

Postconviction Remedies



SEAN O'BRIEN

The University of Missouri–Kansas City School of Law

LAJUANA DAVIS

Samford University Cumberland School of Law

AMANDA ROGERS

Georgetown Law



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ABOUT THE AUTHORS

Sean O'Brien (Chapters 1-8)

Sean O'Brien is the University of Missouri Board of Curators Distinguished Teaching Professor at UMKC School of Law, where he has taught criminal law and procedure since 2005. He also serves as the Habeas Assistance and Training Counsel for the Eighth Circuit through the Defender Services Division of the Administrative Office of the U.S. Courts. He has represented people in death penalty cases across the country since 1983, and he has qualified as an expert witness on standards of performance for capital defense lawyers in state and federal courts throughout the United States. His Supreme Court cases include *Schlup v. Delo*, which set the "actual innocence" standard in federal habeas corpus proceedings, and *Stewart v. Martinez-Villareal*, which empowers habeas courts to prevent the execution of insane prisoners. He directed the research and writing of the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (2008), and publishes and lectures nationally on death penalty, indigent defense, and related mental health issues. Professor O'Brien has served as the Jackson County Public Defender, Executive Director of the Missouri Capital Punishment Resource Center, Chair of the MoBar Criminal Law Committee, and President of the Missouri Association of Criminal Defense Lawyers. He has been recognized for decades of successful work to free the innocent and prevent unjust executions. Prof. O'Brien's most recent exoneration, Sandra Hemme, served more than forty three years for a crime she did not commit, making her the longest-serving exonerated woman in American history. In 2016, the Missouri Bar presented him the Spurgeon Smithson Award for improving access to justice. Other recognitions for his work on behalf of poor people include the KCMBA Lifetime Achievement Award (2005), the Jackson County Legal Leaders Award (2005), The Lawyers Association of Kansas City Justice Charles Whitaker Award (2004), Missouri Lawyer's Weekly Lawyer of the Year (2003), Northwest Missouri State University's Distinguished Alumni Award (2006), The UMKC Alumni Achievement Award (2002), the NLADA National Sentencing Project Award (2008), UMKC's Daniel Brenner Writing Award (2008), the UMKC N.T. Veatch Award for creative scholarship and service, and an honorary Doctor of Humane Letters degree from Benedictine College (2005). Professor O'Brien is the 2023 University of Missouri-Kansas City Alumnus of the Year.

LaJuana S. Davis (Chapters 9-10)

LaJuana S. Davis is the Judge J. Russell McElroy Professor of Law and Director of the Innocence Law Clinic at the Cumberland School of Law. Before joining the academy, LaJuana Davis worked as an attorney for the Equal Justice Initiative of Alabama in Montgomery, Alabama, specializing in direct appeals and state and federal habeas litigation. Davis also negotiated settlements of capital cases, consulted with private law firms about capital litigation cases, worked with legal and community organizations about criminal justice issues, and recruited volunteer counsel for defendants. Davis has also worked as a consultant for the Federal Defenders Office for the Middle District of Alabama. Immediately after law school, Davis worked at the Alabama Capital Representation Resource Center in Montgomery, Alabama. She has also worked at an antitrust firm in Minneapolis, Minnesota. Davis is a graduate of Georgia State University and Harvard School of Law. She is a member of the Alabama and Georgia state bars and a past member of the Minnesota State Bar. Davis teaches criminal law and procedure, appellate advocacy, business crimes, interviewing and counseling, and postconviction remedies. Before coming to Samford

University's Cumberland School of Law in 2007, Davis was a visiting professor at Florida Coastal School of Law in Jacksonville, Florida. Davis' research interests include criminal procedure, women's rights, and the right to counsel.

Amanda K. Rogers (Chapter 11)

Amanda K. Rogers is a visiting professor of law for the Criminal Justice Clinic and Criminal Defense and Prisoner Advocacy Clinic at Georgetown Law. Previously, she founded and directed the Caritas Clemency Clinic at Villanova University Charles Widger School of Law, where she and her students represented incarcerated individuals seeking compassionate release. The clinic represented individuals in federal district courts across the country, including Alabama, Kansas, Maryland, Missouri, North Carolina, Texas, and the Virgin Islands. Prior to teaching, she joined the Public Defender Service for the District of Columbia, where she was a trial attorney and, by the end of her tenure, a supervising attorney and member of PDS' forensic practice group. She graduated from Berkeley Law and following law school, she was a Prettyman fellow at Georgetown Law where she was a trial attorney and clinical teaching fellow for the criminal justice clinics.

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INTRODUCTION

This book was written primarily for law school courses in postconviction remedies and related clinics, though we hope it will be a useful training/teaching resource for defender offices, nonprofit organizations, and others who work with imprisoned clients. The text is designed for a doctrinal course in postconviction remedies, but cases are selected and organized with clinical work in mind. It is important that students and practitioners understand the policies behind judicial and statutory limitations on habeas corpus as they undertake investigation and development of legal claims for their clients. Few things are more frustrating than uncovering a persuasive legal claim, new evidence of innocence, or arguments against excessive sentences, but learning that there is no forum in which to present it. Perhaps students and clinical instructors will derive some inspiration from cases in which dedicated legal work or legislative advocacy by counsel created a forum. Innocence Protection Acts are a good example of next-level advocacy that is sometimes necessary to free a prisoner from unjust incarceration. Prof. Rogers' discussion of statutory procedures for mitigating excessive sentences and Prof. Davis' discussion of innocence cases and litigation resources are examples of the fruits of such advocacy.

The organization of this book generally follows the syllabus that Prof. O'Brien has used to teach postconviction remedies for the past twenty years. Because there is no affordable, comprehensive text on the subject, he created his own materials and case excerpts and distributed them digitally to students. This text adapts those materials for general use.

The procedural doctrines that govern habeas corpus review of criminal convictions in state and federal courts are complex. They are a mixture of constitutional statutory and court-made doctrines that have evolved and continually shift over time. Students will see the pendulum shift between rules that are friendly or hostile to prisoner litigation of constitutional rights. Every judge hearing a postconviction case is subject to conflicting obligations. On one hand, every judge takes an oath to uphold the Constitution, and that includes the constitutional rights of prisoners who claim that they were convicted or sentenced in violation of the Constitution. On the other hand, judges are also required to respect the finality of criminal judgments and the sovereignty of state courts in a federal system. The current system of state and federal statutes, court rules, and judge-created rules have grown out of state and federal courts to balance these conflicting mandates. At different times to varying degrees, the ideological balance of the Supreme Court has determined on which side of the scale the Court will press its thumb.

It would be much simpler to write about the current state of post-Antiterrorism and Effective Death Penalty Act (AEDPA) habeas corpus law and omit the lengthy history of how the present body of law developed to this point. There are compelling reasons not to do that. First, pre-AEDPA habeas doctrines govern habeas cases in circumstances state courts avoid deciding constitutional claims in arbitrary and unfair ways, and the responses to those circumstances can inform how AEDPA should be interpreted and applied. Second, there are circumstances in which federal habeas corpus review continues to be governed by pre-AEDPA law. Pre-AEDPA doctrines for overcoming claims that state courts found procedurally defaulted are unaffected by AEDPA,

so federal habeas corpus review is *de novo* if the state refused to adjudicate a claim. Further, if a habeas petitioner can satisfy AEDPA's new limitation on the habeas remedy under § 2254(d), the federal court can review those claims *de novo*. Habeas still lives beneath AEDPA's formidable hurdles.

Third, pre-AEDPA law informs the interpretation of AEDPA's many vague terms. After multiple failed efforts in successive sessions of Congress to restrict habeas corpus review of state judgments, AEDPA was rushed to the desk of Bill Clinton, who demanded its passage within a year of the Oklahoma City Bombing.¹ This haste produced a law that legal scholars have called "shoddily crafted and poorly cohered."² The Supreme Court itself joins academics in their criticism of AEDPA, remarking that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."³ Finally, every State's constitution has a version of the federal Suspension Clause, and state systems of postconviction review have evolved their own doctrines of postconviction procedure that are similar to those that developed over time in the federal courts, but reflecting the values of jurists and lawmakers in those states. Effective advocacy requires awareness of both state and federal standards of habeas corpus review in the jurisdiction where the prisoner was convicted. While there are similarities between the state and federal systems, understanding the differences is essential.⁴ Many states continue to follow pre-AEDPA caselaw and standards for analyzing procedural default, retroactivity, and successor petitions. A lawyer skilled in the litigation of federal habeas corpus petitions can quickly learn and adapt to any state postconviction system.

A caveat: this book is not intended to be an exhaustive treatise; it covers what the authors believe to be the core procedural problems and issues in postconviction review of criminal cases. The most authoritative and thoroughly researched resources are Randy Hertz and James Liebman, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (LexisNexis 7th Ed. 2024), ISBN: 9781632846211, and Ira Robbins, *HABEAS CORPUS CHECKLISTS* (Thomson Reuters 2025), ISBN 9781539231028. These are multiple-volume treatises that are regularly updated by authors who have a high level of practice experience and scholarly expertise in postconviction procedures. Classroom use of these brilliant resources is cost-prohibitive, yet they should be in every postconviction lawyer's library. The authors are grateful to Professors Hertz, Liebman, and Robbins for their continued contributions to this important area of law.

¹ James Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411, 413 (2011).

² Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 Cornell L. Rev. 329, 342 (2010).

³ *Lindh v. Murphy*, 521 U. S. 320, 336 (1997).

⁴ Some state procedural rules are discussed in Chapter 3, Balancing the Roles of State and Federal Courts: Exhaustion of State Remedies, and Chapter 4, Procedural Bars: Independent, Adequate State Grounds, but we have not included a chapter specifically addressing state remedies because the variations between states would require a separate textbook. We hope that instructors using this text will develop and share state-specific supplements.

We chose CALI to publish this text for many reasons. First, we are acutely aware that our student's crushing debt pays our salaries, so providing open-source instructional materials is the least we can do to show our thanks. Second, the open source digital platform facilitates expansion and updating. We plan to develop additional materials as a bridge between the doctrinal instruction in this book and the practical application of habeas doctrines in postconviction litigation. We also invite suggestions and ideas for making this resource more useful to students, instructors, and other users. Hopefully by demystifying the complex procedural technicalities, students and future lawyers can be equipped to accomplish necessary reforms.

Finally, a heartfelt thank you to our research assistants, Olivia Benoit, Rachel Carr, Ashley Cerrentano, and Lilly Lucas, UMKC Class of 2025, and Sarah K. Brown, Samford University Cumberland School of Law, Class of 2026, for their excellent work and support on this book. We could not have done this without them.

Thank you for your interest in learning more about the legal needs of prisoners in the United States. We wrote this book in the hopes that it would help students and faculty who want to engage in clinical work on behalf of prisoners. The advent of DNA testing has revealed that the United States has a significant wrongful conviction problem. Data also reflects that excessive sentences are a significant driver of mass incarceration. Habeas corpus is not a panacea for these systemic problems, but it is a crucial lifeline for individual prisoners if their legal claims can thread the needle through the labyrinth of complex procedural doctrines. We have had the privilege of collaborating with clinics, public defenders, and prisoner advocacy organizations across the country, and we have written this book with those experiences in mind. It is important to us that this work be shared open source so that it is accessible to students and teachers in a variety of clinical contexts. We also hope it might be a vehicle for future collaboration, and that others will add or suggest supplements and improvements over time.

Sean D. O'Brien

LaJuana Davis

Amanda Rogers

CHAPTER 1: INTRODUCTION TO HABEAS CORPUS

The writ of habeas corpus has been the primary vehicle for the development of the system of postconviction review in the United States. Habeas corpus is a Latin phrase meaning “you shall have the body,” meaning that the custodian of the person who is the subject of the writ must produce the body of that person in a court of law so that the legality of custody can be adjudicated. For example, in *Gideon v. Wainwright*,⁵ the petitioner, Clarence Earl Gideon, was in the custody of Louie L. Wainwright, the Director of the Florida Department of Corrections. The writ was used in Gideon’s case to establish that the Sixth Amendment right-to-counsel clause requires states to appoint counsel to indigent defendants facing felony charges. The writ has been an important instrument for the advancement of constitutional rights throughout American history, and this book will discuss many of those cases.

I. Habeas Corpus and the Constitutional Rights of Criminal Defendants

This book focuses primarily on postconviction remedies available to prisoners whose convictions are tainted by constitutional violations. There is sharp disagreement among jurists not only about what the writ of habeas corpus is or should be, but also whether its use to remedy constitutional violations is consistent with its historical use. This rift is apparent in the Court’s recent decision in *Brown v. Davenport*,⁶ in which Justice Gorsuch described the scope of the writ as limited to challenging the jurisdiction of the court that imposed the conviction: “Usually, a prisoner could not use it to challenge a final judgment of conviction issued by a court of competent jurisdiction.”⁷ This narrow view is “aimed at returning the Great Writ to its historic office.”⁸ By this, of course, he means to reduce or eliminate the writ of habeas corpus as a vehicle for enforcing rights guaranteed by the United States Constitution.

Justice Kagan’s dissent encapsulates the opposing view, that Justice Gorsuch’s “theory, in its fundamentals, is wrong. Federal courts long before *Brown* extended habeas relief to prisoners held in violation of the Constitution—even after a final conviction.”⁹ Justice Kagan pointed out that the Court adjudicated prisoners’ constitutional claims on the merits in the mid-19th century, and that after the Civil War, Congress expanded the Judiciary Act, and “gave federal courts expansive power: ‘to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty’ in violation of the Federal Constitution.”¹⁰ Justice Kagan correctly observed,

⁵ 332 U.S. 375 (1963).

⁶ 596 U.S. 118 (2022).

⁷ *Id.* at 128.

⁸ *Id.* at 132, quoting *Edwards v. Vannoy*, 593 U.S. 255, 290 (2021).

⁹ *Id.* at 146-47 (Kagan, J., dissenting).

¹⁰ *Id.* at 147-148, citing Act of Feb. 5, 1867, 14 Stat. 385; and 28 U. S. C. §§2241(a), (c)(3).

“Under the new statute. . . ‘a single [federal] judge on habeas corpus’ could free ‘a prisoner, after conviction in a State court,’ upon finding him unconstitutionally restrained.”¹¹ Although some courts addressed the constitutional question as where the convicting court had jurisdiction, they did so in the sense that “[N]o court has jurisdiction to imprison a person or detain him in custody in violation of the Constitution.”¹² Although the number of claims available to habeas petitioners has clearly grown, habeas scholar Professor James Liebman points out that the apparent expansion is evidence of the Court’s decision to incorporate clauses from the Bill of Rights into the Fourteenth Amendment Due Process Clause, making them enforceable against the States in habeas corpus proceedings. Scrutiny of the Court’s history reveals only that the reach of the American writ of habeas corpus has always been as broad as the rights recognized by the Court.¹³

This discussion will be revisited in future chapters, but it is important at the outset to note the source of jurisdiction for entertaining legal claims and granting remedies against unjust convictions and sentences.

II. Federal Habeas Corpus and Custody

A petition for writ of habeas corpus is an extraordinary common law writ that has been invoked in many situations to inquire into the legality of one person’s custody of another, even in child custody cases.¹⁴ The primary use of the writ at English common law was to require the Crown to explain its legal right to detain a subject, and to assure adequate process to justify further detention. *Ex parte Bollman*.¹⁵ This form of the writ, known as *habeas corpus ad subjiciendum*, is often called the “Great Writ,” and is the version of habeas corpus that has become the vehicle for postconviction challenges to convictions and sentences in the United States.¹⁶ Common uses of

¹¹ *Id.* at 148.

¹² *Id.*, citing 1 W. Bailey, *Law of Habeas Corpus and Special Remedies* §25, p. 67 (1913).

¹³ 1 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* §2.4.d.[i], p. 51, 73-75 (7th ed. 2020)

¹⁴ See, e.g., *Bates v. Lowery*, 299 Ga. 200, 202, 787 S.E.2d 166, 168, n. 2 (2016) (“When a parent withholds a child from the other parent in violation of a valid child custody order, the other parent may seek to secure the return of the child by filing a habeas corpus petition in the judicial circuit where the child is allegedly being detained illegally.”) Also see *Johnson v. Johnson-Clevenger*, 2025 Ohio 244, (Ohio App. 2025), holding that “a writ of habeas corpus will lie under extraordinary circumstances where the restraint of the child’s liberty is unlawful and the parent lacks an adequate remedy at law.”

¹⁵ 8 U.S. 75, 2 L. Ed. 554, 4 Cranch 75, 97-98 (1807).

¹⁶ *Id.* at 131. Other uses of habeas corpus involved moving a person in custody from one court to another (*habeas corpus ad respondum* or *ad prosequendum*), or to execute a previous judgment (*habeas corpus ad satisfaciendum*), or to bring a prisoner to court for the purpose of giving testimony (*habeas corpus ad testificandum*). 3 W. Blackstone, *Commentaries on the Laws of England* 129-131 (1768).

the writ include challenging a governor's warrant in extradition proceedings,¹⁷ seeking release on bail for a pending criminal charge,¹⁸ or contesting a revocation of probation or parole.¹⁹

Historically “the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement.”²⁰ Justice Black observed, “Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more.”²¹ The Court pointed to a 1722 opinion in which habeas corpus was used to test the legality of an order directing a woman to stay away from her husband; habeas jurisdiction was appropriate because she was not “at her liberty to go where she please[d].”²² The Supreme Court decided that a prisoner released on parole was in custody because parole conditions “significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do.”²³

In concluding that a parolee is in custody, and therefore able to invoke habeas corpus jurisdiction, the Court in *Jones v. Cunningham* relied on cases finding “custody” in various

¹⁷ See, e.g., *Ex parte Walker*, 350 S.W.3d 417, 419 (Tex. App. 2011) (“The only manner to test the legality of a governor's extradition warrant is through the filing of an application for writ of habeas corpus.”) Inquiry is limited to “(1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.” *Id.* at 419-420, citing *Michigan v. Doran*, 439 U.S. 282, 289 (1978).

¹⁸ See, e.g., *Ex parte Barnes*, 312 So. 3d 22, 27 (Ala. 2020), holding that “[a] petition for a writ of habeas corpus is the proper vehicle by which to challenge the setting of allegedly excessive bail.”

¹⁹ See, e.g., *State ex rel. Jonas v. Minor*, 602 S.W.3d 189, 193 (Mo. 2020), holding that “A habeas corpus proceeding may be used to challenge a probation revocation,” citing *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002).

²⁰ *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).

²¹ *Id.* 243.

²² *Id.* at 239, quoting *Rex v. Clarkson*, 1 Str. 444, 445 93 Eng. Rep. 625 (K. B. 1722).

²³ 371 U.S. at 243. The Court described the restraints that led to this conclusion:

And in fact, as well as in theory, the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.

circumstances, including child custody,²⁴ an alien seeking entry into the United States,²⁵ and induction into military service.²⁶ The Court concluded, “History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.”²⁷

In spite of the sweeping language the Court used in *Jones v. Cunningham*, general collateral consequences of a conviction, such as the loss of the right to vote, the inability to hold public office, disqualification from service as a juror and similar civil disabilities do not constitute sufficient restraint on liberty to satisfy the custody requirement of habeas corpus.²⁸ Similarly, the use of a prior conviction to enhance a person’s sentence on a subsequent charge was not “custody” where the petitioner had completed his sentence for that conviction.²⁹ More recently, courts have found that a requirement to register as a sex offender was not a sufficient restraint on liberty to satisfy the custody requirement of 28 U.S.C. § 2254.³⁰

A. General Habeas Corpus Jurisdiction, 28 U.S.C. § 2241

The Constitution provides that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³¹ Congress has given federal courts the power to issue writs of habeas corpus in 28 U.S.C. §§ 2241, 2254, and 2255. Each applies to different circumstances. The general power to issue writs of habeas corpus is found in 28 U.S.C. § 2241, which provides:

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be

²⁴ *Id.* at 239, citing *Ex parte M'Clellan*, 1 Dowl. 81 (K. B. 1831).

²⁵ *Id.*, citing *Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1956).

²⁶ *Id.* at 240, citing *Ex parte Fabiani*, 105 F.Supp. 139 (D. C. E. D. Pa. 1952); *United States ex rel. Steinberg v. Graham*, 57 F.Supp. 938 (D. C. E. D. Ark. 1944).

²⁷ *Id.*

²⁸ *Carafas v. LaVallee*, 391 U.S. 234 (1968).

²⁹ *Maleng v. Cook*, 490 U.S. 488 (1989).

³⁰ *Simpson v. Berger*, 2024 U.S. Dist. LEXIS 165244, 2024 WL 4188726, No. 4:22-cv-00522-SEP (E.D. Mo. Sept. 13, 2024); *Shaver v. Nagy*, 2024 U.S. Dist. LEXIS 212213, 2024 WL 4864591, No. 23-11573 (E.D. Mich. Nov. 21, 2024); *Deck v. California*, 2022 U.S. Dist. LEXIS 176596, 2022 WL 4486138, No. 8:21-cv-01525-MWF (SP) (C.D. Cal. Sept. 1, 2022).

³¹ U.S. Const., Art. 1, § 9. All state constitutions have a similar provision.

entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who

has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.³²

Unlike other sections of the Habeas Corpus Statute which govern habeas corpus proceedings by persons in the custody of a state or federal prisoners challenging a federal conviction, § 2241 addresses custody under color of law, not necessarily related to a conviction for crime. This provision is generally invoked to challenge custody imposed by a claim of authority other than a judgment of conviction,³³ or in other circumstances in which §§ 2254 and 2255 are not adequate remedies.³⁴

B. State Prisoners, 28 U.S.C. § 2254

Much of the controversy discussed in this book stems from federal habeas corpus review of state court judgments, which are seen by some as an encroachment on states' rights. As discussed in the next chapter, Congress explicitly extended federal habeas corpus jurisdiction to state prisoners with federal claims contemporaneously with the Civil War Amendments abolishing slavery, establishing voting rights, and guaranteeing Due Process and Equal Protection of the law to all persons. The current statute governing habeas corpus proceedings brought by persons in state custody provides:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

³² 28 U.S.C. § 2241.

