials or legal assistance in his own language within the AEDPA one-year statute of limitations, despite his efforts to obtain them, is undoubtedly being denied access to courts. He would also have to prove that any remedy that might be instituted would pass the reasonableness test of *Turner*.<sup>143</sup>

Based on *Lewis*'s deference to prison officials and its requirement of compliance with the reasonableness standard in *Turner*,<sup>144</sup> a prisoner who has been denied access to legal materials or assistance in his own language would be able to prove injury.<sup>145</sup> It is questionable, however, whether he might prove the widespread actual injury that would be required for the court to remedy the situation system-wide by providing equal access to materials for all prisoners, no matter what language they speak.<sup>146</sup> The government could argue that providing law library access or translation services for each other-language prisoner, no matter what language he speaks, would be extremely cost-prohibitive. The prison officials would not be required to take on such a cumbersome task based on *Lewis*'s deference to *Turner*.<sup>147</sup> As long as the prison officials could argue that the impact on the prisons is too great to accommodate the right, prisoners would have a difficult time finding a “*de minimis cost*”<sup>148</sup> solution to the language barrier issue.

A petitioner could argue, however, for cost-effective remedies that a court might consider. For example, the prison libraries could provide limited Internet access to each prisoner and direct each to a webpage in his native language that would inform him of the statute of limitations.<sup>149</sup> The prisons could also present each prisoner with a pamphlet explaining his rights under the AEDPA in his own lan-

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<sup>142</sup> *Lewis*, 518 U.S. at 349.

<sup>143</sup> *Id.* at 361.

<sup>144</sup> *Id.* (“[A] prison regulation impinging on inmates’ constitutional rights ‘is valid if it is reasonably related to legitimate penological interests.’”).

<sup>145</sup> *Id.* at 356.

<sup>146</sup> *Id.* at 359 (noting that two instances of injury were a “patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief”).

<sup>147</sup> *Id.*

<sup>148</sup> *Turner v. Safley*, 482 U.S. 78, 90 (1987).

<sup>149</sup> Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK L. REV. 855, 864 (2002) (discussing an Internet-based education system implemented in Maryland through which students can earn a college degree while incarcerated).

guage. Furthermore, the prison could implement a “language-buddy” system, in which the prison could match each prisoner with a fellow inmate who would be available to translate from that prisoner’s language to English and help him prepare any claim he might have.<sup>150</sup> Based on these alternative remedies, if widespread actual injury exists, a court might provide the injunctive relief needed to remedy the prisons’ denial of access to other-language prisoners.

It is quite speculative, however, whether a court would indeed find for prisoners in this instance. The Supreme Court announced that deference to prison officials would be a difficult obstacle for prisoners to overcome, despite creative remedies prisons could provide at a “*de minimis* cost.”<sup>151</sup> In addition, the widespread actual injury requirement necessary to implement these changes implemented would indeed be difficult to face; not all other-language criminal defendants speak the same language, and establishing a system to provide translation assistance or materials for each language would be burdensome. A court would likely defer to the prison officials’ judgment because accommodating every other-language prisoner’s needs would be a tremendous financial and administrative burden on the prison system.

If a prisoner could not establish this widespread actual injury requirement and could only establish that he had been individually injured by the prison’s denial of his access, then he might have a slight chance at obtaining some relief under *Lewis*, but that, too, is questionable. A prisoner attempting to argue for relief under the access-to-courts theory would be at a loss, especially if he were arguing pro se, because *Lewis* does not provide a clearly defined right. The Supreme Court summarily disposed of a pro se petitioner’s argument that he had been denied law library access simply because he had argued it on the wrong constitutional theory.<sup>152</sup> Based on the Court’s treatment of the petitioner in *Kane*, even if a prisoner could argue for the access required under *Lewis*, it is unlikely that he would be successful in overcoming the *Turner* reasonableness standard.<sup>153</sup> Where a prisoner has been denied access to materials in his own language and has therefore been deprived of the chance to bring his claim within the necessary one-year AEDPA statute of limitations, there may be a

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<sup>150</sup> This could present some difficulties, however, due to the often adversarial nature of the prisoner-to-prisoner relationship.

<sup>151</sup> *Turner*, 482 U.S. at 90.

<sup>152</sup> *Kane v. Espitia*, 546 U.S. 9, 9 (2005); see also *supra* notes 107–14 and accompanying text.

<sup>153</sup> *Turner*, 482 U.S. at 89.

constitutional violation under *Lewis*. The question remains whether a prisoner would be successful in presenting it to the court.