³³ See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008), involving allegations by Guantanamo detainees that their detention without adequate fact-finding procedures violated due process.

³⁴ See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996), in which the Court invoked its own jurisdiction under 28 U.S.C. § 2241 to avoid a Suspension Clause issue in a § 2254 case.

court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section,

and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].³⁵

This statute includes provisions not found in §§ 2241 or 2255 that accommodate state interests, such as the requirement that state prisoners first invoke available state remedies (the exhaustion requirement) and provisions limiting the habeas remedy if the state adjudication meets certain minimum requirements. The evolution of postconviction remedies in the United States has been driven by considerations of comity and federalism, as well as by the tension between fairness and finality of criminal adjudications. Examples of provisions that have grown out of these conflicts include the restrictions on the filing of subsequent petitions for writ of habeas corpus found in § 2244(a) and (b), and the one-year statute of limitations on habeas corpus petitions found in § 2244(d).

C. Federal Prisoners, 28 U.S.C. § 2255

Finally, 28 U.S.C. § 2255 governs habeas corpus applications brought by federal prisoners to challenge federal convictions and sentences. Since a motion under § 2255 attacks only federal court action, it does not raise the issues of comity and federalism involved in proceedings under § 2254. However, the tension between fairness and finality of criminal convictions remains a significant consideration in the adjudication of claims raised under § 2255. The statute provides:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

³⁵ 28 U.S.C. § 2254.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.³⁶

Motions under § 2255 are distinctly different from habeas corpus petitions under §§ 2241 and 2254, which are civil in nature. Like common law habeas corpus proceedings, venue lies in the jurisdiction where the prisoner or custodian is located.³⁷ A § 2255 motion, on the other hand, must be filed in the sentencing court, regardless of where the movant is in custody.³⁸ Funneling postconviction litigation to the sentencing court makes sense because the venue of trial is generally the most convenient forum for parties and witnesses, and because the sentencing court has previous knowledge and immediate access to necessary files and records.³⁹

It is unsettled whether a § 2255 motion initiates an independent civil action, or is simply a procedural step in the original criminal prosecution. The Supreme Court has said both things. In *Heflin v. United States*, the Court said that a § 2255 motion is “like a petition for a writ of habeas corpus,” and “is not a proceeding in the original criminal prosecution but an independent civil

³⁶ 28 U.S.C. § 2255.

³⁷ 28 U.S.C. § 2241(d).

³⁸ 28 U.S.C. § 2255(a).

³⁹ *Lee v. United States*, 501 F.2d 494 (8th Cir. 1974).

suit.”⁴⁰ However, the Court also described a § 2255 motion as “a step in the criminal case, and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding.”⁴¹ Both things can be true. It has been called an “independent civil suit” challenging a conviction and sentence,⁴² and in some circuits is required to be docketed as a civil action.⁴³ On the other hand, a magistrate judge lacks the statutory authority to enter a final judgment in proceedings under 28 U.S.C. § 2255 because they are not civil matters for purposes of the Federal Magistrate Act.⁴⁴

Section 2255 supersedes habeas corpus jurisdiction, and provides the exclusive remedy for challenging a federal prisoner’s conviction and sentence.⁴⁵ The Supreme Court stated that § 2255 was enacted to provide in the sentencing court a remedy that is exactly commensurate with the remedies previously available by habeas corpus.⁴⁶ It is not a substitute for relitigating errors cognizable on direct appeal,⁴⁷ but because claims such as ineffective assistance of counsel typically require the development of facts outside of the original trial record, a motion under § 2255 is the preferred procedural mechanism for deciding such claims.⁴⁸ However, § 2255(e) includes a savings clause that allows a prisoner to proceed under 28 U.S.C. § 2241 where § 2255 is inadequate or ineffective to test the legality of detention.⁴⁹

Another extraordinary common law writ that has played a role in correcting unjust convictions and sentences is the writ of error coram nobis, which gives the court that pronounced the judgment the power to vacate a judgment based on “errors in matters of fact which had not been put in issued or passed upon and were material to the validity and regularity of the proceeding itself.”⁵⁰ In *United States v. Morgan*, the Supreme Court ruled that a petitioner could use the writ of coram nobis to challenge a federal conviction and sentence, even though he was no longer in custody and therefore could not proceed pursuant to 28 U.S.C. § 2255, because his federal conviction was being used in a state criminal sentencing to authorize an extended term of

⁴⁰ 358 U.S. 415, 418, n. 7 (1952).

⁴¹ *United States v. Morgan*, 346 U.S. 502, 505-506 (1954).

⁴² *United States v. Huss*, 520 F.2d 598 (2d Cir. 1975).

⁴³ *Jenkins v. United States*, 325 F.2d 942 (3d Cir. 1963).

⁴⁴ *Brown v. United States*, 748 F.3d 1045 (11th Cir. 2014).

⁴⁵ *United States ex rel. Leguillou v. Davis*, 212 F.2d 681 (1954).

⁴⁶ *Davis v. United States*, 417 U.S. 333 (1974).

⁴⁷ *Grimes v. United States*, 607 F.2d 6 (1979).

⁴⁸ *United States v. Turcotte*, 405 F.3d 51 (7th Cir. 2005).

⁴⁹ *Kramer v. Olson*, 347 F.3d 214 (7th Cir. 2003), cert. denied, 541 U.S. 990 (2004). A previous denial of a prisoner’s motion under 28 USC § 2255 does not make remedy under § 2255 “ineffective.” *Waugaman v. United States*, 331 F.2d 189 (5th Cir. 1964).

⁵⁰ *United States v. Mayer*, 235 U.S. 55, 68 (1914).

imprisonment.⁵¹ The Court reasoned that such a remedy was authorized by the All Writs Act, 28 U.S.C. § 1651 (a), which provides, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁵² Writs of error coram nobis and similar remedies were abolished and replaced by the standards articulated in Federal Rule of Civil Procedure 60,⁵³ but the Supreme Court applies Rule 60 to habeas corpus cases.⁵⁴

III. State Postconviction Procedures

Every jurisdiction in the United States has a system of postconviction review that functions similarly to federal habeas corpus, but with substantial variation in from state to state. All are based generally on the writ of habeas corpus guaranteed in each state constitution’s Suspension Clause, though some remedies are defined by court rule,⁵⁵ others by statute,⁵⁶ with the operation of statutes and court rules often modified or defined by case law.⁵⁷ It is not the intention of this text to catalogue and cover all state postconviction procedures, as each state would require its own book. However, the cases discussed in this text will provide examples of the interplay between federal habeas corpus procedures and specific state processes in the context of federal doctrines regarding exhaustion of state remedies (Chapter 3), procedural default (Chapter 4), and other sections.

Most state procedures function much like the federal habeas process. Proceedings are initiated by filing a petition or motion for postconviction relief, to which the state will file an answer, the petitioner may reply, and the court decides whether a hearing is justified by the pleadings. Either party may appeal an adverse decision to a higher court. In jurisdictions where postconviction procedures closely track habeas corpus, pleadings may track the common law terminology. The person in custody or someone acting on their behalf would file a petition for writ of habeas corpus. The person alleged to have custody of the person who is the subject of the petition would file a “return,” which would admit or deny that they have custody, and state the legal basis for it. The petitioner may “traverse” the return, which would reply to factual and legal issues raised in the return. If these pleadings reveal genuine issues of material fact, the court would hold a hearing if necessary to decide the issues, and thereafter grant or deny the petition. At

⁵¹ 346 U.S. 502, 504-505 (1954).

⁵² *Id.* at 506-507.

⁵³ “Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela. Fed. R. 60(b)(e).

⁵⁴ See *Gonzalez v. Crosby*, 545 U.S. 524 (2005), discussed in Chapter ___.

⁵⁵ See, e.g., Arizona Rule of Criminal Procedure 32; Arkansas Rule of Criminal Procedure 37; Missouri Rules of Criminal Procedure 24.035 and 29.15, which define procedures for challenging convictions and sentences after the conclusion of appellate proceedings.

⁵⁶ See, e.g., Kan. Stat. Ann. § 60-1507; Wyo. Stat. Ann. §§ 7-14-101 et seq.

⁵⁷ See, e.g., *Calene v. State*, 846 P.2d 679 (Wyo. 1993), creating pleading and hearing procedures for deciding claims where Wyoming’s collateral review statute was silent.

common law, orders granting or denying petitions for writ of habeas corpus were not appealable, so the aggrieved party would need to file an appropriate writ in a higher court.⁵⁸ It is also common that the court to which the petition is made will review it for sufficiency, and if a claim is stated, the Court will order the respondent to file a reply showing why the writ should be denied. This is commonly referred to as a “show cause order.”⁵⁹ Most jurisdictions use standard civil procedure vocabulary to describe proceedings—petition, answer, reply, and judgment.

IV. The Interplay of Federal and State Systems

The first chapters of the book cover doctrines that have evolved to balance state and federal courts’ duties to respect final judgments on one hand, but enforce constitutional rights on the other. A parallel tension, and equally powerful, is that between finality of convictions and fairness of punishment. This conflict exists independent of issues of comity and federalism; continued examination of the judgment of conviction may frustrate goals of punishment, deterrence, rehabilitation, and finality. Precluding review, on the other hand, may produce harsh, unsatisfying results that leave in place a questionable finding of guilt or unjust punishment. The opening chapter examines the habeas remedy generally, and the struggles over civil and human rights that helped it evolve in the Nineteenth and Twentieth Centuries. This history is essential to understanding the two-way street of comity and federalism and the respective roles of state and Federal judges in a free and just society. Subsequent chapters will examine the cases and statutory changes to habeas corpus.

Each chapter addresses the evolution of particular doctrines for resolving the inherent tensions between finality and fairness. The exhaustion doctrine discussed in Chapter 3 serves the interest of comity and federalism by requiring petitioners to first seek available state remedies before seeking federal habeas corpus relief. This assures the state’s proper role as a primary enforcer of constitutional rights and interpreter of state criminal laws. It has the added benefit of conserving scarce federal judicial resources, as state courts ought to rectify constitutional violations, and if they do, the case may never be filed in federal court.

Chapter 4 addresses the more complicated doctrine of procedural default, which is triggered when a state fails to adjudicate a prisoner’s constitutional claim because of the failure to comply with a pleading requirement, procedural rule, or time limit. Every court system has procedures designed to structure judicial decision-making and channel adversarial litigation fairly and efficiently. Rules govern the content of pleadings, require certain notice to opposing parties,

⁵⁸ In Missouri, for example, if the habeas court grants a petition for writ of habeas corpus, the respondent (usually the warden) may file a petition for writ of certiorari in the next higher court. *State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 516 (Mo. 2001) (en banc). If the habeas court denies a petition for writ of habeas corpus, the petitioner may file a *de novo* petition for writ of certiorari in the next higher court. *In re Ferguson v. Dormire*, 413 S.W. 3d 40 (Mo. App. 2013).

⁵⁹ See, e.g., Mo. Rule 91.05, stating that “A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled thereto.”

and provide time deadlines for filing pleadings and appeals so that cases can proceed in an orderly fashion. Such rules are common and are generally respected by federal courts. Because a significant number of postconviction cases are litigated by prisoners acting *pro se* or represented by appointed counsel with heavy caseloads, a significant number of claims and cases are denied for purely procedural reasons without reaching the merits of claims that might affect the accuracy and justice of the underlying conviction and sentence. Issue-preclusion and fact-preclusion doctrines evolved to serve the interests of comity, federalism, and finality. Exceptions to issue and fact preclusion evolved to advance the interests of reliability and fairness of criminal convictions and sentences. These goals and values are at play in every postconviction case.

The following chart illustrates how cases flow through the system that has evolved over the course of the twentieth century. A typical postconviction case will flow through nine stages of litigation:

Stages of Postconviction Review

Direct Review	Collateral Review	Federal Habeas
3. Certiorari (SCOTUS)	6. Certiorari (SCOTUS)	9. Certiorari (SCOTUS)
2. Appeal (State Appellate Court)	5. Appeal (State Appellate Court)	8. Appeal (Federal Circuit Court of Appeals)
1. Trial (State Trial Court)	4. Postconviction Motion (State Trial-level Court)	7. Habeas Corpus (Federal District Court)

Direct Review. If the system functions properly, at stage one of litigation, the trial, defense counsel, and prosecution counsel perform their duties competently and ethically so that a fully informed jury makes a fair and reliable determination of guilt or innocence, or the defendant makes a well-informed, knowing, voluntary and intelligent decision to enter a plea. Society can rely on those results as just.

In an adversarial system, legal and factual issues will be contested in trial and pretrial proceedings. The trial court will resolve those contested issues, and the losing party can appeal adverse findings to the higher court, litigation stage two. Rulings on motions to suppress, admissibility of evidence, jury instructions, and other issues of trial error can be litigated and decided on appeal. Appellate courts will base their decisions on the four corners of the trial court record; they generally will not hear witness testimony or receive new evidence. If the appeal involves important federal questions deserving the attention of the Supreme Court, those can be

presented and decided in certiorari proceedings.⁶⁰ The state appellate court or the Supreme Court can either affirm the conviction, order a retrial, or grant some other appropriate relief based on the facts and the evidence. Stages one through three are generally called “direct review” or “direct appeal.” Direct review is concluded, and the conviction is final, when the Supreme Court denies certiorari. If no petition for writ of certiorari is filed, the conviction becomes final on the last day on which a timely petition for writ of certiorari could have been filed.⁶¹

Collateral Review. Some common claims require the court to consider evidence that was not presented to the trial court, and therefore was not addressed during the direct review. A common claim of this nature is that trial counsel performed deficiently by failing to investigate and present defense evidence, in violation of the Sixth Amendment Right to the Effective Assistance of Counsel. To adjudicate such a claim, a postconviction court may need to hear evidence establishing whether trial counsel violated the duty of competent performance by pursuing a particular line of investigation, and that the defendant suffered prejudice because the evidence trial counsel failed to present would likely have made a difference to the jury.⁶² This is why in stage four, the litigation returns to a fact-finding court, usually (but not always) to the original trial or sentencing court. As with direct review, the aggrieved party may appeal the judgment entered at stage four to an appellate court (stage five), and that decision can be reviewed on certiorari to the Supreme Court (stages four through six). Stages four through six are commonly called “collateral review” or “postconviction review.”

As discussed in more detail in subsequent chapters, a significant difference between direct review and collateral review is that once the conviction is final, all presumptions in favor of a criminal defendant disappear. The conviction is final; the defendant has been found guilty beyond a reasonable doubt and is no longer presumed innocent. At stage four, the defendant is now the plaintiff (or movant or petitioner), and carries the burden of proof and the burden of persuasion. While a defendant has the constitutional right to effective representation at stages one and two, that right also disappears at stage four.⁶³

Readers should note that federal proceedings involve only six stages of judicial review. The trial or plea will occur in the United States District Court, followed by an appeal to the Circuit

⁶⁰ See, e.g., *Ramos v. Louisiana*, 590 U.S. 83 (2020), striking down Louisiana’s state constitutional provision allowing criminal convictions based on nonunanimous jury verdicts as a violation of the Sixth Amendment right to jury trial clause.

⁶¹ *Allen v. Hardy*, 478 U.S. 255 (1986).

⁶² *Strickland v. Washington*, 466 U.S. 668 (1984). Ineffective assistance of counsel is not the only claim that is best litigated in postconviction proceedings. A petition claiming that the prosecution withheld material, exculpatory evidence in violation of the defendant’s right to due process of law also commonly requires the court to hear evidence. See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁶³ *Pennsylvania v. Finley*, 481 U.S. 551 (1987). But see *Martinez v. Ryan*, 566 U.S. 1 (2012), creating a narrow exception for habeas corpus petitioners to reach the merits of claims defaulted by incompetent collateral review counsel.

Court of Appeals, then a petition for writ of certiorari to the Supreme Court, and followed by proceedings under 28 U.S.C. § 2255 which would follow a similar path from the district court to the Supreme Court.

It should also be noted that not all state postconviction systems follow this exact pattern of litigation. In some states that authorize the death penalty, claims that are traditionally reserved for collateral review are combined with the appellate process on direct review. Wyoming, for example, requires that claims of ineffective assistance of counsel be raised by appellate counsel, who may move to remand the case to the trial court for a hearing on the claim while appellate briefing is stayed.⁶⁴ When the ineffective assistance of counsel claim is resolved, the issue is consolidated with other issues on the direct appeal. In theory, the procedure reduces the time needed to review a judgment of death by combining stage two and stage five, but those time savings are often lost because of other problems inherent in such a system.

Federal Habeas Corpus Proceedings. Once state remedies are fully exhausted, see Chapter 3, Balancing the Roles of State and Federal Courts: Exhaustion of State Remedies, a state prisoner who remains in custody can petition a United States District Court for a writ of habeas corpus (stage seven). The federal courts can consider only issues of federal law, and finality doctrines are enhanced by considerations of comity and federalism that demand some level of respect for state court adjudications which vary according to the circumstances of the case. With some exceptions discussed in Chapter 4, Procedural Bars: Independent, Adequate State Grounds, state decisions that rest on procedural grounds cannot be reviewed if the procedural ground is independent of the federal claim and adequate to justify avoiding the claim. The federal court must presume state court findings of fact to be correct, again with exceptions that are discussed in Chapter 7, Fact Development in Postconviction Proceedings. Federal habeas courts are limited in the evidence that can be received in support of a prisoner's constitutional claims.⁶⁵

If habeas relief is denied in the district court, the petitioner can appeal to the circuit court of appeals (stage eight) only if the district court or the court of appeals issues a "certificate of appealability" (COA) by making "a substantial showing of the denial of a constitutional right."⁶⁶ Finally, an unsuccessful party can petition the Supreme Court for a writ of certiorari to review the decision of the court of appeals.

Not every case flows sequentially through all nine stages of review. Each stage requires about a year, although it can take less or much more time, depending on the gravity and complexity of the issues. For example, a convicted defendant could go directly to federal habeas corpus proceedings (stage seven) after the conclusion of the direct appeal (stage two) and raise only the claims exhausted at trial and on appeal. A defendant sentenced to a relatively short term of years

⁶⁴ See *Calene v. State*, 846 P.2d 679 (Wyo. 1993). Idaho, California, Oklahoma, and Texas have similar rules.

⁶⁵ Cf. 28 U.S.C. § 2254(e) and *Williams v. Taylor*, 529 U.S. 420 (2000), discussed in Chapter 7.

⁶⁶ 28 U.S.C. § 2253(c). A COA can also be granted by a Circuit Justice.

has an incentive to do so, especially if there is no reason to suspect potential claims that were not adequately explored at trial. More commonly, prisoners do not skip any stages in the process. Occasionally, a case is remanded for retrial or for reconsideration of an issue in various stages of the process, and this can add significant time. It is easy to see why the typical capital case requires one or two decades to complete this process.

V. Problems and Issues in the Review of Criminal Convictions

As noted previously, in an ideal world, reliable and fair convictions would be produced in virtually every case by the direct review process. A fully informed jury would reach a reliable verdict, an appellate court would fairly resolve legal issues presented by able counsel, and society could rest assured justice has been done. However, the ideal case is the exception, not the rule, in a nation that chronically underfunds indigent defense systems. Taking note of the volume of scholarship and reports establishing that indigent defense is in a state of crisis in state after state, one scholar observed:

Only once we reframe the indigent crisis in relation to the number of criminal cases filed in state courts, the number of public defenders needed to provide effective representation in those cases, and the number of attorneys that are practicing law, can we appreciate the magnitude of the crisis. It is an uncontained crisis that calls into question the legitimacy of our justice system, our commitment to our constitution, and the role of lawyers in our society.⁶⁷

The practical effect of the underfunding of indigent defense at trial is that lawyers plead clients guilty or go to trial unprepared. One Missouri public defender reported that excessively high caseloads resulted in high turnover, and the loss of experienced lawyers. As a result, “there are always many new attorneys, but due to caseloads, they get next to no supervision; what results is a crop of attorneys faced with crushing caseloads who ‘do not know what effective representation is’ due to a crippling lack of experience and supervision.”⁶⁸ It is unreasonable to think that a system that underfunds trial representation adequately funds appellate and postconviction representation.

In an indigent defense system that constantly teeters on or over the brink of crisis, competent and thorough investigation of legal claims and defenses is the exception, not the rule, and this creates special problems for prisoners seeking collateral and habeas corpus review of unjust and unreliable convictions and sentences. A common occurrence in postconviction representation is that new evidence supporting a claim or a defense, or even evidence of complete innocence, will surface by happenstance or because a prisoner is lucky enough to obtain competent counsel late in the process. Courts are often confronted with compelling evidence and legal claims

⁶⁷ See John Gross, *Reframing the Indigent Defense Crisis*, Harvard L. Rev. Blog Essay, March 18, 2023.

⁶⁸ Sean D. O’Brien, *Missouri’s Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 868 (2010) (emphasis in original).

that surface for the first time after appeal, postconviction or habeas litigation has concluded. This text will examine cases in which such claims were discovered for the first time in federal habeas proceedings, and sometimes after the conclusion of all proceedings. Judges in such situations must decide whether they have the power to reopen the record to allow the claim to be heard and remedied if found meritorious. Is it just to deny a remedy for a constitutional violation simply because it surfaced too far down the line to be considered?

Lack of access to competent lawyers is not the only reason that evidence and legal claims surface when the prisoner has advanced beyond the point when the claim should have been raised. Some cases involve exculpatory evidence deliberately or accidentally withheld by the prosecution. Under what circumstances should these claims be heard and remedied? Sometimes the Court hands down a decision that establishes that many previous cases affirming convictions and sentences were wrongly decided. For example, when the Court decided in *Ramos v. Louisiana*⁶⁹ that a conviction based on the vote of only ten jurors violates the Sixth Amendment right to trial by jury, hundreds of Louisiana prisoners had been convicted on a vote of ten to two. Should their unconstitutional convictions be remedied?

To analyze these questions, it helps to visualize the nine-stage system of review and determine when the new evidence or legal claim was discovered or discoverable. The process is challenging, and often unforgiving. As you read each case, use the chart of Stages of Postconviction Review to determine where in the process relevant events occurred or should have occurred. The ability to do so will help future attorneys understand and meet their responsibilities to clients seeking redress for unfair convictions and sentences.

⁶⁹ 590 U.S. 83 (2020).

CHAPTER 2: THE ROLE OF HABEAS CORPUS IN AMERICAN HISTORY

I. Introduction

The study of postconviction proceedings in the American legal system should begin with the federal writ of habeas corpus. Both the federal writ of habeas corpus and state postconviction proceedings—whether established by constitutions, statutes, or court rules—originate from the common law writ of habeas corpus, often called “the most celebrated writ in the English law.”⁷⁰ Frequently referred to by courts and scholars as The Great Writ, its core principle asserts that “in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”⁷¹ Justice William Brennan observed, “Vindication of due process is precisely its historic office.”⁷² The Framers enshrined the writ in both the Constitution⁷³ and the Judiciary Act of 1789, § 14, which granted federal courts “power to issue writs of scire facias, habeas corpus, and all other writs;” however, it restricted federal courts from issuing the writ unless the prisoner was “in custody under or by colour of the authority of the United States.”

Today, habeas corpus litigation is fraught with procedural complexity and technicalities that often yield anomalous results. In one Missouri case, an assistant attorney general argued that a habeas petitioner who had failed to navigate the intricate maze of federal and state procedures should be executed—even if he could prove his innocence.⁷⁴ At the heart of this complexity are considerations of comity and federalism, and the tension between fairness and finality, which shape a delicate balance between federal and state sovereignty, a balance deeply rooted in American history. It is difficult to imagine that any legislature or policy-making body deliberately designing the current system of habeas corpus review. Chapter 1, Introduction to Habeas Corpus, sets out a general description of habeas corpus procedure as it currently exists in the United States, and it provides a useful overview to the chapters that follow. Understanding modern habeas corpus

⁷⁰ *Faye v. Noia*, 372 U.S. 391, 400 (1963), (citing 3 Blackstone Commentaries 129).

⁷¹ *Faye*, at 401.

⁷² *Id.* at 402.

⁷³ “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONSTITUTION, Art. 1, § 9.

⁷⁴ Missouri Supreme Court Judge Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Valparaiso U. L. REV. 421 (2004). “I... asked the Assistant Attorney General Arguing the case, ‘Are you suggesting... even if we find that Mr. Amrine is actually innocent, he should be executed?’ the Assistant Attorney General answered, ‘That’s correct, your honor.’”; See *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

requires an awareness of the federal judiciary’s historical use of the writ to protect the constitutional rights of individuals from encroachment by state actors.

II. The Fourteenth Amendment and The Judiciary Act of 1867

The Judiciary Act of February 5, 1867, granted federal judges the “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States,” explicitly extending the writ’s reach to persons in state custody. This expansion was no accident. It coincided with the states’ ratification of the Fourteenth Amendment, which prohibited them from depriving any person of due process or equal protection of the law.

John Bingham, the U.S. Representative from Ohio, is often called the “John Madison” of the Fourteenth Amendment for his pivotal role in drafting and shepherding the amendment through the House of Representatives. The debates recorded in the *Congressional Globe* regarding the wording of the Privileges and Immunities Clause, the Equal Protection Clause, and the Due Process Clause reveal that both proponents and opponents of the amendment understood that it would require states to abide by every provision of the Bill of Rights and would authorize Congress to allow individuals to bring lawsuits in federal courts to enforce those rights against the states.⁷⁵ Michigan Senator Jacob Howard, arguing for the amendment, believed the Privileges and Immunities Clause would ensure the Bill of Rights’ enforceability against the states. Noting that the privileges and immunities protected by the Constitution “are not and cannot be fully defined in their entire extent and precise nature,” Senator Howard argued that the amendment would incorporate “the personal rights guaranteed and secured by the first eight amendments to the Constitution.”⁷⁶ Among the rights he specifically listed as enforceable against the states was the right to “claim the benefit of the writ of habeas corpus.”⁷⁷

Congressional debates frequently referenced concerns regarding the likelihood that white southerners, upon resuming governance, would enact oppressive laws and practices against formerly enslaved persons. These predictions proved prescient as the Jim Crow era took hold in the South after Reconstruction.⁷⁸ However, the drafters had clearly hoped their Civil War Amendments would prevent these injustices.

⁷⁵ “Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property: we are only opposed to enforcing it by national authority. even by the consent of the loyal people of all the States.” Ohio Representative John Bingham, *Congressional Globe*, Feb. 27, 1866, p. 1889.

⁷⁶ Senator Jacob M. Howard, *Congressional Globe*, May 23, 1886, p. 2675.

⁷⁷ *Id.*, quoting *Corfield v. Coryell*, 6 F. Cas. 546, 4 Wash. C.C. 371 (1823).

⁷⁸ Senator James Nye put it bluntly, “It is a more obtuse observer still who does not comprehend the settled determination of the present forces, now coming into the political foreground of the South, to establish some species of local despotism whereby the colored man’s condition shall be kept perpetually disparaged. In this probable cause of collision lies the danger; and, sir, in my humble opinion it is the chief danger to be guarded against.”

While the Fourteenth Amendment drafters envisioned the Privileges and Immunities Clause as the primary mechanism for protecting the rights of individuals from arbitrary state power, the Supreme Court differed in its approach. In the *Slaughter-House Cases*, the Court concluded:

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.⁷⁹

The Court rejected the meat packing businesses' argument that Louisiana regulations violated the Fourteenth Amendment's Privileges and Immunities Clause. The Court reasoned that a more expansive interpretation of the clause might "destroy the main features of the general system," which relied on "the existence of the States with powers for domestic and local government, *including the regulation of civil rights*—the rights of person and of property—[as] essential to the perfect working of our complex form of government."⁸⁰ Justice Felix Frankfurter put it more plainly: "The notion that the Privileges or Immunities Clause of the Fourteenth Amendment absorbed, as it is called, the provisions of the Bill of Rights that limit the Federal Government has never been given countenance by this Court."⁸¹

The narrowing of rights guaranteed under the Privileges and Immunities Clause left the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to bear primary responsibility for protecting civil rights. The Court recognized explicit protections as enforceable against the states under the Equal Protection Clause,⁸² though the "separate but equal doctrine of *Plessy v. Ferguson*"⁸³ considerably weakened its impact. Victims of constitutional violations arising from state criminal prosecutions were left to rely on the Fourteenth Amendment's Due Process

Congressional Globe, February 28, 1866, p. 1073. The Supreme Court observed, "Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity." *Slaughter-House Cases*, 83 U.S. 36, 70 (1872).

⁷⁹ *Slaughter-House Cases*, 83 U.S. at 82.

⁸⁰ *Id.* (emphasis added).

⁸¹ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring).

⁸² *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880) (striking down a Virginia statute providing that black men were ineligible for jury service).

⁸³ 163 U.S. 537 (1896).

Clause for redress. Students of criminal procedure are well acquainted with this lengthy and complex journey. Nearly a century after the Fourteenth Amendment's adoption, the Warren Court began to selectively incorporate the Bill of Rights protections to persons subject to state power and made them enforceable against the states in federal court.⁸⁴

The Great Writ has played a central role in advancing American civil liberties and shaping criminal justice. It served as the procedural vehicle for enforcing the right to counsel against the states through the Due Process Clause of the Fourteenth Amendment,⁸⁵ arguably the most significant advancement in criminal defendants' rights because it afforded criminal defendants the assistance of legal representation which enabled the effective exercise of additional constitutional rights and protections. In the early twentieth century, due process of law had a relatively narrow scope. In *Frank v. Mangum*, due process was satisfied as long as the defendant was afforded the opportunity to be heard in court. However, in *Moore v. Dempsey*, the Court made clear that federal courts had the power and duty to adjudicate Moore's claim that his trial was dominated by a lynch mob, including conducting evidentiary hearings.⁸⁶ In subsequent cases, the Court interpreted the Fourteenth Amendment's Due Process Clause to provide relief for state prisoners subjected to violent and exceptionally coercive police interrogations⁸⁷ and other forms of police misconduct that shocked the conscience of the Court,⁸⁸ and mob-dominated trials. As more provisions of the Bill of Rights were incorporated into due process, these rights became enforceable against the states through the writ of habeas corpus.

Justice Clarence Thomas articulated a contrasting view of the Great Writ and argued that "[b]ecause federal habeas review overrides the States' core power to enforce criminal law, it

⁸⁴ Compare *Wolf v. Colorado*, 318 U.S. 25 (1949), and *Mapp v. Ohio*, 367 U.S. 643 (1961) (4th Amendment Exclusionary Rule); *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment Self-Incrimination Clause); *Palko v. Connecticut*, 302 U.S. 319 (1937) and *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment Double Jeopardy Clause); *Powell v. Alabama*, 287 U.S. 45 (1932), and *Gideon v. Wainwright*, 372 U.S. 335 (1963); *West v. Louisiana*, 194 U.S. 258 (1904), and *Pointer v. Texas*, 380 U.S. 400 (1968) (Sixth Amendment Confrontation Clause); *Francis v. Resweber*, 329 U.S. 459 (1947), and *Robinson v. California*, 370 U.S. 660 (1962) (8th Amendment Cruel & Unusual Punishment Clause); *Klopfer v. North Carolina*, 386 U.S. 213 (1962) (6th Amendment Right to Speedy Trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (6th Amendment right to jury trial and unanimous verdict); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment Right to Bear Arms); *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (8th Amendment Excessive Fines Clause);

⁸⁵ *Powell*, 287 U.S. 45 (1932) (right to counsel in capital cases), *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel in special circumstances), *Gideon*, 372 U.S. 335 (1963) (right to counsel in felony cases), *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases with possible jail time); *Evitts v. Lucey*, 469 U.S. 387 (1984) (right to counsel in first appeal as of right).

⁸⁶ *Moore v. Dempsey*, 261 U.S. 86 (1922).

⁸⁷ See *Brown v. Mississippi*, 297 U.S. 278 (1936), *Ashcraft v. Tennessee*, 332 U.S. 143 (1944), *Watts v. Indiana*, 338 U.S. 49 (1949). *Faye v. Noia* was itself an interrogation case in which Noia sought habeas relief in part upon a claim that he was interrogated by police using methods condemned in

⁸⁸ *Rochin v. California*, 342 U.S. 165 (1952).

‘intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.’ That intrusion ‘imposes special costs on our federal system.’”⁸⁹ Among those costs, Justice Thomas identified the disruption of a state’s sovereign power to enforce its criminal laws and punish the guilty, as well as the state’s strong interest in the finality of its adjudications.⁹⁰ On a more visceral level, Justice Thomas viewed habeas corpus relief as infringing on the rights and expectations of crime victims.⁹¹

The ongoing tension between the constitutional rights of the accused and respect for state court sovereignty has shaped the evolution of habeas corpus jurisprudence. This conflict continues in the litigation of each federal habeas petition filed by a state prisoner. Lawyers representing prisoners with federal constitutional claims *must* recognize this tension and its potential to influence, and at times distort, judicial processes and decision-making. A federal court adjudicating a state prisoner’s habeas corpus petition balances competing imperatives: enforcing the Constitution while respecting state court adjudications. To reconcile these competing obligations, the Court developed intricate doctrines designed to balance the interests of both the habeas petitioner and the state. As the following cases will demonstrate, states that make a good-faith effort to respect and uphold a prisoner’s constitutional rights may benefit from issue-preclusion and fact-preclusion doctrines. Similarly, prisoners who diligently investigate and pursue their constitutional claims in state court may gain access to equitable safety valves that enable federal courts to adjudicate their claims on the merits.

Adding another layer of procedural complexity, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) fundamentally reshaped habeas corpus litigation. Signed into law by President Bill Clinton, AEDPA imposed, for the first time in U.S. history, a statute of limitations on habeas corpus petitions and required federal courts to defer to state court *legal* rulings on federal constitutional questions. It also raises significant obstacles to federal evidentiary hearings. Habeas corpus relief is still available in narrow circumstances where a state court’s adjudication or avoidance of a constitutional issue fails to satisfy AEDPA’s provisions. These new limitations on the habeas remedy will be explored in Chapter 8, The Antiterrorism and Effective Death Penalty Act. However, to fully understand and interpret AEDPA and its impact, it is essential to first examine the historic principles of habeas corpus that have protected individuals from unconstitutional state action in criminal cases. This chapter will trace the judicial evolution of the writ of habeas corpus, while subsequent chapters will analyze congressional legislation that codified or clarified judicial developments leading up to AEDPA’s enactment, which significantly changed the framework for adjudicating the constitutionality of state criminal convictions.

⁸⁹ *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2021), quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

⁹⁰ *Shinn v. Ramirez*, at 1731.

⁹¹ *See Brumfield v. Cain*, 576 U.S. 305, 325 (Thomas, J., dissenting).

III. The Fourteenth Amendment Due Process Clause, State Adjudication, and the Racial Origins of Habeas Corpus

The evolution of modern habeas corpus and the limitations imposed by the Antiterrorism and Effective Death Penalty Act have their roots in the 1913 case of Leo Frank, universally regarded as a miscarriage of justice. Frank's inability to obtain federal habeas corpus relief exposed flaws in the legal standard that blocked federal courts from reviewing his claim that a mob-dominated trial deprived him of due process in his conviction for the murder of thirteen-year-old Mary Phagan. His conviction and subsequent lynching became a lasting stain on the American justice system. In 1986, Georgia Governor Joe Frank Harris finally pardoned Frank after Alonzo Mann, a fourteen-year-old office boy at the time of the murder, came forward and stated that he had seen another man carrying Phagan's body out of Frank's pencil factory.⁹²

A detailed account of Frank's trial, including primary source materials, is available on the *Famous Trials* website, created by University of Missouri-Kansas City School of Law Professor Douglas O. Linder.⁹³ The following summary is based on materials published on Professor Linder's site.

From the outset of the investigation, significant doubts emerged about Frank's culpability as the perpetrator of this infamous crime. Mary Phagan's body was found in the basement of the National Pencil Factory, which Frank managed. Initial suspicions focused on the night watchman, Newt Lee. Near Phagan's body, investigators found two handwritten notes on scraps of paper. One read, "a long tall negro black that hoo it wase," and the other paper read, "he said he would love me...play like the night witch did it but that long tall black negro did buy his self." Bloody fingerprints on a basement door and Phagan's jacket were never tested.

Jim Conley, a Black sweeper at the factory, later admitted to writing the notes, and a plant foreman had seen Conley washing blood from a shirt. However, Conley claimed—implausibly—that Frank had asked him to guard the office door while he engaged in sexual activity with Phagan, and afterward, Conley helped Frank dispose of the body. Conley further alleged that Frank then instructed him to write the two murder notes. Conley pleaded guilty to being an accomplice and was sentenced to one year for his role in the crime. Frank testified in his own defense, presented an alibi, and called numerous character witnesses who attested that Frank was not the type of person to commit such a crime. He also challenged the prosecutor's timeline. The prosecution countered with testimony from female factory workers who claimed Frank had made improper sexual advances and had a reputation for lasciviousness. As the trial was in session, mobs marched

⁹² *Georgia Pardons Victim 70 Years After Lynching*, The New York Times, A16, March 12, 1986. Mann said he did not speak out at the time of trial because he feared the real killer. *Id.*

⁹³ UMKC Law Professor Douglas O. Linder's FAMOUS TRIALS website, <https://www.famous-trials.com/leo-frank>.

outside the courthouse while chanting, “Hang the Jew.”⁹⁴ After just two hours of deliberation, the jury convicted Frank and sentenced him to death.

In a pattern common among innocence cases, new evidence supporting Frank’s innocence gradually surfaced after the verdict. Two days after Frank’s indictment, one juror was heard telling fellow members of the Atlanta Elks Club, “I’m glad they indicted the goddamn Jew. They ought to take him out and lynch him, and if I get on that jury I’ll hang that Jew for sure.”⁹⁵ Additionally, hairs found outside Frank’s office—claimed by the prosecution to belong to Phagan—had, in fact, come from another girl, according to a microscopic examination conducted before trial and reported to the prosecution. Women who had testified about Frank’s alleged sexual advances later recanted and admitted detectives pressured them to provide false testimony. Another woman, Annie Maude Carter, provided an affidavit stating that Conley had confessed to her that he had killed Mary Phagan.

On appeal to the Georgia Supreme Court, Frank challenged the admission of irrelevant and inflammatory evidence, and he raised several grounds regarding “alleged disorder occurring in the courtroom and vicinity during the progress of the trial.”⁹⁶ Frank “contended that the occurrence of such disorder prevented a fair and impartial trial, and furthermore that the court should have granted a mistrial upon motion made at the conclusion of the argument.”⁹⁷ The Georgia Supreme Court upheld Frank’s conviction. Two judges dissented, finding the evidence of Frank’s alleged lascivious behavior irrelevant and inflammatory.⁹⁸

Frank petitioned the U.S. District Court for habeas corpus relief, arguing that his trial violated the Due Process Clause of the Fourteenth Amendment. His petition was denied, and the case made its way to the U.S. Supreme Court.

FRANK V. MANGUM⁹⁹

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The points raised by the appellant may be reduced to the following:

(1) It is contended that the disorder in and about the courtroom during the trial and up to and at the reception of the verdict amounted to mob domination, that not only the jury but the

⁹⁴ *Georgia Pardons Victim*, *supra* note 14.

⁹⁵ *The Trial of Leo Frank: An Account*, Linder, FAMOUS TRIALS, <https://www.famous-trials.com/leo-frank/27-home>.

⁹⁶ Frank v. State, 141 Georgia 243, 280 (1914).

⁹⁷ *Id.*

⁹⁸ *Id.* at 284.

⁹⁹ 237 U.S. 309 (1915).

presiding judge succumbed to it, and that this in effect wrought a dissolution of the court, so that the proceedings were coram non judice.

[Grounds 3-5 are intentionally omitted]

In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of habeas corpus under § 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers v. Peck*, 199 U.S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. [citations omitted]

As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. [citations omitted]

It is, therefore, conceded by counsel for appellant that in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of habeas corpus will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

* * * *

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte Royall*, 117 U.S. 241, 252 -- applying in a habeas corpus case what was said in *Covell v. Heyman*,

111 U.S. 176, 182, a case of conflict of jurisdiction: -- "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see *In re Tyler, Petitioner*, 149 U.S. 164, 186.

* * * *

We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. *Myers v. State*, 97 Georgia 76 (5), 99; *Collier v. State*, 115 Georgia, 803.

Such an appeal was accorded to the prisoner in the present case [*Frank v. State*, 141 Georgia, 243 (16), 280 (1914)], in a manner and under circumstances already stated, and the Supreme Court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the States and the Federal Government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestations of hostile sentiment cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the Supreme Court. This, we think, embodies more than one error of reasoning. It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such

disorder as to cause a loss of jurisdiction in the trial court; which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the State before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

* * * *

The final order of the District Court, refusing the application for a writ of habeas corpus, is Affirmed.

MR. JUSTICE HOLMES with whom concurred MR. JUSTICE HUGHES, dissenting.

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of habeas corpus should be denied, or whether the District Court should have proceeded to try the facts. The allegations that appear to us material are these. The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be 'probable danger of violence' if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on until order restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

* * * *

The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or more irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. The State acts when by its agency it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own -- that still less does such procedure draw to itself the final determination of the Federal question. *Simon v. Southern Ry.*, 236 U.S. 115, 122, 123. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. *Kansas Southern Ry. v. C.H. Albers Commission Co.*, 223 U.S. 573, 591. *Nor. & West. Ry. v. Conley*, March 8, 1915, 236 U.S. 605. Otherwise, the right will be a barren one. It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for habeas corpus to override the findings of fact by the state courts. It would indeed be a most serious thing if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation and that the Supreme Court of the State on writ of error had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State had disposed of the present question by its judgment on one side along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And

notwithstanding the principle of comity and convenience (for in our opinion it is nothing more, *United States v. Sing Tuck*, 194 U.S. 161, 168), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of habeas corpus, when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the enviroing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one jurymen yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the State to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as then administered by one elected by a mob intent on death.