The lesser standard for extraordinary circumstances, however, only requires that the petitioner show that for some reason beyond his control he was unable to file his claim by the one-year deadline.<sup>154</sup> In denying prisoners access to AEDPA materials or assistance in their own language, prison officials are denying other-language prisoners the capability to bring their grievances to court. While this might serve as a constitutional argument under *Lewis*, the denial of that access could more easily satisfy the lesser standard of an extraordinary circumstance that would entitle a defendant to equitable tolling. A prisoner who is unaware of a statute of limitations because he was refused help in a language he can understand cannot know that he has missed the one-year deadline and his only chance to bring his claim.<sup>155</sup>

Equally important to the extraordinary circumstances analysis is whether, in fact, the prisoner has exercised reasonable diligence in pursuing his claim.<sup>156</sup> What this means for an other-language defendant is unclear because the *Mendoza* court was the first to recognize that denial of access to an other-language defendant might be considered an extraordinary circumstance.<sup>157</sup> Nevertheless, the *Mendoza* court determined that the petitioner in that case, if the facts he alleged were true, might well have satisfied the due diligence standard.<sup>158</sup> The petitioner had inquired at both prisons' libraries, within the first few months, about other-language materials.<sup>159</sup> He had also enlisted the assistance of two inmates in preparing both his state claim, which was denied as untimely, and his habeas petition.<sup>160</sup>

An other-language prisoner asserting due diligence might therefore have to prove, first, that there were no materials or assistance in his language available to alert him of the AEDPA. He would also have to establish that he inquired of the prison officials and the

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<sup>154</sup> Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 385 (2005). Equitable tolling has been granted in situations such as where prison officials failed to mail a defendant's petition, where the defendant was able to prove "actual innocence," or where the defendant was mentally incompetent at the time of trial. *Id.* at 384.

<sup>155</sup> *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006).

<sup>156</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

<sup>157</sup> See *supra* notes 71–81 and accompanying text.

<sup>158</sup> *Mendoza*, 449 F.3d at 1071.

<sup>159</sup> *Id.* at 1067.

<sup>160</sup> *Id.* at 1067–68.

prison libraries whether other-language materials were available, at least within the first few months, to establish that he had not been sitting on his claim. It is questionable whether he might have to file a formal complaint with the prison to satisfy the requirement of administrative exhaustion,<sup>161</sup> as his attempt to do so in a language he did not understand would likely be futile and thus exempt from exhaustion requirements.<sup>162</sup> He might also have to prove that he was unable to receive assistance from other inmates, either because he was unable to become familiar with inmates who spoke his own language and were able to read, write, and speak English (whether due to social or administrative separation), or because there were no inmates present at the facility who could meet those standards. Once the petitioner establishes this requisite due diligence, and he has already proven that his inability to obtain translation assistance or materials in his own language was out of his control, he may be entitled to equitable tolling of the AEDPA based on the extraordinary circumstances test.<sup>163</sup>

For the analysis of the extraordinary circumstances standard to come full circle, it is important also to distinguish *Kane*.<sup>164</sup> The *Mendoza* court quickly dismissed any appearance of a facial conflict with the Supreme Court's recent holding in *Kane* that there is no free-standing Sixth Amendment right of a pro se defendant to access a law library.<sup>165</sup> The *Kane* Court, however, determined whether there was a "clearly established" federal right that had been violated for purposes of habeas relief.<sup>166</sup> While *Lewis*'s right of access to courts might provide viable grounds for relief for a prisoner who has been denied law library access or legal assistance that has thus prevented him from bringing a claim,<sup>167</sup> *Kane* is silent on this issue for the simple reason that it was never raised by the petitioner.<sup>168</sup> Regardless of whether denial of law library access or other assistance in one's own language

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<sup>161</sup> The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2006), provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

<sup>162</sup> *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (noting that the doctrine of exhaustion contains an exception which permits early review when exhaustion would prove "futile").

<sup>163</sup> *Mendoza*, 449 F.3d at 1071.

<sup>164</sup> *Kane v. Espitia*, 546 U.S. 9, 9 (2005).

<sup>165</sup> *Mendoza*, 449 F.3d at 1070.

<sup>166</sup> *Kane*, 546 U.S. at 9.

<sup>167</sup> *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

<sup>168</sup> *Id.*

would create a ground for habeas relief, the standard for equitable tolling—“the presence of an extraordinary circumstance and the inmate’s exercise of diligence”<sup>169</sup>—is significantly different from the “clearly established” federal right that is required for habeas relief.<sup>170</sup> A prisoner need not allege a constitutional violation in order to gain equitable tolling; he needs merely to assert some circumstance that was beyond his control that prevented him, despite his diligence, from pursuing his claim.<sup>171</sup>

Because of this difference in legal standards, the fact that *Kane* specifically denies a positive Sixth Amendment right to law library access is non-dispositive.<sup>172</sup> A grant of more time in which a prisoner might file a habeas petition based on his law library access would not undermine *Kane*’s holding. Furthermore, it would reaffirm *Lewis*’s notion that every petitioner must be able to bring his claim.<sup>173</sup> Based on the gravity of the violation—that there could be a constitutional violation of the right of access to courts under *Lewis*—the situation should qualify as an “extraordinary circumstance.”<sup>174</sup>

While *Lewis* does not establish a positive right to law library access, and *Kane* refuses to announce one for a pro se defendant, a defendant nonetheless must be provided the capability to bring his claim.<sup>175</sup> Denial of access to law library materials or legal assistance in a prisoner’s own language within the one-year period effectively prevents him from bringing his claim for wrongful imprisonment before a federal court. This inability to bring a claim, despite his efforts, should qualify for equitable relief under the AEDPA, even if a court were reluctant to find a *Lewis* violation of access to courts.

This grant of equitable tolling would not place an additional burden on the prison system and would thus comply with *Turner*’s standard. In the case of a habeas petitioner who requests equitable tolling, it is because his habeas petition has been summarily denied.<sup>176</sup> This means that the prisoner has already obtained assistance or materials and has attempted to prepare his claim, but the court has denied him the chance to be heard.<sup>177</sup> His claim is arguably ripe, and once

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<sup>169</sup> *Mendoza*, 449 F.3d at 1071 n.6.

<sup>170</sup> *Kane*, 546 U.S. at 9.

<sup>171</sup> McCollough, *supra* note 154, at 385.

<sup>172</sup> *Kane*, 546 U.S. at 9.

<sup>173</sup> *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

<sup>174</sup> *Mendoza*, 449 F.3d at 1071.

<sup>175</sup> *Lewis*, 518 U.S. at 350.

<sup>176</sup> *Mendoza*, 449 F.3d at 1068 (“[T]he magistrate judge recommended that *Mendoza*’s habeas petition be dismissed as untimely.”).

<sup>177</sup> *Id.*

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granted the equitable tolling he may bring the claim before the court for his chance at habeas relief. The equitable tolling, therefore, would not place an additional burden on the prison system in which the petitioner is incarcerated.

The intent of the AEDPA was to prevent abuse of habeas corpus filings.<sup>178</sup> A prisoner who has had no chance to bring a claim because he was unable to learn of the statute of limitations cannot be accused of abusing habeas corpus proceedings if he pursued his rights diligently. Any delay would be out of his control, and once he is ready to present his claim he should not be punished for a failure on the part of the prison system to provide him the capability to bring his claim. While there would be a slight burden on the court to determine factually whether the petitioner was pursuing his rights, this is not because the petitioner has committed any wrongdoing. When the petitioner is able to bring his claim before the court after the provision of equitable tolling, the court will provide the function it would have had the claimant been capable of bringing his claim within the one-year AEDPA deadline: access to justice for the petitioner.

#### V. THE ROLE OF THE GREAT WRIT CALLS FOR EQUITABLE TOLLING

In addition to a possible violation of *Lewis's* right of access to the courts as an extraordinary circumstance requiring equitable tolling of the AEDPA, the harshness of the AEDPA and the importance of the Great Writ to our criminal justice system call for this relief. Even if the cost-prohibitive nature of providing access to law library materials or legal assistance to other-language criminal defendants in their own languages were to undermine the argument based on *Lewis's* right of access to courts, several policy reasons surrounding the writ of habeas corpus and the severe sanctions of violating the AEDPA call for equitable tolling: the Great Writ's role as a remedy of last resort for prisoners who have been unconstitutionally incarcerated,<sup>179</sup> the harsh and unforgiving nature of the AEDPA,<sup>180</sup> and the inherent inability to provide equal access to justice for prisoners who do not understand English.<sup>181</sup>

Because the Great Writ originated as, and continues to be, the last resort for prisoners to obtain relief in our criminal justice sys-

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<sup>178</sup> H.R. REP. NO. 104-23, at 9 (1995) (Conf. Rep.).