After the U.S. Supreme Court upheld the district court's denial of federal habeas corpus relief, Leo Frank was scheduled for execution on June 22, 1915. The case had garnered national publicity, with widespread editorials arguing that an innocent man had been unfairly convicted and sentenced to death. Many criticized the judicial system for failing to correct an unjust verdict tainted by anti-Semitism.¹⁰⁰ Judge Leonard Roan, who had presided over Frank's trial, was on his death bed when he wrote to Georgia Governor John M. Slaton, imploring him to stop Frank's

¹⁰⁰ See *News Stories and Articles About the Frank Case*, Linder, FAMOUS TRIALS, <https://www.famous-trials.com/leo-frank/32-news>.

execution. Governor Slaton commuted Frank’s sentence to life imprisonment and issued a detailed statement explaining his decision. He wrote, in part:

[T]he performance of my duty under the Constitution is a matter of my conscience. The responsibility rests where the power is reposed. Judge Roan, with that awful sense of responsibility, which probably came over him as he thought of that Judge before whom he would shortly appear, calls to me from another world to request that I do that which he should have done. I can endure misconstruction, abuse and condemnation, but I cannot stand the constant companionship of an accusing conscience, which would remind me in every thought that I, as a Governor of Georgia, failed to do what I thought to be right. There is a territory “beyond a REASONABLE DOUBT and absolute certainty”, for which the law provides in allowing life imprisonment instead of execution. This case has been marked by doubt...¹⁰¹

Governor Slaton’s statement acknowledged that the mob-dominated atmosphere of the trial was so pervasive that the trial judge did not allow Frank to be present for the reading of the verdict for fear of his safety. Slaton also questioned the Georgia Supreme Court’s ruling on this factual issue.

Following the governor’s decision, on the night of August 16, 1915, twenty-five armed men cut the prison’s phone lines, stormed the facility, and seized Leo Frank. In the early morning hours of August 17, they drove Frank to the outskirts of Marietta, Georgia—Mary Phagan’s hometown—where they hung him from an oak tree.¹⁰² It would take another seventy-one years for the Georgia Board of Pardons and Paroles, with the support of Georgia Governor Joe Frank Harris, to unanimously and posthumously pardon Leo Frank. The board cited the failure of authorities to bring the true killer to justice as a key factor in its decision.

Questions and Comments:

1. **“Claim”:** A claim presented in a petition for writ of habeas corpus has two components. The first is the legal basis of the claim, and the second is the facts that prove the claim. *Frank v. Mangum* makes clear that the legal basis of the claim must be rooted in federal law—specifically, in this case, the Due Process Clause of the Fourteenth Amendment. Frank’s case reached the Court before any provisions of the Bill of Rights had been

¹⁰¹ *The Leo Frank Trial: Clemency Decision of Governor John M. Slaton*, Linder, FAMOUS TRIALS, <https://www.famous-trials.com/leo-frank/35-clemencydecision>.

¹⁰² *The Leo Frank Trial: A Chronology*, Linder, FAMOUS TRIALS, <https://www.famous-trials.com/leo-frank/28-chronology>.

incorporated into the Due Process Clause. What federal constitutional obligations did the Due Process Clause impose on the states when *Frank* was decided?

2. **Legal component of the claim:** What was the legal basis for the Supreme Court’s decision to affirm the denial of habeas corpus relief? Does its reasoning rest on a narrow interpretation of habeas corpus jurisdiction or a restrictive view of the rights guaranteed under the Due Process Clause of the Fourteenth Amendment? In the *Frank* Court’s view, what is the minimum level of due process to which Frank was entitled in state court? In other words, what would a prisoner in Leo Frank’s position have to show the federal court to justify habeas corpus relief?
3. **Focus of the federal habeas court:** When deciding Leo Frank’s petition for writ of habeas corpus, was the Court looking at whether he had a fair trial, or was it enough that Frank was allowed to appeal his conviction to a higher court? Are there circumstances in which a federal habeas judge could hear evidence and grant relief for claims like those raised by Frank? What conditions in the state court proceedings would need to be present for this to occur?
4. **Factual component of the claim:** The second component of every habeas corpus claim is the factual basis—the evidence supporting an argument that a constitutional violation has occurred. What does *Frank v. Mangum* say about state court determinations of fact? Under the *Frank* standard, can the federal court reassess those issues and independently determine what happened at Frank’s trial?
5. **Comity:** The Court uses the term “comity” to describe the relationship between federal and state courts. What does this suggest about the Court’s perception of its primary obligation when reviewing a habeas petition filed by a state prisoner convicted of a crime?
6. **Actual due process violations:** Consider the ways in which a lynch-mob dominated trial could undermine due process. How would such an atmosphere affect the right to a fair and impartial decision-maker? How might it influence the defense’s ability to present evidence or the willingness of witnesses to testify? In Frank’s case, Judge Roan was so concerned about Frank’s safety that he did not allow him to be present in the courtroom when the jury announced its verdict. What does this decision suggest about the fairness of the trial?
7. ***Frank v. Mangum* focus is on the appeal:** Leo Frank lost his claim that his trial was dominated by a lynch mob because the Georgia Supreme Court rubber-stamped his conviction, ignoring the overwhelming record support for Frank’s claim that his trial was dominated by a lynch mob. Could he have avoided that result by pursuing his constitutional claim in federal court in the first instance, without appealing to the Georgia appellate court? In *Ex parte Royall*,¹⁰³ the Court rejected the petition of a Virginia prisoner who alleged that he was unconstitutionally restrained because he was being prosecuted under a Virginia statute that was “repugnant to the Constitution of the United States.” The Court decided that although it may have jurisdiction under federal statute to discharge Royall, “such power ought not, for the reasons given in the other cases just decided, to be exercised in

¹⁰³ 117 U.S. 254 (1886).

advance of his trial.”¹⁰⁴ *Royall* established the principle that a state prisoner must first invoke or “exhaust” state remedies before seeking federal relief and the failure to do so will result in the denial of the prisoner’s petition for that reason alone. Where does that leave prisoners in state custody after *Frank v. Mangum*? If there is a procedure for seeking a state remedy on a federal constitutional claim, and a prisoner fails to invoke it, what are the consequences? If a prisoner does pursue a state remedy and the state court rules against them, under what circumstances would the federal court under *Frank v. Mangum* adjudicate and remedy those claims?

8. **Frank’s outcome:** How does the outcome of Frank’s case rest with you? Was the legal process fair and reliable? Did it lead to a just result? Can it be said that the proceedings were free of improper considerations and influences? Does this case suggest circumstances in which federal courts should have the authority to adjudicate allegations of unconstitutional state criminal trials independently? What factors support allowing federal courts to review state criminal judgments? What was the broader social context in America when *Frank v. Mangum* was decided? The decision coincided with the beginning of the seven-decade Great Migration, or the Second Middle Passage, during which Americans of African descent fled the South to escape Jim Crow laws and racial violence and oppression.¹⁰⁵ In the four years following *Frank v. Mangum*, over half a million Black citizens left the South, in part due to the persistent threat of lynching. When Frank was decided, lynch mobs were killing Black Americans at a rate of one every four days.¹⁰⁶ Given this historical backdrop, what impact did the Court’s opinion likely have on the quality of justice dispensed by state judges?

The Supreme Court revisited the *Frank* decision in the context of events that unfolded during the Red Summer of 1919—a wave of racial violence that swept across dozens of cities in the United States. The National Archives describes the Red Summer as follows:

The Red Summer was a pattern of white-on-black violence that occurred in 1919 throughout the United States. The post World War I period was marked by a spike in racial violence, much of it directed toward African American veterans returning from Europe, where they were often treated much better there than by white Americans, despite their brave service to the country. The bloodiest incident occurred in Elaine, Arkansas, where it is estimated that over 100 African Americans were killed. The racial violence of the Red Summer erupted in many other Southern locations as well as in the

¹⁰⁴ *Id.* at 255.

¹⁰⁵ *Red Summer, The Race Riots of 1919*, The National WWI Museum and Memorial, <https://www.theworldwar.org/learn/about-wwi/red-summer>.

¹⁰⁶ See Isabel Wilkerson, *THE WARMTH OF OTHER SUNS* (Random House 2010), telling the story of the Great Migration and the social conditions that motivated southern families to move across America.

North, most notably in Chicago. The presence of racial hostility in the North was partly a reaction of Northern whites to the large influx of African Americans into Northern cities during the Great Migration, though this hostility did not prevent large numbers of African Americans from heading North.¹⁰⁷

The Supreme Court selected a case arising from the Elaine, Arkansas, Massacre of 1919 as the vehicle to reconsider *Frank v. Mangum*. On the night of September 30, 1919, approximately 100 African American sharecroppers attended a meeting of the Progressive Farmers and Household Union of America at a church in Hoop Spur, three miles north of Elaine.¹⁰⁸ The purpose of the meeting was to organize for fair prices from plantation owners for cotton grown by Black farmers. That summer, racial violence against Black communities had erupted by Whites in cities including Washington DC; Chicago, Illinois; Knoxville, Tennessee; and Indianapolis, Indiana. Aware of these dangers, Hoop Spur union leaders posted armed guards outside the church. On the night of September 30, a group of local white men fired shots into the church, and the shots were returned, resulting in the death of W.A. Adkins, a white railroad security officer. Charles Pratt, a white Phillips County deputy sheriff, was also wounded.

The following day, an estimated 500 to 1,000 armed white civilians from surrounding counties in Arkansas and Mississippi, along with 500 National Guard troops from Little Rock, descended upon Elaine to quash what they falsely labeled an “insurrection” against the white residents of Phillips County. The exact death toll has never been fully accounted for, but troops were “under order to shoot to kill any negro who refused to surrender immediately.”¹⁰⁹ Troops and vigilantes indiscriminately massacred an estimated 200 or more Black men, women, and children. Five White people also died—and for that, someone would have to face prosecution.

MOORE ET AL. V. DEMPSEY¹¹⁰

MR. JUSTICE HOLMES delivered the opinion of the Court.

The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form, were only a form, and that the

¹⁰⁷ *African American Heritage: Racial Violence and the Red Summer*, National Archives, <https://www.archives.gov/research/african-americans/wwi/red-summer>.

¹⁰⁸ The description of the Elaine Massacre is paraphrased from *Elaine Massacre of 1919*, ENCYCLOPEDIA OF ARKANSAS, <https://encyclopediaofarkansas.net/entries/elaine-massacre-of-1919-1102/>, Also see Francine Uenuma, *The Massacre of Black Sharecroppers That Led the Supreme Court to Curb the Racial Disparities of the Justice System*, SMITHSONIAN MAGAZINE, August 2, 2018, <https://www.smithsonianmag.com/history/death-hundreds-elaine-massacre-led-supreme-court-take-major-step-toward-equal-justice-african-americans-180969863/>.

¹⁰⁹ Uenuma, *The Massacre*, *supra* n. 27.

¹¹⁰ 261 U.S. 86 (1923).

appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

* * * *

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury -- blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial

enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in Court; we presume the proceedings before the Chancellor to which we shall advert

In *Frank v. Mangum*, 237 U.S. 309, 335, it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by Habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask -- that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer-to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for habeas corpus was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the State held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the Court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

Mr. JUSTICE McREYNOLDS, dissenting.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences.

In *Frank v. Mangum*, 237 U.S. 309, 325, 326, 327, 329, 335, after great consideration a majority of this Court approved the doctrine which should be applied here. The doctrine is right and wholesome. I cannot agree now to put it aside and substitute the views expressed by the minority of the Court in that cause.

Questions and Comments:

1. **Justice Holmes' dissent becomes law:** What explains the different outcomes in *Frank v. Mangum* and *Moore v. Dempsey*? Does the Court's reasoning differ on the substantive meaning of due process, or is another factor at play? What does *Moore v. Dempsey* consider to be the appropriate scope of habeas corpus review? In *Frank v. Mangum*, the Court deferred entirely to the Georgia Supreme Court's denial of relief. What significance does the Court in *Moore v. Dempsey* give to the Arkansas Supreme Court's decision? Is the Georgia court's decision more deserving of deference than the Arkansas Supreme Court's decision, or does another factor explain the different outcomes?
2. **Federal enforcement of federal rights:** Habeas corpus litigation took a different course after the Supreme Court's strong declaration in *Moore v. Dempsey*: "But if the case is that the whole proceeding is a mask, [...] neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." What duty do federal district courts have in cases after *Moore v. Dempsey* where habeas petitioners present facially meritorious claims? This decision opened the federal courthouse door to state prisoners seeking adjudication of constitutional claims. However, the exhaustion requirement of *Ex parte Royall* remained in place, and Frank Moore and his co-defendants appear to have complied with it—the law and facts supporting his due process claim were presented to the Arkansas Supreme Court and rejected. Yet, the Supreme Court required federal courts to adjudicate his claims on the merits and to conduct an evidentiary hearing if necessary to reliably resolve factual disputes. What are the implications of this ruling for future habeas corpus litigation? If you were a federal judge, how do you think this might impact your docket?
3. **Conflicting duties—Comity vs. Fairness:** As noted in the introduction to this chapter,

federal courts must balance competing duties. On one hand, state courts are the final arbiters of state law, so their judgments pronouncing state law are binding on federal courts. On the other hand, federal judges adjudicate cases and controversies arising under the laws, Constitution, and treaties of the United States. Under the Supremacy Clause, those judgments are binding on state courts. But what is a federal court's duty with respect to a state judgment that conflicts with federal law? In *Frank v. Mangum*, the Court clearly prioritized state sovereignty, and in *Moore v. Dempsey* the Court prioritized the enforcement of constitutional rights. This tension remains central to habeas corpus jurisprudence and was a motivating force behind AEDPA. Subsequent decisions will address the weight federal courts give to state court findings of fact and conclusions of law, as well as other complex issues in habeas corpus litigation. For example, what is the federal court's duty when a prisoner asserts a constitutional claim, but the state court refuses to adjudicate it? Is there a difference between a state court's judgment that ignores a federal constitutional claim and one that declines adjudication of the claim because the prisoner violated a local rule of procedure in attempting to assert it?

4. **Federal judges, Article III, and habeas corpus:** One argument against federal review of state criminal judgments is that state judges are equally obligated to uphold constitutional rights. While this is true in principle, are there factors that weigh against deferring entirely to state judges for the protection of constitutional rights? Article III vests the power of judicial review of constitutional questions exclusively in life-tenured federal judges. Might a federal judge have superior expertise on questions of federal law? What about susceptibility to local political pressures? In Georgia and Arkansas, state judges are elected, while federal judges hold lifetime appointments. Is an appointed judge more independent than an elected judge? What judicial system is more reliable in safeguarding a prisoner's constitutional rights? How might state politics have influenced the State court decisions in *Frank v. Mangum* and *Moore v. Dempsey*?¹¹¹

IV. After *Moore v. Dempsey*: Establishing the Contours of the Great Writ

Once the federal courthouse doors were opened to enforce the constitutional rights of state prisoners, the Supreme Court and federal district courts faced a growing body of cognizable claims. In the three decades after *Moore v. Dempsey*, the scope of due process expanded beyond protection from mob-dominated trials to include the right to counsel for indigent defendants in

¹¹¹ See Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808 (2000), arguing that voter "removal of judges perceived as 'soft on crime' has made it clear to those remaining on the bench that upholding the law in capital cases comes at their own peril." A former chief Judge of the Alabama Court of Criminal Appeals admits as much. "If your rulings show that you reverse too many high-profile death penalty cases, you will surely be beaten in your bid for re-election. There are very few judges who can withstand that type of pressure." William M. Bowen, Jr., *An Alabama Judge's Perspective on the Mitigation Function in Capital Cases*, 36 Hofstra L. Rev. 805, 807 (2008).

capital cases¹¹² and in cases involving special circumstances,¹¹³ the right to be free from torture and other coercive interrogation techniques,¹¹⁴ and the prohibition of police conduct that “shocks the conscience.”¹¹⁵ The Supreme Court’s certiorari jurisdiction was the primary mechanism through which new principles of constitutional law were established. But as a practical matter, the nine justices could not ensure that every defendant’s constitutional rights were upheld in every case. Each time the Court handed down a decision recognizing a new right as enforceable against states, the writ of habeas corpus became the primary procedural vehicle for its implementation.

After *Moore* held that even “perfection in the [State court’s] machinery for correction” cannot “prevent this Court from securing to the petitioners their constitutional rights,” lower courts grappled with the implications of this pronouncement on habeas corpus review by U.S. district courts. Several questions emerged: Did access to the Supreme Court’s jurisdiction by writ of certiorari provide adequate redress, such that the Supreme Court’s denial of certiorari ended the litigation? Must the federal district courts hold evidentiary hearings, and if so, under what circumstances? What weight should state court judgments carry? Does the doctrine of *res judicata* apply in habeas proceedings? Even if federal courts are deemed to have special expertise or obligations to adjudicate constitutional issues, should federal courts defer to state court findings of fact? If so, are there circumstances in which federal courts should independently ascertain the facts?

In 1953, the Supreme Court consolidated three habeas corpus cases involving North Carolina prisoners sentenced to death to determine what effect, if any, a denial of certiorari by the U.S. Supreme Court should have on subsequent federal habeas review and what bearing previous state court proceedings should have on the disposition of a federal petition for writ of habeas corpus brought by the same prisoner. The Court also considered several issues encompassed within these questions. Because the Court was splintered on various points, Justice Reed authored the majority opinion on the effect of prior state court decisions, while Justice Frankfurter’s opinion commanded a majority on the significance of the Supreme Court’s denial of certiorari.

BROWN V. ALLEN¹¹⁶

MR. JUSTICE REED delivered the opinion of the Court.

¹¹² Powell v. Alabama, 287 U.S. 45 (1932).

¹¹³ Betts v. Brady, 316 U.S. 455 (1942).

¹¹⁴ Brown v. Mississippi, 297 U.S. 278 (1936), Ashcraft v. Tennessee, 332 U.S. 143 (1944), Watts v. Indiana, 338 U.S. 49 (1949).

¹¹⁵ Rochin v. California, 342 U.S. 165 (1952).

¹¹⁶ 344 U.S. 443 (1953).

* * * *

II. EFFECT OF FORMER PROCEEDINGS

[Justice Reed described the three North Carolina cases before the Court. In Case No. 32, *Brown v. Allen*, the habeas petitioner challenged the racial composition of the grand jury and the voluntariness of his confession. In Case No. 22, *Speller v. Allen*, the petitioner challenged the racial composition of his trial jury. In Case No. 20, *Daniels v. Allen*, the petitioner challenged the racial composition of both the grand jury and petit jury and the voluntariness of his confession. In all three cases, the district court accepted the findings of the State sentencing court with respect to each petitioner's federal claim. and denied the writ. In *Speller v. Allen*, the petitioner also sought and was denied a writ of certiorari to the Supreme Court, and the district court added that the petition could be dismissed "solely in light of the procedural history." The petitioner in *Daniels v. Allen* had also petitioned for certiorari, which was denied. The district court denied habeas corpus relief in all three cases. in *Brown*, the court's decision rested solely on the State court record. In *Speller* and *Daniel*, the district court took further evidence by way of testimony and stipulation.]

A. *Effect of Denial of Certiorari.* -- In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this Court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals. 192 F.2d 763, 768 *et seq.*; *Speller v. Allen*, 192 F.2d 477. . . .When on review of proceedings no *res judicata* or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in *Dorsey v. Gill*, 80 U. S. App. D. C. 9, 148 F.2d 857, see 7 F.R.D. 313, the denial would make the issues *res judicata*. The minority thinks that where a record distinctly presenting a substantial federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action.

B. *Effect of State Court Adjudications.*The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. *A fortiori*, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. *Mooney v. Holohan*, 294 U.S. 103; *Ex parte Hawk*, 321 U.S. 114. In other circumstances the state adjudication carries the weight that federal practice gives to

the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.⁶

The District Court and the Court of Appeals recognized the power of the District Court to reexamine federal constitutional issues even after trial and review by a state and refusal of certiorari in this Court. [...] Where it is made to appear affirmatively, as here, that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials. Whether we affirm or reverse in these cases, therefore, does not depend upon the trial court's consideration of our denial of certiorari but upon the soundness of its decisions upon the issues of alleged violation of federal procedural requirements or of petitioner's constitutional rights by the North Carolina proceedings. We now take up those problems. [citations omitted]

III. RIGHT TO PLENARY HEARING.

Petitioner alleges a procedural error in No. 32, *Brown v. Allen*. As we stated in the preceding subdivision, the writ of habeas corpus was refused on the entire record of the respective state and federal courts. 98 F.Supp. 866. It is petitioner's contention, however, that the District Court committed error when it took no evidence and heard no argument on the federal constitutional issues. He contends he is entitled to a plenary trial of his federal constitutional issues in the District Court. He argues that the Federal District Court, with jurisdiction of the particular habeas corpus, must exercise its judicial power to hear again the controversy notwithstanding prior determinations of substantially identical federal issues by the highest state court, either on direct review of the conviction or by post-conviction remedy, habeas corpus, coram nobis, delayed appeal or otherwise.¹⁰

Jurisdiction over applications for federal habeas corpus is controlled by statute.¹¹ The Code directs a court entertaining an application to award the writ.¹¹⁷¹² But an application is not "entertained" by a mere filing. Liberal as the courts are and should be as to practice in setting out

⁶ As the burden of overturning the conviction rests on the applicant, he should allege specifically, in cases where material, the uncontradicted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights.

¹⁰ See note 15, *infra*.

¹¹ 28 U. S. C. § 2241 (a).

¹² 28 U. S. C. § 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto... "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained... "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief.¹³

The word "entertain" presents difficulties. Its meaning may vary according to its surroundings.¹⁴ In § 2243 and § 2244 we think it means a federal district court's conclusion, after examination of the application with such accompanying papers as the court deems necessary, that a hearing on the merits legal or factual is proper. . . . Even after deciding to entertain the application, the District Court may determine later from the return or otherwise that the hearing is unnecessary.