<sup>179</sup> Sessions, *supra* note 10, at 1515.

<sup>180</sup> See *supra* notes 40–51 and accompanying text.

<sup>181</sup> Rearick, *supra* note 3, at 543.

tem,<sup>182</sup> providing the chance to bring a petition for habeas corpus to each and every defendant is necessary to maintain our ideals of justice. If a prisoner is being incarcerated because of a constitutional violation that occurred during his trial, he has a right to be heard, regardless of what language he speaks. The AEDPA significantly curbs that right.

Imagine a prisoner without a high school education attempting to discern when the one-year statute of limitations is triggered, and when it is tolled, and whether his state application for post-conviction relief has been “properly filed.”<sup>183</sup> Now imagine that same person does not speak, read, write, or understand a word of English. That person may not know that his constitutional rights were violated in a lower court. But assuming that he does, and assuming that he knows he is entitled to some sort of remedy, how is he supposed to obtain that remedy if the prison does not furnish him with any materials or assistance in a language that he can understand? If this person nonetheless attempts “diligently”<sup>184</sup> to obtain materials or assistance from the prison to no avail, is it fair to fault him procedurally for something that was completely out of his control? After the one-year period has passed, and he is finally able to file his claim, possibly with help from another inmate or from family or friends on the outside, is it fair to tell him that he missed the deadline and that he will remain incarcerated, regardless of the constitutional violation, for the rest of his sentence?

The AEDPA is harsh. The AEDPA is complicated. Although common sense would dictate that the hypothetical, non-English-speaking prisoner receive a chance at habeas relief after he has jumped numerous hurdles to even file the petition, in reality, denying him his last chance to challenge his imprisonment is inequitable. As noted above, other courts have refused to hold that a language barrier is enough to constitute an extraordinary circumstance to toll the AEDPA statute of limitations.<sup>185</sup> *Mendoza* is the first court to recognize that a language barrier, combined with the inability to procure other-language materials or assistance, could be construed as an extraordinary circumstance, and, if the petitioner exhibits the requi-

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<sup>182</sup> Sessions, *supra* note 10, at 1515. See also Benjamin R. Orye, Note, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 484 (Oct. 2002) (“The writ of habeas corpus, the Great Writ, is the last resort of those who have been wrongly imprisoned.”).

<sup>183</sup> 28 U.S.C. § 2244(d)(2) (2006).

<sup>184</sup> Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

<sup>185</sup> See *supra* notes 71–81 and accompanying text.

site diligence, he may be entitled to equitable relief.<sup>186</sup> The underlying purpose of the AEDPA was to prevent abuse of the habeas corpus system and to promote judicial efficiency.<sup>187</sup> It was not intended to categorically deprive non-English-speaking criminal defendants of the right to bring a habeas petition. But that has been the effect for many prisoners.

The purpose of the Great Writ is to free those wrongly imprisoned.<sup>188</sup> That venerable purpose is undermined not only by the harsh, complicated, and unforgiving provisions of the AEDPA but also by courts' reluctance to recognize a language barrier as an extraordinary circumstance when a defendant cannot obtain the materials or assistance he needs to file a petition to challenge his wrongful imprisonment.<sup>189</sup> By affording other-language criminal defendants the opportunity to be heard in court, assuming they have diligently pursued their claims, equitable tolling of the AEDPA in this circumstance brings the Great Writ back to its purpose of ensuring access to justice.

While it is not guaranteed that other-language prisoners will be able to prevail on their habeas corpus claims, it is necessary that they at least have the chance to present their grievances to the court. Once in court, the petitioner is afforded two protections: a court translator through which he may present the facts of his case<sup>190</sup> and the court's application of "less stringent standards" by which it analyzes petitioner's claim when he appears pro se.<sup>191</sup> A prisoner who has been afforded equitable tolling of his habeas petition based upon his inability to access other language materials, but who has been able through some other means to file his habeas petition, will be on near-equal footing with any other English-speaking petitioner. It is a small step to afford this class of prisoners equitable tolling. Offering that prisoner the initial access to the court and the opportunity to present the facts of his case is the only requirement for a petitioner such as Mendoza to effectively pursue a habeas corpus petition.

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<sup>186</sup> 449 F.3d 1065, 1068–69 (9th Cir. 2006).

<sup>187</sup> H.R. REP. NO. 104-23, at 9 (1995) (Conf. Rep.).

<sup>188</sup> Sessions, *supra* note 10, at 1514.