It is clear by statutory enactment that a federal district court is not required to entertain an application for habeas corpus if it appears that "the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus."¹⁵ The Reviser's Notes to this section in House Report No. 308, 80th Cong., 1st Sess., say that no material change in existing practice is intended. Nothing else indicates that the purpose of Congress was to restrict by the adoption of the Code of 1948 the discretion of the District Court, if it had such discretion before, to entertain petitions from state prisoners which raised the same issues raised in the state courts.¹⁶

Furthermore, in enacting 28 U. S. C. § 2254, dealing with persons in custody under state judgments, Congress made no reference to the power of a federal district court over federal habeas corpus for claimed wrongs previously passed upon by state courts.¹⁷ See discussion at p. 447, *supra*. A federal judge on a habeas corpus application is required to "summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U. S. C. § 2243. This has long

¹³ 28 U. S. C. § 2242. *Darr v. Burford*, *supra*, p. 203. See § 2243, *supra*.

¹⁴ See *Denholm & McKay Co. v. Commissioner*, 132 F.2d 243, 247, and cases cited.

¹⁵ 28 U. S. C. § 2244:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." See S. Rep. No. 1559, 80th Cong., 2d Sess., Amendment No. 45.

¹⁶ See H. R. 4232, 79th Cong., 1st Sess.; H. R. 3214, 80th Cong., 1st Sess.; H. R. 3214, 80th Cong., 2d Sess.; Report of the Judicial Conference of Senior Circuit Judges, 1947, pp. 17-20.

¹⁷ 28 U. S. C. § 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

been the law. R. S. § 761, old 28 U. S. C. § 461. It was under this general rule that this Court approved in *Salinger v. Loisel*, 265 U.S. 224, 231, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge and the second judge is of the opinion that in the light of the record a satisfactory conclusion has been reached.¹¹⁸ That principle is also applicable to state prisoners. *Darr v. Burford*, *supra*, 214-215.

However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. See p. 447, *supra*. *Moore v. Dempsey*, 261 U.S. 86. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. Cf. 28 U. S. C. § 2244. See n. 15, *supra*. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See *White v. Ragen*, 324 U.S. 760, 764.

[The Court then proceeded to examine the merits of each petitioner's claims, and concluded that the record developed in state and federal court established that the constitutional rights of the petitioners had not been infringed.] [citations omitted]

The judgments are affirmed.

MR. JUSTICE FRANKFURTER (concurring)¹¹⁸

* * * *

The course of litigation in these cases and their relevant facts are set out in MR. JUSTICE REED's opinion. This opinion is restricted to the two general questions which must be considered before the Court can pass on the specific situations presented by these cases. The two general problems are these:

I. The legal significance of a denial of certiorari, in a case required to be presented here under the doctrine of *Darr v. Burford*, 339 U.S. 200, when an application for a writ of habeas corpus thereafter comes before a district court.

II. The bearing that the proceedings in the State courts should have on the disposition of such an application in a district court.

¹¹⁸ Justice Frankfurter's reasoning represents the majority opinion on the legal effect of a prior denial of certiorari review. All footnotes intentionally omitted.

I.

If we were to sanction a rule directing the District Courts to give any effect to a denial of certiorari, let alone the effect of *res judicata* which is the practical result of the position of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago.

It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here. Thirty years ago the Court rather sharply reminded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490. We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard. Any departure from this fundamental rule in the type of case we are considering ought to be based on a showing that these denials of certiorari, unlike all the other denials, are in fact the essential equivalents of adjudication on the merits.

Just as there is no ground for holding that our denial is in effect *res judicata*, so equally is there no basis for leaving the District Judge free to decide whether we passed on the merits. For there is more to the story. The District Judge ordinarily knows painfully little of the painfully little we knew. It is a rare case indeed in which the District Court has any information concerning the certiorari proceeding. In over 90% of the cases studied, there were neither papers filed nor allegations made indicating in any way what issue the petition for certiorari presented. In even fewer cases was there any indication that any papers from the State proceedings had been before this Court. It may be said that the District Court can call for the papers that were here. It is seldom done. Moreover, in view of the unlikelihood that such a record could reveal enough for a sound judgment, such a requirement would be futile. But otherwise the District Judge can know only in a negligible number of cases what little we had before us. To say that he is at liberty to decide whether we passed on the merits of a case invites what must, in almost all cases, be idle speculation. We would be inviting a busy federal district judge to rest on our denial and cloak his failure to exercise a judgment in formal compliance with a statement that he can give meaning to something that almost always must to him be meaningless.

To give [a district judge] discretion to interpret the denial of certiorari as a "determination" can so rarely be rationally justified that it is either futile or mischievous to allow such denial to weigh in the District Court's disposition.

The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions. And so we conclude that in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an "expression of opinion on the merits." *Sunal v. Large*, 332 U.S. 174, 181.

II. [The bearing that the proceedings in the State courts should have on the disposition of such an application in a district court.]

[I]t is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.

First. Just as in all other litigation, a prima facie case must be made out by the petitioner. The application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief.

Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court (cf., e. g., *Ex parte Peterson*, 253 U.S. 300), either as an *amicus* or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice.

Second. Failure to exhaust an available State remedy is an obvious ground for denying the application. An attempt must have been made in the State court to present the claim now asserted in the District Court, in compliance with § 2254 of the Judicial Code. *Section 2254* does not, however, require repeated attempts to invoke the same remedy nor more than one attempt where there are alternative remedies. Further, *Darr v. Burford* requires "ordinarily" an application for certiorari to the United States Supreme Court from the State's denial of relief. Cf. *Frisbie v. Collins*, 342 U.S. 519, 520-522.

Third. If the record of the State proceedings is not filed, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. Ordinarily, where the issues are complex, it will be simpler to call for the record, certainly in the first instance. If the issues are simple, or if the record is called for and

is found inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues.

Such flexibility in the inquiry into the facts is necessary. A printed record reflecting orderly procedure through the State courts and showing clearly what has happened in the State courts is rarely available in these cases.¹⁴ The effort and expense of calling for a record and of having a transcript of the proceedings prepared might be more burdensome than a short hearing, especially where the questions of fact are simple and easily settled. It seems an unnecessary deference to State proceedings to say that the District Judge, regardless of the relative expense of one procedure or the other, must always call for everything in the State proceedings. To satisfy requirements of exhaustion he will want to know enough to know whether the claim presented to him was presented in the State courts. But if the claim is either frivolous or, at the other extreme, substantial and if the facts are undisputed, to call for the State record would probably avail little. If the claim is frivolous, the judge should deny the application without more. If the question is one on which he must exercise his legal judgment under the habeas corpus statute,¹⁵ it may be sufficient to have information, perhaps presented by the pleadings of the applicant or of the State, as to the disposition of any disputed questions of fact. It seems unduly rigid to require the District Judge to call for the State record in every case.

Fourth. When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.

Fifth. Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, see *Baumgartner v. United States*, 322 U.S. 665, 670-671, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

For instance, the question whether established primary facts underlying a confession prove that the confession was coerced or voluntary cannot rest on the State decision. See, e. g., *Haley v. Ohio*, 332 U.S. 596, 601 (concurring opinion) and *Stroble v. California*, 343 U.S. 181, 190. Again, *Powell v. Alabama*, 287 U.S. 45, represents the settled rule that due process requires a State court in capital cases to assign counsel to the accused. Consequently, a finding in a State court of the historical fact that the accused had not had counsel could be considered binding by the District Judge, who would issue the writ regardless of what conclusion the State court had reached as to the law on representation by counsel in capital cases. If the conviction was not for a capital offense,

however, *Powell v. Alabama* may not apply, and the considerations adverted to in that opinion as to the necessity of counsel in a particular case to ensure fundamental fairness would be controlling. The District Judge would then look to the State proceedings for whatever light they shed on the historical facts such as the age and intelligence of the accused, his familiarity with legal proceedings, and the kind of issues against which he had to defend himself. Cf. *Johnson v. Zerbst*, 304 U.S. 458. But it is for the federal judge to assess on the basis of such historical facts the fundamental fairness of a conviction without counsel in the circumstances. Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Sixth. A federal district judge may under § 2244 take into consideration a prior denial of relief by a federal court, and in that sense § 2244 is of course applicable to State prisoners. *Section 2244* merely gave statutory form to the practice established by *Salinger v. Loisel*, 265 U.S. 224. What was there decided and what § 2244 now authorizes is that a federal judge, although he may, need not inquire anew into a prior denial of a habeas corpus application in a federal court if "the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

These standards, addressed as they are to the practical situation facing the District Judge, recognize the discretion of judges to give weight to whatever may be relevant in the State proceedings, and yet preserve the full implication of the requirement of Congress that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts. Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus. Such power is in the spirit of our inherited law. It accords with, and is thoroughly regardful of, "the liberty of the subject," from which flows the right in England to go from judge to judge, any one of whose decisions to discharge the prisoner is final.²⁰ Our rule is not so extreme as in England; § 2244 does place some limits on repeating applications to the Federal Courts. But it would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts.

Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the *Supremacy Clause of the Constitution* whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

I yield to no member of this Court in awareness of the enormity of the difficulties of dealing with crime that is the concomitant of our industrialized society. And I am deeply mindful of the fact that the responsibility for this task largely rests with the States. I would not for a moment hamper them in the effective discharge of this responsibility. Equally am I aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal justice. On the other hand, it must not be lost sight of that there are also abuses by the law-enforcing agencies. It does not lessen the mischief that it is due more often to lack of professional competence and want of an austere employment of the awful processes of criminal justice than to willful misconduct. In this connection it is relevant to quote the observations of one of the most esteemed of Attorneys General of the United States, William D. Mitchell:

"Detection and punishment of crime must be effected by strictly lawful methods. Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement. The greater the difficulties of detecting and punishing crime, the greater the temptation to place a strained construction on statutes to supply what may be thought to be more efficient means of enforcing law. The statutory and constitutional rights of all persons must be regarded, and their violation, inadvertent or otherwise, is to be avoided."
(Department of Justice release, for April 8, 1929.)

Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law. See, *e. g.*, *De Meerleer v. Michigan*, 329 U.S. 663, and *Marino v. Ragen*, 332 U.S. 561. Can it really be denied that in both these cases, which antedated *Darr v. Burford*, the United States District Courts sitting in Illinois and Michigan would have been justified in granting the writ of habeas corpus had application been made for it? The tag that an inferior court should not override a superior court would not have been a fit objection against the exercise of the jurisdiction with which the Congress invested the District Courts.

The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.

The significance of the writ for the moral health of our kind of society has been amply attested by all the great commentators, historians and jurists, on our institutions. It has appropriately been characterized by Hallam as "the principal bulwark of English liberty." But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization.

The circumstances and conditions for bringing into action a legal remedy having such potentialities obviously cannot be defined with a particularity appropriate to legal remedies of much more limited scope. To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities. Equally unmindful, however, of the purposes of the writ -- its history and its functions -- would it be to advise the Federal District Courts as to their duty in regard to habeas corpus in terms so ambiguous as in effect to leave their individual judgment unguided. This would leave them free to misuse the writ by being either too lax or too rigid in its employment. The fact that we cannot formulate rules that are absolute or of a definiteness almost mechanically applicable does not discharge us from the duty of trying to be as accurate and specific as the nature of the subject permits.

It is inadmissible to deny the use of the writ merely because a State court has passed on a federal constitutional issue. The discretion of the lower courts must be canalized within banks of standards governing all federal judges alike, so as to mean essentially the same thing to all and to leave only the margin of freedom of movement inevitably entailed by the nature of habeas corpus and the indefinable variety of circumstances which bring it into play.

Questions and Comments:

1. **The battle lines over habeas:** *Brown v. Allen* arguably completed the work that Justice Holmes began in *Moore v. Dempsey*.¹¹⁹ Justice Gorsuch recently criticized the decision stating that after *Brown v. Allen*, "Full-blown constitutional error correction became the order of the day."¹²⁰ Conservative jurists, including Justice Gorsuch, view the writ of habeas corpus as limited historically to circumstances where "the court of conviction lacked jurisdiction over the defendant or his offense."¹²¹ Justice Kagan disagreed, arguing that "Federal courts long before *Brown* extended habeas relief to prisoners held in violation

¹¹⁹ It should also be noted that The Antiterrorism and Effective Death Penalty Act undid much of Justice Holmes' work. See Chapter 8, discussing the numerous ways in which AEDPA constrains the power of federal judges to hear habeas corpus cases and grant relief.

¹²⁰ *Brown v. Davenport*, 142 S. Ct. 1510, 1522 (2021).

¹²¹ *Id.* at 1521.

of the Constitution—even after a final conviction.”¹²² She correctly pointed out that “*Brown* built on decades and decades of history” and that federal courts from the mid-1800s on “granted habeas writs to prisoners, federal and state alike, who on the way to conviction or sentence had suffered serious constitutional harms.”¹²³ Recall that in *Moore v. Dempsey*, Justice Holmes stated, “If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above.” By “loss of jurisdiction,” he clearly referred to the due process violation caused by the mob-dominated courtroom. Justice Sotomayor, in her dissent in *Brown v. Davenport*, pointed to cases reasoning that violating the Constitution was outside the power of the courts, equating constitutional violations with jurisdictional defects:

The majority tries to cram the many habeas decisions belying its position into a narrow jurisdictional “exception,” ante, at 8—but its effort does no more than reveal the peril of looking at history through a 21st-century lens. In the majority’s view, a habeas court could grant relief only “if the court of conviction lacked jurisdiction,” not if it committed “errors in adjudication.” Ante, at 8, 10. But some of the decisions the majority must contend with made no mention at all of the convicting (or sentencing) court’s jurisdiction. See, e.g., *Wells*, 18 How., at 308-315, 59 U.S. 307, 15 L. Ed. 421; *Yick Wo*, 118 U. S., at 365-374, 6 S. Ct. 1064, 30 L. Ed. 220. And those that did so often used the word to mean something different from what it does today. The concept of “jurisdictional defects” (ante, at 9) could at that time include—rather than contrast with—constitutional errors of the kind described above. As one legal historian puts the point: The jurisdictional inquiry was then (though of course not now) often “merits based.” A. Woolhandler, *Demodeling Habeas*, 45 *Stan. L. Rev.* 575, 630 (1993). That is why this Court could say in the late 19th century that a court of conviction has jurisdiction only “when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law.” *In re Bonner*, 151 U. S. 242, 257 (1894). Or why a roughly contemporaneous habeas treatise could state: “[N]o court has jurisdiction to imprison a person or detain him in custody in violation of the Constitution.” 1

¹²² *Id.* at 1531 (Kagan, J., dissenting).

¹²³ *Id.* at 1534.

W. Bailey, *Law of Habeas Corpus and Special Remedies* §25, p. 67 (1913). So the majority’s supposedly narrow jurisdictional exception in fact allowed expansive relief: From the mid-1800s on, federal courts granted habeas writs to prisoners, federal and state alike, who on the way to conviction or sentence had suffered serious constitutional harms.¹²⁴

Habeas corpus scholar Professor James Liebman sides with Justice Kagan; he viewed *Frank v. Mangum* as the only exception to the Court’s interpretation of the habeas remedy as broad as the rights conferred by the Constitution—and *Frank* was quickly overturned by *Moore v. Dempsey*.¹²⁵ However, there is no dispute that *Brown v. Allen* clarified how federal judges should balance respect for state judgments with the constitutional rights of habeas petitioners.

2. **Balancing conflicting duties and resolving disputes of fact:** Justice Frankfurter’s concurring opinion in *Brown* provided useful guidance on how federal courts should balance their duty to respect state judgments with their obligation to enforce constitutional rights. He outlined six principles, which continue to inform habeas litigation: (1) The habeas petitioner must plead a prima facie case. (2) The petitioner must exhaust state remedies. (3) The federal court may call for the record of the state proceedings, and use appropriate procedures, including a hearing if necessary, to decide the issue. (4) Absent a “vital flaw” in the state court process for determining facts, the federal court may accept their findings of fact and deny the writ, although “State adjudication of questions of [federal] law cannot, under the habeas corpus statute, be accepted as binding.” This principle later became the “presumption of correctness” doctrine, which requires federal courts to defer to state court fact findings except in certain circumstances. (5) If a claim involves the legal interpretation of significant facts, the district judge “must exercise his own judgment on this blend of facts and their legal values.” Subsequent decisions refer to these as “mixed questions” of fact and law. (6) A federal district judge may consider a prior denial of relief by a federal court under § 2244, a principle central to the “abuse of the writ” doctrine generally prohibiting the filing of second or successive petitions for habeas corpus petitions except under limited circumstances. These principles, discussed in later units, illustrate the Court’s efforts to define the federal-state relationship in the enforcement of constitutional rights and administration of criminal justice.
3. **The need for federal habeas review:** Justice Frankfurter identified two cases, *DeMeerleer*

¹²⁴ *Brown v. Davenport*, 142 S. Ct. at 1533-34.

¹²⁵ JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, 9-10 (Charlottesville, Va.: The Michie Company, 1988.) Now in its seventh edition, and co-authored with Prof. Randy Hertz, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* is an indispensable addition to any postconviction lawyer’s library.

*v. Michigan*¹²⁶ and *Marino v. Ragen*,¹²⁷ and asked rhetorically: “Can it really be denied that in both these cases, which antedated *Darr v. Burford*, the United States District Courts sitting in Illinois and Michigan would have been justified in granting the writ of habeas corpus had application been made for it?” In *DeMeerleer v. Michigan*, a seventeen-year-old defendant was tried for murder and sentenced to life imprisonment without being advised of his right to counsel. In *Marino v. Ragen*, an eighteen-year-old Italian immigrant who spoke no English waived his right to a jury trial and pleaded guilty without counsel and with the arresting officer acting as his translator throughout the proceedings. Justice Rutledge’s concurring opinion in *Marino* criticized the Illinois courts for allowing Marino to languish in prison for twenty-two years while trying to navigate complex state remedies. He wrote that the Illinois system of postconviction review “is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court.”¹²⁸ Why did Justice Frankfurter single out these cases? What does this suggest about his view of the proper reach of habeas corpus and the role of state courts in protecting constitutional rights?

4. **The state court’s obligation to enforce the Constitution:** A recurring theme in habeas corpus jurisprudence is the obligation of habeas petitioners to exhaust state remedies. Before *Brown*, the Court in *Young v. Reagen* suggested that states were required to provide prisoners with a “clearly defined method by which they may raise claims of denial of federal rights.”¹²⁹ Over a decade after *Brown*, the Court granted certiorari in *Case v. Nebraska* to decide “whether the Fourteenth Amendment requires that the states afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.”¹³⁰ The Nebraska Supreme Court acknowledged that *Case* had presented a *prima facie* constitutional claim, but it ruled that habeas corpus relief was unavailable in Nebraska state courts if the sentencing court “had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.”¹³¹ After certiorari was granted, the Nebraska legislature enacted a postconviction procedure statute that on its face provided a remedy for the denial of federal constitutional rights. Therefore, the Supreme Court vacated the judgement and remanded the case to the Nebraska Supreme Court for reconsideration in light of the new Nebraska statute. Justice Brennan wrote separately to explain his vision of how constitutional rights of state prisoners should be adjudicated in state and federal courts:

The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied.

¹²⁶ 329 U.S. 663 (1947).

¹²⁷ 332 U.S. 561 (1947).

¹²⁸ 332 U.S. at 569 (Rutledge, J., concurring).

¹²⁹ 337 U.S. 235, 239 (1949).

¹³⁰ 381 U.S. 336 (1965).

¹³¹ *Id.* at 337.

Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement of 28 U. S. C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. See *Townsend v. Sain*, 372 U.S. 293, 312-318. Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of *Townsend v. Sain* were met, prove unnecessary.¹³²

5. **The absence of a state remedy:** Suppose that Nebraska had not enacted a postconviction review statute, and the Court had to decide whether states are constitutionally required to provide a procedural mechanism for prisoners to challenge constitutional violations during a criminal prosecution. How should the Court decide the question? What constitutional provision would require the state to adopt such a procedure? What would be the minimum requirements of an adjudicative process? Assume the Court were to answer the question in the negative—that states are not obligated to provide a process to adjudicate a state prisoner’s constitutional claims. What effect would that have on a state prisoner’s access to habeas corpus relief? If there is no state remedy provided, what becomes of the prisoner’s obligation to exhaust state remedies? How should the federal court review such a claim? Is there any reason that a federal court should refrain from reviewing such claims *de novo*? What if the state court procedures were not clearly announced, unduly complex and difficult, or arbitrarily applied? One court observed that in such a situation: “A state may disable its own courts from revisiting criminal convictions without putting a similar damper on federal courts.”¹³³ What did the court mean by this statement?

¹³² *Case v. Nebraska*, 381 U.S. at 344-45 (Brennan, J., concurring).

¹³³ *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990).

V. Habeas Corpus, Executive Action, and Judicial Processes

The cases discussed in the previous sections involve habeas corpus proceedings brought by prisoners in custody after a judgment at the conclusion of a state judicial process. Habeas corpus also serves as a safeguard against arbitrary and unjust executive power. As Justice O'Connor observed, "Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court."¹³⁴ Put another way, habeas corpus is not part of proceedings in a prosecution; rather, "it is a new suit brought by [the petitioner] to enforce a civil right."¹³⁵ Habeas corpus challenges custody, whether imposed by executive or judicial action.

In the following sections, this book will examine circumstances in which state procedures have been deemed adequate or inadequate to bar a federal court from reviewing a prisoner's federal claims. Many courts have wrestled with the question of what minimum procedural protections are required. In contemplating the absolute *floor* of due process—below which a court's procedures cannot fall—consider the Suspension Clause argument that arises from the Camp X-Ray habeas cases, brought by detainees held at Guantanamo Bay. For the first time in history, the Supreme Court found that an act of Congress violated the Suspension Clause when it explicitly prohibited federal courts from exercising habeas corpus jurisdiction over any Guantanamo detainees. The detention at issue arose from the War on Terror, but rather than charge the detainees as criminal defendants, Congress authorized the Military Commissions Act of 2006 (MCA),¹³⁶ which created tribunals empowered to act on hearsay evidence and suspects were prohibited from learning or rebutting evidence against them which was classified. Further, the tribunal could consider and act on statements obtained by torture, as long as the torture preceded the enactment of the Detainee Treatment Act (DTA) of 2005.¹³⁷ Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider... an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." In a landmark ruling, the Supreme Court held that Congress had unconstitutionally suspended the writ of habeas corpus, marking the first time in U.S. history that the Court struck down a congressional act on these grounds.

¹³⁴ Keeney v. Tamayo Reyes, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting).

¹³⁵ *Id.*, quoting *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883).

¹³⁶ Military Commissions Act of 2006, 28 U.S.C. § 2241(e).

¹³⁷ Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739.

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JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

I

Under the Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224, note following 50 U.S.C. § 1541, the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.*, at 518 (plurality opinion of O'Connor, J.); *id.*, at 588-589 (Thomas, J., dissenting). After *Hamdi*, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each

¹³⁸ 553 U.S. 723 (2008).

denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

After *Rasul v. Bush*, 542 U.S. 466 (2004)], petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (DC 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (DC 2005).

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of § 1005 of the DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." 119 Stat. 2742. Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs. *Ibid.*

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-577 (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA, 10 U.S.C. § 948a et seq., which again amended § 2241. The text of the statutory amendment is discussed below. See Part II, *infra*.

Petitioners' cases were consolidated on appeal, and the parties filed supplemental briefs in light of our decision in *Hamdan*. The Court of Appeals' ruling, 375 U.S. App. D.C. 48, 476 F.3d 981 (CADDC 2007), is the subject of our present review and today's decision.

The Court of Appeals concluded that MCA § 7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners' habeas corpus applications, *id.*, at 987; that petitioners are not entitled to the privilege of the writ or the protections of the Suspension Clause, *id.*, at 990-991; and, as a result, that it was unnecessary to consider whether Congress provided an adequate and effective substitute for habeas corpus in the DTA.

We granted certiorari. 551 U.S. 1160 (2007).

II

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U.S.C. § 2241(e) now provides:

"(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on

behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"(2) Except as provided in [§§ 1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA provides the effective date for the amendment of § 2241(e). It states:

"The amendment made by [MCA § 7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." 120 Stat. 2636.

There is little doubt that the effective date provision applies to habeas corpus actions. Those actions, by definition, are cases "which relate to . . . detention." See Black's Law Dictionary 728 (8th ed. 2004) (defining habeas corpus as "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal").

[W]e cannot ignore that the MCA was a direct response to *Hamdan's* holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, see 476 F.3d at 986, n. 2 (citing relevant floor statements); and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2; see Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1509, n. 329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies").

Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme. In a critical exchange with Patrick Henry at the Virginia ratifying convention Edmund Randolph referred to the Suspension Clause as an "exception" to the "power given to Congress to regulate courts." See 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 460-464 (J. Elliot 2d ed. 1876). A resolution passed by the New York ratifying convention made clear its understanding that the Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention. See Resolution of the New York Ratifying Convention (July 26, 1788), in 1 *id.*, at 328 (noting the convention's understanding "[t]hat every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*"). Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government. As he explained in *The Federalist* No. 84:

"[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: 'To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.' And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the bulwark of the British Constitution.'" C. Rossiter ed., p 512 (1961) (quoting 1 Blackstone *136, 4 *id.*, at *438).

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance"

that is itself the surest safeguard of liberty. See *Hamdi*, 542 U.S., at 536 (plurality opinion). The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. See *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"); cf. *In re Jackson*, 15 Mich. 417, 439-440 (1867) (Cooley, J., concurring) ("The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer"). The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

[The Court analyzed cases in which individuals in the custody of the U.S. Military outside of the borders of the United States or in territories of the United States petitioned federal courts for habeas corpus relief, finding cases in which the Court did and did not exercise habeas jurisdiction over alien detainees, *see, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922), finding that "the United States was bound to provide to noncitizen inhabitants "guaranties of certain fundamental personal rights declared in the Constitution," and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), declining to exercise habeas jurisdiction over enemy aliens held in Landsberg Prison in Germany during the Allied Powers' post-war occupation. The Court turned aside the Government's argument that Cuba's retention of *de jure* sovereignty over Guantanamo Bay in the 1903 Lease Agreement with the United States deprived federal courts of jurisdiction over noncitizen detainees. The Court noted, "The United States has maintained complete and uninterrupted control of the bay for over 100 years." The Court concluded, "The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us."]

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. Cf. *Hamdi*, 542 U.S., at 564 (Scalia, J., dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ"). This Court may not impose a *de facto* suspension by abstaining from these controversies. See *Hamdan*, 548 U.S., at 585, n. 16. "[A]bstention is not appropriate in cases... in which the legal challenge 'turn[s] on the status of the persons as to whom the military asserted its power'" (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)). The MCA does not purport to be a formal suspension of

the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals, see DTA § 1005(e), provides an adequate substitute. Congress has granted that court jurisdiction to consider

"(i) whether the status determination of the [CSRT] ... was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742.

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims. See, *e.g.*, Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version codified at 28 U.S.C. § 2241 (2000 ed. and Supp. V) (extending the federal writ to state prisoners)); Cf. *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969) (interpreting the All Writs Act, 28 U.S.C. § 1651, to allow discovery in habeas corpus proceedings); *Peyton v. Rowe*, 391 U.S. 54, 64-65 (1968) (interpreting the then-existing version of § 2241 to allow petitioner to proceed with his habeas corpus action, even though he had not yet begun to serve his sentence).

Unlike in *Hayman* and *Swain*, here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review. Congress' purpose is evident not only from the unequivocal nature of MCA § 7's jurisdiction-stripping language, 28 U.S.C. § 2241(e)(1) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus..."), but also from a comparison of the DTA to the statutes at issue in *Hayman* and *Swain*.

In contrast the DTA's jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful. DTA § 1005(e)(2)(C), 119 Stat. 2742. If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not

have drafted the statute in this manner. Instead, it would have used language similar to what it used in the statutes at issue in *Hayman* and *Swain*. . . Unlike in *Hayman* and *Swain*, moreover, there has been no effort to preserve habeas corpus review as an avenue of last resort. No saving clause exists in either the MCA or the DTA. And MCA § 7 eliminates habeas review for these petitioners.

The differences between the DTA and the habeas statute that would govern in MCA § 7's absence, 28 U.S.C. § 2241 (2000 ed. and Supp. V), are likewise telling. In § 2241 (2000 ed.) Congress confirmed the authority of "any justice" or "circuit judge" to issue the writ. Cf. *Felker*, 518 U.S., at 660-661 (interpreting Title I of AEDPA to not strip from this Court the power to entertain original habeas corpus petitions). That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. See 28 U.S.C. § 2241(b). By granting the Court of Appeals "exclusive" jurisdiction over petitioners' cases, see DTA § 1005(e)(2)(A), 119 Stat. 2742, Congress has foreclosed that option. This choice indicates Congress intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings. The DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one, but, if congressional intent is to be respected, the procedures adopted cannot be as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding. Otherwise there would have been no, or very little, purpose for enacting the DTA.

It is against this background that we must interpret the DTA and assess its adequacy as a substitute for habeas corpus. The present cases thus test the limits of the Suspension Clause in ways that *Hayman* and *Swain* did not.

B

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. *St. Cyr*, 533 U.S., at 302. And the habeas court must have the power to order the conditional release of an individual unlawfully detained --though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See *Ex parte Bollman*, 8 U.S. 75, 4 Cranch 75, 136, 2 L. Ed. 554 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"); R. Hurd, *Treatise on the Right of Personal Liberty, and On the Writ of Habeas Corpus and the Practice Connected With It: With a View of the Law of Extradition of Fugitives* 222 (2d ed. 1876) ("It cannot be denied where 'a probable ground is shown that the party is imprisoned without just cause, and therefore, hath a right to be delivered,' for the writ then becomes a 'writ of right, which may not be denied but ought to be granted to every man that is committed or detained in prison or otherwise restrained of his liberty'"). But see *Chessman v. Teets*, 354 U.S. 156, 165-166 (1957) (remanding in a habeas case for retrial within a "reasonable time"). These are

the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant -- as the parties have and as we do -- or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, see Part IV-C, *supra*, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. See App. to Pet. for Cert. in No. 06-1196, at 156, P F(8) (noting that the detainee can access only the "unclassified portion of the Government Information"). The detainee can confront witnesses that testify during the CSRT proceedings. *Id.*, at 144, Pg(8). But given that there are in effect no limits on the admission of hearsay evidence--the only requirement is that the tribunal deem the evidence "relevant and helpful," *ibid.*, Pg(9)--the detainee's opportunity to question witnesses is likely to be more theoretical than real.

The Government defends the CSRT process, arguing that it was designed to conform to the procedures suggested by the plurality in *Hamdi*. See 542 U.S., at 538. Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place, *id.*, at 525. Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights

the detainee had under the Due Process Clause. True, there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of § 2241 ends and its analysis of the petitioner's due process rights begins. But the Court had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. The closest the plurality came to doing so was in discussing whether, in light of separation-of-powers concerns, § 2241 should be construed to prohibit the District Court from inquiring beyond the affidavit Hamdi's custodian provided in answer to the detainee's habeas petition. The plurality answered this question with an emphatic "no." *Id.*, at 527 (labeling this argument as "extreme"); *id.*, at 535-536.

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. See 2 Chambers, *Course of Lectures on English Law 1767-1773*, at 6 ("Liberty may be violated either by arbitrary imprisonment without law or the appearance of law, or by a lawful magistrate for an unlawful reason"). This is so, as *Hayman* and *Swain* make clear, even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights. Were this not the case, there would have been no reason for the Court to inquire into the adequacy of substitute habeas procedures in *Hayman* and *Swain*. That the prisoners were detained pursuant to the most rigorous proceedings imaginable, a full criminal trial, would have been enough to render any habeas substitute acceptable *per se*.

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See *Bismullah III*, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. See *Townsend v. Sain*, 372 U.S. 293, 313 (1963),

overruled in part by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992). Here that opportunity is constitutionally required.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request "review" of their CSRT determination in the Court of Appeals, DTA § 1005(e)(2)(B)(i), 119 Stat. 2742; but the "Scope of Review" provision confines the Court of Appeals' role to reviewing whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful, § 1005(e)(2)(C), *ibid*. Among these standards is "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . . allowing a rebuttable presumption in favor of the Government's evidence." § 1005(e)(2)(C)(i), *ibid*.

There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

This is not a remote hypothetical. One of the petitioners, Mohamed Nechla, requested at his CSRT hearing that the Government contact his employer. Petitioner claimed the employer would corroborate Nechla's contention he had no affiliation with al Qaeda. Although the CSRT determined this testimony would be relevant, it also found the witness was not reasonably available to testify at the time of the hearing. Petitioner's counsel, however, now represents the witness is available to be heard. See Brief for Boumediene Petitioners 5. If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court. Even under the Court of Appeals' generous construction of the DTA, however, the evidence identified by Nechla would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete. In other contexts, *e.g.*, in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims, similar limitations on the scope of habeas review may be appropriate. See *Williams v. Taylor*, 529 U.S. 420, 436-437 (2000) (noting that § 2254 "does not equate prisoners who exercise diligence in pursuing their claims with those who do not"). In this context, however, where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record.

The Government does not make the alternative argument that the DTA allows for the introduction of previously unavailable exculpatory evidence on appeal. It does point out, however, that if a detainee obtains such evidence, he can request that the Deputy Secretary of Defense convene a new CSRT. See Supp. Brief for Federal Respondents 4. Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus. The Deputy Secretary's determination whether to initiate new proceedings is wholly a discretionary one. And we see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary's decision not to open a new CSRT pursuant to Instruction 5421.1. Congress directed the Secretary of Defense to devise procedures for considering new evidence, see DTA § 1005(a)(3), 119 Stat. 2741; but the detainee has no mechanism for ensuring that those procedures are followed. DTA § 1005(e)(2)(C), *id.* at 2742, makes clear that the Court of Appeals' jurisdiction is "limited to consideration of... whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense ...

and... whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(A), *ibid.*, further narrows the Court of Appeals' jurisdiction to reviewing "any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." The Deputy Secretary's determination whether to convene a new CSRT is not a "status determination of the [CSRT]," much less a "final decision" of that body.

We do not imply DTA review would be a constitutionally sufficient replacement for habeas corpus but for these limitations on the detainee's ability to present exculpatory evidence. For even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so. To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation. Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus.

Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

A

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan*, 548 U.S., at 636 (Breyer, J., concurring) ("[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine--through democratic means--how best to do so").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Lakhdar Boumediene's statements:** U.S. District Judge Richard Leon ordered Lakhdar Boumediene and four other detainees released after finding insufficient evidence to justify

further detention.¹³⁹ Nearly three years after his release, Boumediene wrote about his ordeal in the New York Times:

Had I been brought before a court when I was seized, my children's lives would not have been torn apart, and my family would not have been thrown into poverty. It was only after the United States Supreme Court ordered the government to defend its actions before a federal judge that I was finally able to clear my name and be with them again.¹⁴⁰

2. **The Constitution in extraordinary times:** He made note of the Supreme Court's statement in his case that "the laws and Constitution are designed to survive, and remain in force, in extraordinary times." What parallels exist between Frank, Moore, and Boumediene's cases that make this an important consideration? What made their respective historical contexts "extraordinary"? Will there ever be a time not deemed "extraordinary"?
3. **Territorial jurisdiction of the writ:** Justice Scalia dissented in *Boumediene v. Bush* stating, "The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires."¹⁴¹ Justice Scalia and the majority disagreed over three World War II era habeas cases: one in which habeas jurisdiction was found lacking because the Court had no jurisdiction over Landsberg Prison in Germany,¹⁴² and two others in which the Court upheld the legal authority of a congressionally created military commission to try detainees for war crimes.¹⁴³ Justice Scalia argued that all three cases divested the Court of jurisdiction to hear Boumediene's habeas petition. The majority disagreed, finding that while there was no jurisdiction over Eisentrager's custodian, and because "the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here."¹⁴⁴ The majority further noted that the procedures used to convict and execute General Yamashita for war crimes "have been sharply criticized by Members of this Court."¹⁴⁵ Justice Scalia issued a stark warning: "The Nation will live to regret what the

¹³⁹ Jess Bravin, *Judge Orders 5 Gitmo Inmates Released*, WALL STREET JOURNAL, November 21, 2008, https://web.archive.org/web/20121108220430/http://online.wsj.com/article/SB122719994241444547.html?mod=googlenews_wsj.

¹⁴⁰ Lakhdar Boumediene, *My Guantanamo Nightmare*, THE NEW YORK TIMES, Jan. 7, 2012, <https://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html>

¹⁴¹ *Boumediene*, at 827 (Scalia, J., dissenting).

¹⁴² *Johnson v. Eisentrager*, 339 U.S. 763 (1950),

¹⁴³ *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942),

¹⁴⁴ *Boumediene*, at 786.

¹⁴⁵ *Id.*

Court has done today.”¹⁴⁶ Who is correct? Is extending due process protections dangerous? What are the risks at stake in ensuring—or limiting—access to habeas corpus?

4. **Creating a new forum:** The detention of prisoners at Camp X-Ray at the Guantanamo Bay Naval Base in Cuba has been highly controversial. *Boumediene* set out the procedural history of detainee litigation; after the *Boumediene* decision, the Government’s success rate in the Supreme Court dropped to 0-6 in its legal attempts to authorize detention and trials—possibly even death sentences—outside of the borders and norms of the United States legal system. Why would the Government choose not to try these detainees in a traditional court of law? Would a court martial in a U.S. Military Court of Justice provide an adequate forum for trying these detainees, some of whom were allegedly involved in the bombing of the U.S.S. Cole and the World Trade Center attacks on 9/11? The Government identified one key objective in designing the Combatant Status Review Tribunals—to protect information that could threaten national security. The Government wanted to be able to present evidence that only the judge would hear if disclosure to the accused might jeopardize national security. The same rationale justified restriction of information that the accused might use in defense of accusations. For a comparison between the Government’s treatment of enemy combatants in the War on Terror and in previous armed conflicts, refer to Professor Margulies’ text, *Guantanamo and the Abuse of Presidential Power*.¹⁴⁷ He brilliantly explains how the Law of War and the procedures under the Geneva Conventions were faithfully followed by the United States in previous conflicts, including the Vietnam War, in which detainees included unlawful enemy combatants arrested in a war zone and accused of acts of espionage against United States forces in violation of recognized laws of war.
5. **Due process minima:** *Boumediene* is not a postconviction case; however, it speaks to the minimum due process requirements that must be met for habeas relief to be granted. How does it compare to other cases in this unit? Is it more demanding of the government than the standard applied in *Frank v. Mangum*? How does it compare with habeas review standards applied in *Moore v. Dempsey* and *Brown v. Allen*?
6. **Historical precedent—the internment of persons of Japanese ancestry:** In *Korematsu v. United States*, the Court ruled that Congress had the power to exclude persons of Japanese ancestry from the West Coast while America was at war with Japan.¹⁴⁸ *Korematsu* is often cited alongside *Dred Scott* as the most reprehensible Supreme Court decisions in American history. The Court has since formally repudiated it, stating: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”¹⁴⁹ Fred Korematsu’s loyalty to the United States was not at issue in the case; he was convicted of remaining unlawfully in a restricted area

¹⁴⁶ *Id.*, at 850.

¹⁴⁷ See JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER*, Simon & Schuster (2007).

¹⁴⁸ 323 U.S. 214 (1944).

¹⁴⁹ *Trump v. Hawaii*, 585 U.S. 667, 710 (2021) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

after being directed to leave. The case of Mitsuye Endo, however, has some relevance to the principles at issue in *Boumediene*. Ms. Endo was an American citizen of Japanese ancestry who was removed to an internment camp pursuant to the relocation order. She filed a petition for a writ of habeas corpus seeking release, alleging “that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.”¹⁵⁰ The Government conceded that Ms. Endo was suspected of no crime and was a loyal American citizen. The Court examined the history and context of the relocation order, which was recently deemed unconstitutional, and found that the explicit concern of the executive order relocating persons of Japanese ancestry was to protect the country against acts of espionage. The Court held, “Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character.”¹⁵¹ The Court ruled that “Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.”¹⁵² What common principle underlies *Endo* and *Boumediene*? The Government conceded Ms. Endo’s loyalty. If loyalty had been contested, what would a hearing on that issue look like? Who should bear the burden of proof, and what kind of evidence would be relevant?

7. **Three statutory sources of habeas jurisdiction:** There are three primary statutory provisions governing federal habeas corpus. *Boumediene* involved 28 U.S.C. § 2241, which provides: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”¹⁵³ Compare this to 28 U.S.C. § 2254(a): “The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States,” and 28 U.S.C. § 2254 (a): “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” Unlike § 2254 and § 2254, a petition pursuant to § 2241 is not predicated on a judgment, conviction, or sentence. Why would Congress provide this additional authority? What constitutional rights are available to persons in custody who have not been convicted or sentenced? Are there constitutional rights that would authorize habeas corpus relief for someone in custody pursuant to a judgment of conviction and sentence, but who is not challenging either the conviction or the sentence? In *Weaver v. Graham*, Weaver’s claim was reviewed on

¹⁵⁰ Ex parte Mitsuye Endo, 323 U.S. 283, 294 (1944).

¹⁵¹ *Endo*, 323 U.S. 283 at 303.

¹⁵² *Id.* at 304.

¹⁵³ § 2241(a).

certiorari to the Florida Supreme Court's denial of state habeas corpus relief.¹⁵⁴ In *Ford v. Wainwright*, Ford challenged his execution in a § 2254 petition.¹⁵⁵ Could such claims be brought under § 2241? One of the more common uses of § 2241 is to test the validity of a governor's warrant seeking extradition, although review is limited to a narrow set of issues, as seen in *Michigan v. Doran*.¹⁵⁶ In each of these examples, the petitioner challenged executive action—the administration of a sentence that violates the *Ex Post Facto* Clause, the 8th Amendment, or the Extradition Clause, U.S. Constitution Article IV, § 2, Clause 2. What other circumstances and constitutional rights might authorize habeas corpus review of executive action independent of a judgment and sentence?

VI. Comity, Federalism, and Habeas Corpus

The cases in this unit were selected to highlight the controversies surrounding habeas corpus review of prisoners' constitutional claims in various contexts. *Frank v. Mangum*, *Moore v. Dempsey*, and *Boumediene v. Bush* each involve distinct elements of anti-Semitism, racism, and Islamophobia. Does this strengthen or weaken the justification for habeas corpus review? In *Brown v. Allen*, Justice Frankfurter noted the very low rate of success for habeas petitioners—in the preceding seven years, only 67 out of 3,702 applications were granted. In the preceding four years, only 29 petitions were granted, and only five of those resulted in judgments in favor of release from state penitentiaries. Does this suggest that the writ of habeas corpus is unnecessary? Justice Frankfurter argued that the low success rate was evidence that federal intrusion into state sovereignty is minimal, but he maintained that habeas corpus remained a necessary remedy for those rare cases—such as *Demeerler v. Michigan* and *Marino v. Ragen*—involving egregious violations of constitutional rights that state courts failed to remedy.

Subsequent chapters of this book will examine the federal-state tensions in greater detail. In virtually every case, the courts engage in a delicate balance between their duties under comity and federalism to respect state actions with their duties under federal law to adjudicate and remedy constitutional violations. As the cases in this chapter demonstrate, this balance has implications for both factual and legal decision-making in state and federal courts.