<sup>189</sup> See, e.g., Perez v. Sherrer, 2006 U.S. Dist. LEXIS 16575 at \*17 (D.N.J. Mar. 17, 2006); Perez v. Johnson, 2001 U.S. Dist. LEXIS 23727 at \*12 (N.D. Tex. June 21, 2001).

<sup>190</sup> Federal Court Interpreters Act, 28 U.S.C. § 1827 (2006).

<sup>191</sup> Haines v. Kerner, 404 U.S. 519, 520 (1972).

## VI. CONCLUSION

*Mendoza v. Carey* has provided a new avenue through which other-language defendants might be able to bring their federal habeas corpus claims that were previously time-barred.<sup>192</sup> Other circuit courts of appeals and the Supreme Court have yet to recognize the inability to procure legal materials or assistance in one's own language as an "extraordinary circumstance" that would entitle a prisoner who has exerted due diligence in pursuing his claim to equitable tolling.<sup>193</sup> Based on Supreme Court jurisprudence regarding the right to access courts, prisons are essentially denying other-language criminal defendants the capability to bring their claims, and thus equitable tolling is necessary to remedy this violation. Despite *Kane's* denial of a Sixth Amendment right to law library access for a pro se defendant,<sup>194</sup> *Lewis* still stands as good law on the right of access to courts and the principle that, based on Equal Protection and Due Process grounds,<sup>195</sup> a state must provide a criminal defendant with the capability to bring his claim to court.<sup>196</sup>

*Lewis* provides that the state, at the minimum, may not deprive a prisoner of the capability of bringing his claim.<sup>197</sup> It follows that when a prisoner is actively trying to file a petition of habeas corpus but is unable to do so because of his inability to procure materials or assistance in his own language at a state facility, a state must confer the capability through those other materials or assistance for him to bring his habeas petition to court. While *Mendoza* does not rely on *Lewis's* right of access to courts, it does recognize that this is an extraordinary circumstance out of the prisoner's control for the purpose of equitable tolling.<sup>198</sup> Because *Lewis* requires that a prisoner be able to present his claim,<sup>199</sup> it makes perfect sense that a state that does not provide access to the necessary assistance by which a non-English-speaking criminal defendant may bring the claim creates exactly the extraordinary circumstance that was envisioned for the pur-

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<sup>192</sup> See 449 F.3d 1065, 1070 (9th Cir. 2006).

<sup>193</sup> See, e.g., *Perez*, 2006 U.S. Dist. LEXIS 16575 at \*17; *Perez*, 2001 U.S. Dist. LEXIS 23727 at \*12.

<sup>194</sup> *Kane v. Espitia*, 546 U.S. 9, 9 (2005).

<sup>195</sup> *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

<sup>196</sup> *Id.* at 350.

<sup>197</sup> *Id.*

<sup>198</sup> *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006).

<sup>199</sup> 518 U.S. at 350.

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poses of equitable tolling.<sup>200</sup> Providing other-language criminal defendants with equitable tolling would then provide them with the capability to bring their claims in court and thus satisfy *Lewis*.<sup>201</sup>

In addition to the right of access to courts, the importance of the Great Writ as the “last hope”<sup>202</sup> for criminal defendants to obtain relief from an unconstitutional incarceration calls for equitable tolling in an extraordinary circumstance such as this. Because an other-language criminal defendant has no chance to know of the AEDPA unless he has access to legal materials or assistance in his own language to explain it, there is no reason for him to suffer its harsh consequence. If a non-English-speaking defendant loses his claim because he was not able to receive meaningful assistance, principles of equity require that he be able to bring his claim so long as he pursued it diligently. Once a prisoner is able to know simply of the existence of the AEDPA, perhaps then it would be fair to subject him to it. But for a prisoner who cannot understand English, let alone the law itself, we are depriving him of a chance at freedom based solely on a procedural technicality. The other circuits, along with the Supreme Court, should adopt the holding of the Ninth Circuit in *Mendoza v. Carey*—that a non-English-speaking criminal defendant should be entitled to equitable tolling based on his diligence in pursuing his claim and on the extraordinary circumstance that he was denied access to legal materials or assistance in his own language.<sup>203</sup>

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<sup>200</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (equitable tolling granted when the petitioner “has been pursuing his rights diligently” and “some extraordinary circumstance stood in his way”).

<sup>201</sup> See *Lewis*, 518 U.S. at 350.

<sup>202</sup> Sessions, *supra* note 10, at 1514.

<sup>203</sup> 449 F.3d 1065, 1068–69 (9th Cir. 2006).