¹⁵⁴ See, e.g., *Weaver v. Graham*, 450 U.S. 24 (1981) (state prisoner challenging parole statute that increased his sentence in violation of the *Ex Post Facto* Clause).

¹⁵⁵ *Ford v. Wainwright*, 477 U.S. 399 (1989) (state prisoner alleged that the execution of an insane person violates the 8th Amendment Cruel & Unusual Punishment Clause).

¹⁵⁶ 439 U.S. 2282 (1978).

CHAPTER 3: BALANCING THE ROLES OF STATE AND FEDERAL COURTS: EXHAUSTION OF STATE REMEDIES

I. State Remedies Generally

The decisions in *Moore v. Dempsey* and *Brown v. Allen* raise important questions about the role of state courts in policing the constitutionality of state criminal convictions. The exhaustion doctrine—which requires habeas petitioners to fairly present the facts and the legal arguments supporting their claims in state court before petitioning a federal court—evolved to help federal courts navigate the delicate balance between their often-conflicting duties: enforcing the Constitution and respecting state sovereignty. The requirement that a habeas petitioner¹⁵⁷ invoke state remedies before petitioning a federal court for relief serves multiple purposes. In addition to respecting the state’s role in the administration of criminal justice, it also conserves limited federal judicial resources. A prisoner who prevails in state court has no need for federal intervention. Federal courts may have greater expertise in federal constitutional law, but state courts are equally obliged to remedy constitutional violations.

This chapter will examine key exhaustion cases that illustrate the interplay between federal and state sovereignty. The doctrine was articulated in *Ex parte Royall*,¹⁵⁸ where the Court held that a habeas petitioner claiming he was convicted under an unconstitutional statute must first pursue available state remedies before seeking federal relief. Virtually every state constitution forbids suspending the writ of habeas corpus, but as *Case v. Nebraska* demonstrated, not all states utilized their habeas corpus jurisdiction to review the constitutionality of criminal judgments. Subsequent chapters will explore the benefits that flow to the states implementing robust postconviction procedures, including the federal courts’ presumption that state court findings of fact are correct. In other circumstances, the state judgment may rest on state procedural grounds that are independent of the federal issue and sufficient to uphold the outcome of the state adjudication. Justice Sandra Day O’Connor described the system of comity and federalism in habeas corpus as a two-way street; the federal court should respect “both the States’ sovereign power to punish offenders and their *good-faith* attempts to honor constitutional rights.”¹⁵⁹

*Williams v. Kaiser*¹⁶⁰ illustrates this two-way street. Williams was sentenced to prison for robbery—without the representation of appointed counsel. At the time of his conviction in the state

¹⁵⁷ The word “prisoner” will often be used in the text to refer to the petitioning party to emphasize that in habeas corpus proceedings, custody is a necessary element of habeas corpus jurisdiction. In some instances, “movant,” “appellant,” “petitioner,” or “applicant” would also be appropriate. See *Corridore v. Washington*, 71 F.4th 491 (6th Cir. 2023), affirming the dismissal of a habeas petition because the petitioner was released from prison, and neither lifetime electronic shackling nor the requirement to register as a sex offender satisfied the “in custody” requirement of 28 U.S.C. § 2254(a). A more in-depth discussion of the custody requirement is set out in Chapter 1 of this book.

¹⁵⁸ 117 U.S. 241 (1886).

¹⁵⁹ *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (emphasis added).

¹⁶⁰ 323 U.S. 471 (1945).

of Missouri, robbery was punishable by death, placing his case within the scope of *Powell v. Alabama*,¹⁶¹ which required counsel be appointed in capital cases. Williams challenged his conviction by filing a habeas corpus petition in the Missouri Supreme Court, which denied his petition for failing to state a claim. The U.S. Supreme Court granted certiorari.

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JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner pleaded guilty to an indictment charging him with robbery by means of a deadly weapon. The Circuit Court of Iron County, Missouri, found him guilty and sentenced him to the state penitentiary, where he is now confined, for a term of fifteen years on May 28, 1940. In April, 1944, he filed a petition for a writ of *habeas corpus* in the Supreme Court of Missouri. After reciting the foregoing facts concerning his conviction he further alleges in his petition:

"Prior to his conviction and sentence, as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty."

And he contends that he was deprived of counsel contrary to the requirements of the *due process clause of the Fourteenth Amendment*. The Supreme Court of Missouri allowed petitioner to proceed *in forma pauperis* but denied the petition for the reason that it "fails to state a cause of action." The case is here on a petition for a writ of certiorari which we granted because of the substantial nature of the constitutional question which is raised.

Missouri has a statute which requires a court on request to assign counsel to a person unable to employ one and who is charged with a felony. Rev. Stat. 1939, § 4003. The Missouri Supreme Court did not indicate the reasons for its denial of the petition beyond the statement that the petition failed to state a cause of action. Whatever the grounds of that decision it is binding on us insofar as state law is concerned. *Smith v. O'Grady*, 312 U.S. 329. But the right to counsel in cases of this type is a right protected by the *Fourteenth Amendment of the federal Constitution*. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. *Powell v. Alabama*, 287 U.S. 45, 59-60. And Missouri has not suggested in the argument before this Court that it provides a remedy other than *habeas corpus* for release from a confinement under a judgment of conviction obtained as a result of an unconstitutional procedure. Neither in the briefs nor in oral argument did Missouri suggest that its *habeas corpus* procedure (see Rev. Stat. 1939, §§ 1590, 1621, 1623) is not available in this situation. [footnote omitted]

¹⁶¹ 287 U.S. 45 (1932).

The petition for *habeas corpus* was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. *Smith v. O'Grady, supra*. Read in that light we think the petition makes a *prima facie* showing of denial of the constitutional right. The Missouri Supreme Court has ruled that when a defendant requests counsel it will be "presumed," in absence of evidence to the contrary (*State v. Steelman, 318 Mo. 628, 631, 300 S. W. 743*), that he was "without counsel and that he lacked funds to employ them." *State v. Williams, 320 Mo. 296, 306, 6 S. W. 2d 915*. We indulge the same presumption. Certainly it may be reasonably inferred from that request and from the further allegation that as a result of the court's failure to appoint counsel petitioner was "compelled to plead guilty," that he was unable to employ counsel to present his defense because he was without funds. Like other judgments, a judgment based on a plea of guilty is not of course to be lightly impeached in collateral proceedings. See *Johnson v. Zerbst, 304 U.S. 458, 468-469*. But a plea of guilty to a capital offense made by one who asked for counsel but could not obtain one and who was "incapable adequately of making his own defense" stands on a different footing. Robbery in the first degree (Rev. Stat. 1939, § 4450) by means of a deadly weapon is a capital offense in Missouri. Rev. Stat. 1939, § 4453.

Powell v. Alabama, supra, p. 71, held that at least in capital offenses "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." It follows from our construction of this petition that if the allegations are taken as true, petitioner was denied due process of law. It may well be that these allegations will turn out to be specious and unfounded. But they are sufficient under the rule of *Powell v. Alabama* to establish a deprivation of due process of law if their verity is determined. See *Cochran v. Kansas, 316 U.S. 255*. Cf. *Walker v. Johnston, 312 U.S. 275*.

As we have said, Missouri does not claim that *habeas corpus* is not available in this type of case or that under Missouri law there is some procedure other than *habeas corpus* available to petitioner in which he may challenge the judgment of conviction on constitutional grounds. Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to *habeas corpus* in this type of case. *Smith v. O'Grady, supra*. Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect.

* * * *

The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute. But as we have seen, the allegations in the petition seem sufficient under the rule laid down by the Supreme Court of Missouri in *State v. Williams, supra*. And Missouri suggests no other state ground which might be the basis of the decision.¹⁶² That is to say, the only state grounds which have been advanced in support of the decision below appear to be insubstantial. We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intendment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial. If perchance the Supreme Court of Missouri meant that some reason of state law precludes a decision of the federal question, that question is not foreclosed by this decision. Cf. *State Tax Commission v. Van Cott*, 306 U.S. 511; *Minnesota v. National Tea Co.*, 309 U.S. 551. But on the present state of the record before us, we do not see what more petitioner need do to establish the federal right on which his petition is based.

Reversed.

Questions and Comments:

1. **The Missouri Court's duty:** What should happen on remand to the Missouri Supreme Court? What is the broader impact of this ruling on state courts? Does it impose new obligations? The Missouri Supreme Court is the final arbiter of Missouri law. What if the court simply ruled that Missouri habeas corpus is not an appropriate procedure for litigating the constitutionality of criminal judgments?
2. **The scope of Missouri habeas corpus:** How important is it that the Court noted that Missouri law authorized prisoners in Williams' circumstances to use the writ of habeas corpus to challenge constitutional violations in the imposition of a conviction or sentence? Is the state required to provide a postconviction procedure? That was the central issue in *Case v. Nebraska*, but it was rendered moot when Nebraska enacted a postconviction procedure.
3. **Missouri's postconviction rule:** After *Williams v. Kaiser*, Missouri adopted Missouri

¹⁶² [Court's footnote 7] It is stated that the petition does not allege facts which show that petitioner was denied a fair trial, that he was ignorant, that he was innocent, or that the court was prejudiced. But it is not apparent how the addition of any such allegations to the petition would be relevant to petitioner's cause of action based on the constitutional right to counsel. We are not referred to any Missouri law which would make them relevant.

Rule 27.26, which was widely praised as a “model of fairness.” Unlike habeas corpus, which is filed and litigated in the jurisdiction where the prison is held, Rule 27.26 directed postconviction cases back to the sentencing court. The original version of Rule 27.26, titled Rule 29.26 and adopted in 1959, consisted of a single paragraph:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment within the purview of Rules 28.08 and 28.04.¹⁶³

Many states modeled their postconviction rules on Rule 27.26—there was no time limit for filing the motion; the leave to amend the motion was liberally granted; it provided for evidentiary hearings where necessary to resolve the claim; and it allowed for a second or successive motion to be filed upon a showing of good cause. In 1973, the Missouri Supreme Court, in *Fields v. State*, required the appointment of counsel for all indigent defendants filing *pro se* Rule 27.26 motions.¹⁶⁴ Missouri has since repealed and replaced the rule with the much more restrictive Rule 24.035, governing challenges to a conviction after a guilty

¹⁶³ Mo. Sup. Ct. R. 27.26, RSMo (1959).

¹⁶⁴ 572 S.W.2d 477 (Mo. 1978).

plea, and Rule 29.15, governing challenges to convictions after trial. These new rules will be discussed in a later chapter. What are the advantages or disadvantages of allowing motions to be freely amended? Why might it be necessary to file a second or third postconviction motion? Should a case be reopened to consider newly discovered evidence? What if the Supreme Court establishes a new right or clarifies an existing right after a prisoner has already unsuccessfully litigated a Rule 27.26 motion to completion in Missouri courts? These questions are often at the heart of exhaustion issues in habeas litigation.

What happens if a prisoner discovers new claims, new evidence, or a change in the law after state court proceedings have concluded? This is a common occurrence in the criminal justice system, particularly in states with overburdened public defender systems. If a claim has never been presented in state court, is it considered exhausted? The answer to that question depends on whether the state postconviction procedures allow for the litigation of such claims. If a successive postconviction motion is arguably allowed in state court, the prisoner would have to return to state court to exhaust the claim. If no viable state remedy exists, the claim is considered exhausted, but forfeiture rules sometimes flow from the failure to present the claim properly in State court. The doctrine of procedural bar will be discussed in the next chapter.

Three years after *Williams v. Kaiser*, Congress amended the Habeas Corpus Act to require petitioners to exhaust state remedies before asking a federal court for habeas corpus relief:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.¹⁶⁵

¹⁶⁵ 28 U. S. C. § 2254 (1948). Note that this section was modified by the Antiterrorism and Effective Death Penalty Act as follows:

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

The legislative exhaustion requirement was consistent with Supreme Court decisions. Note that the statute preserved the mutual obligations of state and federal courts, requiring prisoners to present their claims first to the state courts, unless the state provided no procedural mechanism for a remedy, or the state’s process was “ineffective to protect the rights of the prisoner.”

II. The Exhaustion Requirement in Action

Williams v. Kaiser demonstrates important aspects of the relationship between federal and state adjudication of the same petitioner’s constitutional claims in state and federal court. The Court looked for state law grounds for the decision, or the habeas petitioner’s violations of well-established procedures for raising his claim and, finding none, remanded the case for adjudication because the petitioner pled a sufficient claim for relief. In the following years, the Exhaustion Requirement continued to evolve as the Court began enforcing additional provisions of the Bill of Rights on behalf of state prisoners. *Fay v. Noia*,¹⁶⁶ discussed in more detail in Chapter 3, provides a helpful overview of the Exhaustion Doctrine. Noia pled guilty in his New York criminal prosecution for murder to avoid the death penalty. However, his co-defendants successfully challenged their prosecutions because the police used constitutionally impermissible interrogation methods to obtain their confessions, and they were released. The same methods were used to obtain Noia’s confession, but the State of New York alleged that by failing to appeal his guilty plea, Noia waived the error.¹⁶⁷ Before addressing the waiver issue, the Supreme Court determined whether the exhaustion doctrine precluded consideration of his claims.

FAY V. NOIA

In . . . extending the habeas corpus power of the federal courts evidently to what was conceived to be its constitutional limit, the Act of February 5, 1867, clearly enough portended difficult problems concerning the relationship of the state and federal courts in the area of criminal administration. Such problems were not slow to mature. Only eight years after passage of the Act, Mr. Justice Bradley, sitting as Circuit Justice, held that a convicted state prisoner who had not sought any state appellate or collateral remedies could nevertheless win immediate release on federal habeas if he proved the unconstitutionality of his conviction; although the judgment was

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(b). The purpose and implications of the AEDPA exhaustion provisions are discussed in Chapter 8.

¹⁶⁶ 372 U.S. 391

¹⁶⁷ *Id.* at 396-398.

not final within the state court system, the federal court had the power to inquire into the legality of the prisoner's detention. *Ex parte Bridges, supra*. Accord, *Ex parte McCready, supra*. This holding flowed inexorably from the clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants, and it was explicitly approved by the full Court in *Ex parte Royall, 117 U.S. 241, 253*, a case in which habeas had been sought in advance of trial. The Court held that even in such a case the federal courts had the *power* to discharge a state prisoner restrained in violation of the Federal Constitution, see *117 U.S., at 245, 250-251*, but that ordinarily the federal court should stay its hand on habeas pending completion of the state court proceedings. This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the state court might decide. As well stated in a later case:

While the Federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the Federal Constitution or laws, . . . the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with the Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the Federal court will remain unimpaired."¹⁶⁸

These decisions fashioned a doctrine of abstention, whereby full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings. Thus the Court has frequently held that application for a writ of habeas corpus should have been denied "without prejudice to a renewal of the same after the accused had availed himself of such remedies as the laws of the State afforded . . ." *Minnesota v. Brundage, 180 U.S. 499, 500-501*. See also *Ex parte Royall, supra, at 254*. With refinements, this doctrine requiring the exhaustion of state remedies is now codified in *28 U. S. C. § 2254*. [note 29 omitted] But its rationale has not changed: "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its

¹⁶⁸ [Court's footnote 28] *Cook v. Hart, 146 U.S. 183, 194-195*. See, e. g., *Ex parte Fonda, 117 U.S. 516*; *In re Wood, 140 U.S. 278*; *Pepke v. Cronan, 155 U.S. 100*; *In re Frederich, 149 U.S. 70*; *Whitten v. Tomlinson, 160 U.S. 231*; *Reid v. Jones, 187 U.S. 153*; *United States ex rel. Drury v. Lewis, 200 U.S. 1*; *Pettibone v. Nichols, 203 U.S. 192*; *Ex parte Simon, 208 U.S. 144*; *Johnson v. Hoy, 227 U.S. 245*.

jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U.S. 200, 204. The rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power." *Bowen v. Johnston*, 306 U.S. 19, 27. Cf. *Stack v. Boyle*, 342 U.S. 1; *Frisbie v. Collins*, 342 U.S. 519; *Douglas v. Green*, 363 U.S. 192.

The reasoning of *Ex parte Royall* and its progeny suggested that after the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent. And so this Court has consistently held, save only in *Frank v. Mangum*, 237 U.S. 309.

The Court in *Faye v. Noia* ultimately decided that Noia did not fail to exhaust his state remedies, and that he did not default his right to relief by failing to appeal his guilty plea. The Court made two additional observations regarding exhaustion. First, the issue for the federal court is whether there is a *presently available* state remedy.¹⁶⁹ Further, the exhaustion doctrine requires only that the petitioner invoke "stage[s] of the normal appellate process," and that certiorari review in the Supreme Court "does not provide a normal appellate channel in any sense comparable to the writ of error."¹⁷⁰

In *Rose v. Lundy*,¹⁷¹ a federal district judge reviewed a habeas petition that included both exhausted claims—those previously litigated in State court—and unexhausted claims that had not been presented in state proceedings. The judge determined that Lundy's trial had been fundamentally unfair and granted relief on multiple claims, including claims not exhausted. The Supreme Court granted certiorari and ruled that the district court erred in adjudicating Lundy's unexhausted claims.

¹⁶⁹“Nothing in the *Hawk* opinion points to past exhaustion. . . . There is thus no warrant for attributing to Congress, in the teeth of the language of § 2254, intent to work a radical innovation in the law of habeas corpus. We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court.” *Fay v. Noia*, at 434-435.

¹⁷⁰ *Id.* at 436.

¹⁷¹ 455 U.S. 509 (1982).

ROSE V. LUNDY

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III-C.

In this case we consider whether the exhaustion rule in *28 U. S. C. §§ 2254(b), (c)* requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.¹⁷² After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for postconviction relief in the Knox County Criminal Court.

1

The respondent subsequently filed a petition in Federal District Court for a writ of habeas corpus under *28 U. S. C. § 2254*, alleging four grounds for relief: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. After reviewing the state-court records, however, the District Court concluded that it could not consider claims three and four "in the constitutional framework" because the respondent had not exhausted his state remedies for those grounds. The court nevertheless stated that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."¹⁷³

Apparently in an effort to assess the "atmosphere" of the trial, the District Court reviewed the state trial transcript and identified 10 instances of prosecutorial misconduct, only 5 of which

¹⁷² [Court's footnote 1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from 5 to 15 years on the crime against nature charge.

¹⁷³ [Court's footnote 2] The Tennessee Criminal Court of Appeals had ruled specifically on grounds one and two, holding that although the trial court erred in restricting cross-examination of the victim and the prosecuting attorney improperly alluded to the respondent's violent nature, the respondent was not prejudiced by these errors. *Lundy v. State*, 521 S. W. 2d 591, 595-596 (1974).

the respondent had raised before the state courts.¹⁷⁴ In addition, although purportedly not ruling on the respondent's fourth ground for relief -- that the state trial judge improperly charged that "every witness is presumed to swear the truth" -- the court nonetheless held that the jury instruction, coupled with both the restriction of counsel's cross-examination of the victim and the prosecutor's "personal testimony" on the weight of the State's evidence, see n. 3, *supra*, violated the respondent's right to a fair trial. In conclusion, the District Court stated:

"Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

"...Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his *Sixth Amendment* rights were violated and the jury poisoned by the prosecutorial misconduct."¹⁷⁵

¹⁷⁴ [Court's footnote 3] In particular, the District Court found that the prosecutor improperly:

- (1) misrepresented that the defense attorney was guilty of illegal and unethical misconduct in interviewing the victim before trial;
- (2) "testified" that the victim was telling the truth on the stand;
- (3) stated his view of the proper method for the defense attorney to interview the victim;
- (4) misrepresented the law regarding interviewing government witnesses;
- (5) misrepresented that the victim had a right for both private counsel and the prosecutor to be present when interviewed by the defense counsel;
- (6) represented that because an attorney was not present, the defense counsel's conduct was inexcusable;
- (7) represented that he could validly file a grievance with the Bar Association on the basis of the defense counsel's conduct;
- (8) objected to defense counsel's cross-examination of the victim;
- (9) commented that the defendant had a violent nature;
- (10) gave his personal evaluation of the State's proof.

The petitioner concedes that the state appellate court considered instances 1, 3, 4, 5, and 9, but states without contradiction that the respondent did not object to the prosecutor's statement that the victim was telling the truth (#2) or to any of the several instances where the prosecutor, in summation, gave his opinion on the weight of the evidence (#10). The petitioner also notes that the conduct identified in #6 and #7 did not occur in front of the jury, and that the conduct in #8, which was only an objection to cross-examination, can hardly be labeled as misconduct.

¹⁷⁵ [Court's footnote 4] The court granted the writ and ordered the respondent discharged from custody unless within 90 days the State initiated steps to bring about a new trial.

In short, the District Court considered several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the respondent's habeas petition.

The Sixth Circuit affirmed the judgment of the District Court, *624 F.2d 1100 (1980)*, concluding in an unreported order that the court properly found that the respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct." The court specifically rejected the state's argument that the District Court should have dismissed the petition because it included both exhausted and unexhausted claims.

II

The petitioner urges this Court to apply a "total exhaustion" rule requiring district courts to dismiss every habeas corpus petition that contains both exhausted and unexhausted claims. [footnote omitted] The petitioner argues at length that such a rule furthers the policy of comity underlying the exhaustion doctrine because it gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings. The petitioner also believes that uniform adherence to a total exhaustion rule reduces the amount of piecemeal habeas litigation.

Under the petitioner's approach, a district court would dismiss a petition containing both exhausted and unexhausted claims, giving the prisoner the choice of returning to state court to litigate his unexhausted claims, or of proceeding with only his exhausted claims in federal court. The petitioner believes that a prisoner would be reluctant to choose the latter route since a district court could, in appropriate circumstances under *Habeas Corpus Rule 9(b)*, dismiss subsequent federal habeas petitions as an abuse of the writ.¹⁷⁶ In other words, if the prisoner amended the petition to delete the unexhausted claims or immediately refiled in federal court a petition alleging only his exhausted claims, he could lose the opportunity to litigate his presently unexhausted claims in federal court. This argument is addressed in Part III-C of this opinion.

In order to evaluate the merits of the petitioner's arguments, we turn to the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine.

III

A

¹⁷⁶ [Court's footnote 6] Rule 9(b) provides that:

"[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

The exhaustion doctrine existed long before its codification by Congress in 1948. In *Ex parte Royall*, 117 U.S. 241, 251 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act:

"The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. See, e. g., *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-19 (1925) (holding that the lower court should have dismissed the petition because none of the questions had been raised in the state courts. "In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted"). In *Ex parte Hawk*, 321 U.S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist."¹⁷⁷ None of these cases, however, specifically applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In 1948, Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion. [footnote 8 omitted] Section 2254,¹⁷⁸ however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise "the question presented," but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of § 2254, as

¹⁷⁷ [Court's footnote 7] The Court also made clear, however, that the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." 321 U.S., at 118.

¹⁷⁸ [Court's footnote 9] Section 2254 in part provides:

"(b) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

well as the pre-1948 cases, contains no reference to the problem of mixed petitions, [footnote 10 omitted] in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope.

B

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973). [footnote 12 omitted] Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S., at 251. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U.S. 200, 204 (1950). See *Duckworth v. Serrano*, 454 U.S. 1, 2 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. See *Braden v. 30th Judicial Circuit Court of Kentucky*, *supra*, at 490. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U.S.C. § 2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

The facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims. In his opinion, the District Court Judge wrote that "there is such mixture of violations that one cannot be separated from and considered independently of the others." Because the two unexhausted claims for relief were intertwined with the exhausted ones, the judge apparently considered all of the claims in ruling on the petition. Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

C

The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. See *Braden v. 30th Judicial Circuit Court of Kentucky*, *supra*, at 490. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U. S. C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." See n. 6, *supra*. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders v. United States*, 373 U.S. 1, 18 (1963), where this Court stated:

"[If] a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." [Footnote 13 omitted]

See Advisory Committee Note to *Habeas Corpus Rule 9(b)*, 28 U. S. C., p. 273. Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

IV

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. [Footnote 14 omitted] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court (Parts I, II, III-A, III-B, and IV, *ante*), but I do not join in the opinion of the plurality (Part III-C, *ante*). I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. §§ 2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 510. But I disagree with the plurality's view, in Part III-C, that a habeas petitioner must "risk forfeiting consideration of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. *Ante*, at 520, 521. The issue of *Rule 9(b)*'s proper application to successive petitions brought as the result of our decision today is not before us -- it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event, I disagree with the plurality's proposed disposition of the issue. In my view, *Rule 9(b)* cannot be read to permit dismissal of a subsequent petition under the circumstances described in the plurality's opinion.

I conclude that when a prisoner's original, "mixed" habeas petition is dismissed without any examination of its claims on the merits, and when the prisoner later brings a second petition based on the previously unexhausted claims that had earlier been refused a hearing, then the remedy of dismissal for "abuse of the writ" cannot be employed against that second petition, absent unusual factual circumstances truly suggesting abuse. This conclusion is to my mind inescapably compelled not only by *Sanders*, but also by the Advisory Committee explanation of the Rule, and by Congress' subsequent incorporation of the higher, "abusive" standard into the Rule. The plurality's conclusion, in contrast, has no support whatever from any of these sources. Nor, of course, does it have the support of a majority of the Court.

A. "Mixed" Petitions

Rose v. Lundy refers to a petition containing both exhausted and unexhausted claims as a "mixed" petition and forbids federal courts from adjudicating such petitions. The Court identified two options available to federal judges reviewing a mixed petition:

- a. the judge may dismiss the unexhausted claims and proceed to hear the exhausted claims only, or
- b. (2) the judge may dismiss the petition in its entirety, requiring petitioners to return to state court to exhaust all claims.

Note that the Court emphasized that the choice between these options belongs to the habeas petitioner. Rather than accepting this Hobson's choice, habeas petitioners proposed district courts a third option: hold the federal habeas proceedings in abeyance while the petitioner exhausts state remedies. This approach allows the petition to remain on file, keeps stays of execution in place, and the petition acts as a placeholder while the petitioner returns to state court to exhaust state remedies. *Rhines v. Weber*,¹⁷⁹ discussed below, authorizes federal habeas courts to use this procedure if the petitioner can show good cause for it. Stay-and-abeyance orders became commonplace in the wake of *Rose v. Lundy*.

If the judge takes the first option and dismisses unexhausted claims, what happens to those claims? There are two potential barriers that might permanently bar the prisoner from federal review of unexhausted claims. If a prisoner is unsuccessful on exhausted claims, the abuse of the writ doctrine (discussed in Chapter 4) prohibits petitioners, absent exceptional circumstances, from filing a second or successive habeas petition. Thus, those dismissed claims may be abandoned forever. The second barrier is the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which provides that “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court...”¹⁸⁰ The statute of limitations could bar the prisoner from ever having his dismissed claims heard in federal court. The dismissal of unexhausted claims could forever bar those claims from federal review.

Given the dire consequences of the district court exercising either option, courts generally defer to the petitioner's decision on which option to take. These decisions become exceedingly consequential and more complex if the prisoner is under a sentence of death. The elegantly simple stay-and-abeyance option described in Comment 1 became common but controversial in death penalty litigation because it paused federal proceedings while the death row prisoner litigated additional issues in state court. In some cases, this process took months or even years. Occasionally, a habeas petitioner prevails in state court, rendering the federal habeas case moot and preserving scarce federal judicial resources.¹⁸¹

The Antiterrorism and Effective Death Penalty Act (AEDPA) gave federal courts an additional tool to reduce delays in resolving habeas corpus petitions. 28 U.S.C. § 2254(b)(2) provides: “An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” While

¹⁷⁹ 544 U.S. 269 (2005).

¹⁸⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). In *Duncan v. Walker*, 533 U.S. 167 (2001) the Supreme Court ruled that the federal statute of limitations is tolled only while properly filed state postconviction action is pending. It does not pause upon the filing of a federal habeas petition. See also *Artuz v. Bennett*, 531 U.S. 4 (2000), interpreting the provision tolling the statute of limitations during the time that a “properly filed” postconviction action is pending in State court.

¹⁸¹ See e.g., *Simpson v. Camper*, 927 F.2d 392 (8th Cir. 1991) (dismissed as moot); *Simpson v. Camper*, 974 F.2d 1030 (1992).

Congress likely intended this provision as a shortcut to the exhaustion of state remedies avoiding the stay-and-abeyance procedure, can this provision prevent a habeas petitioner from returning to state court and invoking state remedies without the permission of the federal court? The petitioner would be simultaneously litigating on two fronts, but what if the prisoner receives a hearing and rules on the merits presented to the state court? Should the federal court revisit its earlier denial of relief?

B. Problems and Issues of Potential Waiver

Pre-AEDPA, lawyers representing the state often “waived” the exhaustion requirement in attempts to hasten habeas litigation in death cases, leading to an extensive body of law on the appropriateness of accepting such a waiver. Some courts held that the values of comity and federalism protected by the exhaustion requirement were too valuable to waived, even by agreement of the parties as in *Batchelor v. Cupp*,¹⁸² or even with approval of a state supreme court as in *Jennison v. Goldsmith*.¹⁸³ *Jennison* rejected a habeas petitioner’s reliance on the Arizona Supreme Court’s decision in *Arizona v. Shattuck*,¹⁸⁴ which stated that counsel need not petition the Supreme Court for review of a decision by an Arizona Court of Appeals because “once the defendant has been given the appeal to which he has a right, state remedies have been exhausted.”¹⁸⁵ The Ninth Circuit Court of Appeals disagreed: “While *Jennison* does not have an appeal as of right to the Arizona Supreme Court... he does have the right to raise before the Arizona Supreme Court the issue he seeks to raise in federal habeas,” and therefore, discretionary review by the Supreme Court “is nevertheless a state remedy that remains available to *Jennison*.”¹⁸⁶ Other courts were less stringent by allowing the exhaustion requirement to be waived.¹⁸⁷ In *Velasquez v. Florida Department of Corrections*, the court found that a district court abused its discretion when it declined to accept the Attorney General’s waiver of exhaustion.¹⁸⁸ Other courts ruled that a state could waive exhaustion through litigation conduct,¹⁸⁹ recognizing that the state had implicitly waived exhaustion by conceding the merits of the petitioner’s claim for relief.¹⁹⁰ Additionally, in *D’Ambrosio v. Bagley*, the warden appealed an order granting habeas corpus relief on a claim that the state withheld exculpatory evidence, and the warden waived the exhaustion

¹⁸² 693 F.2d 859, 862-63 (9th Cir. 1982).

¹⁸³ 940 F.2d 1308, 1310 (9th Cir. 1991).

¹⁸⁴ 140 Ariz. 582, 684 P.2d 154, 157 (1984).

¹⁸⁵ *Id.* at 157.

¹⁸⁶ *Jennison*, 940 F.2d at 1310.

¹⁸⁷ *See, e.g.*, *Velasquez v. Fla. Dept. of Corrections*, 827 F.3d 964 (11th Cir. 2016).

¹⁸⁸ *Id.*

¹⁸⁹ *Accord*, *Dickens v. Armontrout*, 944 F.2d 461 (8th Cir. 1991); *Felder v. Estelle*, 693 F.2d 549 (5th Cir. 1982).

¹⁹⁰ *See, e.g.*, *Sharrieff*, 574 F.3d 225 (3rd Cir. 2009).

defense by waiting until the case was on appeal to assert it.¹⁹¹ In *Granberry v. Greer*, the Court ruled that the state could forfeit its defense of exhaustion by simply failing to assert it.¹⁹² The Court also ruled that the district court has the discretion to accept or reject the state’s express waiver of exhaustion.¹⁹³ As noted in Comment 5, AEDPA now allows a federal court to deny—not grant—an unexhausted claim. Additionally, 28 U.S.C. § 2254(c) legislatively overturns *Granberry v. Greer* stating: “A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.”¹⁹⁴

C. Complete Exhaustion

In *O’Sullivan v. Boerckel*, the Supreme Court held that prisoners must invoke discretionary review in a state’s highest court as part of their obligation to exhaust state remedies “when that review is part of the ordinary appellate review procedure in the State.”¹⁹⁵ The Court conceded, “Boerckel may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine.”¹⁹⁶ However, the Court provided an opt-out mechanism for the requirement that prisoners seek review in the state’s highest court, noting “that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable.”¹⁹⁷ Because Boerckel did not seek discretionary review in the Illinois Supreme Court, the Court concluded that “Boerckel ha[d] procedurally defaulted his claims.”¹⁹⁸ Justice Souter wrote separately to explain his understanding of the Court’s ruling:

In construing the exhaustion requirement, “we have . . . held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past.” *Ante*, at 6 (citing *Wilwording v. Swenson*, 404 U.S. 249, 249-250 (1971) (*per curiam*)). I understand that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide

¹⁹¹ D’Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2007)

¹⁹² 481 U.S. 129 (1987).

¹⁹³ Thompson v. Wainwright, 714 F.2d 1495 (1983).

¹⁹⁴ See *Granberry*, 481 U.S. 129.

¹⁹⁵ O’Sullivan v. Boerckel, 526 U.S. 838, 847 (1999).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 848.

relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion. It is not obvious that either comity or precedent requires otherwise.¹⁹⁹

The *Wilwording* decision cited by Justice Souter followed the long-established rule that a prisoner is obligated to invoke only non-futile state remedies. Justice Stevens dissented, stating “it should be enough to avoid waiving a claim that a state prisoner in a state like Illinois raised that claim at trial and in his appeal as of right.”²⁰⁰ Stevens argued that the Court was wrong to view the case as an exhaustion issue; when Boerckel filed his habeas petition, he could not have filed an application asking the Illinois Supreme Court to review his claims. Therefore, the claim was exhausted because there was no state remedy available to him. He further stated, “The presence or absence of exhaustion, in sum, tells us nothing about whether a prisoner has defaulted his constitutional claims.”²⁰¹ Justice Stevens’ real issue was whether Boerckel waived the claims at issue. He found that Boerckel did not “waive” his constitutional claims because he did what the exhaustion doctrine required of him: “The question we must ask is whether respondent has given the State a fair opportunity to pass on these claims.”²⁰² Justice Stevens determined that Boerckel had.

Justice Breyer, joined by Justices Sotomayor, Stevens, and Ginsberg, also dissented, expressing concern that increased applications by prisoners to the states’ highest courts would burden the very principles of comity and federalism that the exhaustion doctrine was intended to protect. They also noted that, contrary to the majority’s ruling, “states such as Illinois have no particular interest in requiring state prisoners to seek discretionary review in every case.”²⁰³ All justices, however, agreed that the majority opinion provided an escape hatch for state high courts that wanted to avoid the flood of cases that would inevitably follow *O’Sullivan v. Boerckel*. “[A] federal habeas court should respect a State’s desire that prisoners not file petitions for discretionary review, where the State has expressed the desire clearly.”²⁰⁴ The day after *O’Sullivan* was decided, the Missouri Supreme Court issued an order amending its rule governing applications to transfer cases from a Court of Appeals to explicitly state: “Transfer by this Court is an extraordinary remedy that is not part of the standard review process for purposes of federal habeas review.”²⁰⁵

¹⁹⁹ *O’Sullivan v. Boerckel*, 526 U.S. at 850 (Souter, J., concurring).

²⁰⁰ *Id.* at 862 (Stevens, J., dissenting).

²⁰¹ *Id.* at 856.

²⁰² *Id.* at 857.

²⁰³ *Id.* at 863 (Breyer, J., dissenting).

²⁰⁴ *Id.* at 864.

²⁰⁵ Missouri Rule 83.04.

The Eighth Circuit Court of Appeals in *Randolph v. Kemna* ruled that this language was sufficient to exempt Missouri's transfer procedure from the exhaustion requirement under *O'Sullivan*.²⁰⁶

D. Repetitious Litigation and Futile Remedies

The exhaustion doctrine does not require a habeas petitioner to invoke futile state procedures before presenting claims in a federal court. "The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of... separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective."²⁰⁷ In *Wilwording v. Swenson*, Missouri prisoners sought habeas relief based on inhumane conditions of confinement at the Missouri State Penitentiary. Although the petitioners sought habeas corpus relief unsuccessfully in Missouri courts, the district court ruled that their claims were unexhausted because "petitioners had not invoked any of a number of possible alternatives to state habeas including 'a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts,' or perhaps other relief under the State Administrative Procedure Act."²⁰⁸ The Eighth Circuit Court of Appeals affirmed, and the Supreme Court reversed stating, "The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights."²⁰⁹ This was particularly true where the warden failed to show that Missouri courts had ever granted a hearing under any of the alternate procedures he suggested.²¹⁰ The Court held that presenting their claims once through Missouri's habeas corpus procedure was adequate to exhaust state remedies.

As noted in *Brown v. Allen*, "Petitioners are not required to file 'repetitious applications' in the state courts."²¹¹ Nor are habeas petitioners required to pursue futile state remedies. Indeed, the dissenters in *O'Sullivan v. Boerckel* argued persuasively that invoking the Illinois Supreme Court's discretionary review procedure would have been futile, given the low rate of successful petitions. A notable example of a state procedure being deemed futile for exhaustion purposes is *Harris v. Champion*, where the Oklahoma court system was backlogged due in large part to understaffed public defender offices.²¹² At one point, only five attorneys in the appellate public

²⁰⁶ 276 F.3d 401, 404 (8th Cir. 2002) ("Rule 83.04... makes clear that Missouri does not consider a petitioner who bypasses its supreme court in favor of federal habeas review to have denied the State its rightful 'opportunity to resolve federal constitutional claims.'" (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

²⁰⁷ *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (quoting *Marino v. Ragen*, 332 U.S. 561, 568 (1947)).

²⁰⁸ *Id.* at 249-50.

²⁰⁹ *Id.* at 250.

²¹⁰ *Id.*

²¹¹ 344 U.S. 443, 449 n. 3 (1953).

²¹² 15 F.3d 1538 (10th Cir. 1994) (*Harris II*).

defender offices were assigned to 705 unbriefed cases.²¹³ Defenders routinely requested, and appellate courts granted, lengthy extensions to file briefs. Many habeas petitioners in Oklahoma had waited three years or more for appellate briefs to be filed after counsel was appointed.²¹⁴ In response, the Court of Appeals consolidated thirty habeas corpus petitions and ordered the district court to conduct a hearing to determine whether the substantial delay violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the right to effective assistance of counsel, and whether the federal court should excuse petitioners from exhausting state remedies before filing federal habeas corpus petitions.²¹⁵ The court had previously ruled in *Way v. Crouse* that an eighteen month delay in processing a prisoner’s appeal was sufficient to excuse the exhaustion requirement.²¹⁶ In *Harris II*, the court surveyed multiple cases from various circuit courts holding that unreasonable delay in the state review process justified dispensing with the exhaustion requirement.²¹⁷ Rather than establishing a bright line rule, the court concluded that a “delay in adjudicating a direct criminal appeal beyond two years from the filing of the notice of appeal gives rise to a presumption that the state appellate process is ineffective.”²¹⁸ To rebut the presumption, the state must provide a “constitutionally sufficient justification” for the delay.²¹⁹

E. Fair Presentation—Identity of Claim

Finally, application of the exhaustion requirement requires identity of the claim at issue. For example, a claim that the Cruel and Unusual Punishment Clause of the Eighth Amendment bars the execution of an insane prisoner, decided in *Ford v. Wainwright*, is assessed at the time the prisoner is scheduled to be executed.²²⁰ Thus, a state determination in 1999 that Missouri prisoner Bobby Shaw was competent to be executed was not the same issue as whether he remained competent three years later when his appeals expired. When Shaw’s counsel filed a federal habeas petition challenging his execution on those grounds in 2002, the Eighth Circuit Court of Appeals ruled that the issue was unexhausted. Because Shaw’s federal habeas claim asserted that he was *currently* incompetent to be executed, the court determined “[he] asserts a new and different claim

²¹³ *Id.* at 1548.

²¹⁴ *Id.* at 1569.

²¹⁵ See *Harris v. Champion*, 938 F.2d 1062 (10th Cir. 1991) (Harris I); see also *Hill v. Reynolds*, 942 F.2d 1494, 1496-97 (10th Cir. 1991) (reversing district court orders dismissing habeas petitions for failure to exhaust and ordering hearings into Oklahoma’s lengthy appellate delays).

²¹⁶ 421 F.2d 145, 146-47 (10th Cir. 1970) (“the concept of federal-state comity involves mutuality of responsibilities, and an unacted upon responsibility can relieve one comity partner from continuous deference.”).

²¹⁷ *Harris*, 15 F.3d 1538, 1555-56 (Harris II).

²¹⁸ *Id.* at 1556.

²¹⁹ *Id.*

²²⁰ 477 U.S. 399 (1986).

in this petition.”²²¹ Therefore, “the exhaustion doctrine prevents us from considering the claim before the state court has an opportunity to address it,”²²² requiring Shaw to first present the claim in state court before federal review could proceed.

F. The Exhaustion Doctrine and Death Penalty Cases

Rose v. Lundy created significant risks for habeas corpus petitioners. The dismissal of unexhausted claims or dismissal of an entire petition could have serious consequences if the statute of limitations barred the petitioner from returning to federal court with their claims. These risks were even more pronounced in the context of capital cases. The inevitable effect of pausing federal habeas corpus litigation to return to state court and exhaust state remedies is a delay in the execution of a death sentence. In non-capital cases, the clock continues to run on the habeas petitioner’s sentence to life imprisonment or a term of years. In fact, the delay caused by exhausting state remedies in non-capital cases benefits the state, since the prisoner continues serving a greater portion of the sentence—even if they ultimately win release through habeas litigation.

The opposite is true in death penalty cases; a stay of execution issued by a federal court prevents the state from carrying out its judgment until the litigation concludes—often through a writ of certiorari to the Supreme Court. Requiring exhaustion of state remedies simply prolongs the process further. State resentment of federal judicial intervention is at its highest when a federal court blocks the execution of a final State judgment. In *Barefoot v. Estelle*, the Supreme Court limited federal courts’ authority to stay executions for habeas petitioners making a substantial showing of the denial of a constitutional right.²²³ However, stays of execution pending disposition of federal habeas corpus petitions remained commonplace. Under *Rose v. Lundy*, if a federal court dismissed mixed petitions, its stay of execution would dissolve, allowing the state to issue a new warrant commanding the prisoner’s execution. This put a death-sentenced prisoner in the untenable position of sacrificing meritorious claims or being executed with no federal habeas corpus review. To avoid these dire outcomes, courts devised procedures accommodating these unique circumstances. The most common approach was for the federal habeas court to stay the petitioner’s execution and hold federal proceedings in abeyance while the prisoner exhausted state remedies. A panel of the Eight Circuit Court of Appeals rejected the stay-and-abeyance approach, prompting the Supreme Court to address its propriety in *Rhines v. Weber*.²²⁴

²²¹ *Shaw v. Delo*, 971 F.2d 181, 187 (8th Cir. 1992).

²²² *Id.*

²²³ 463 U.S. 880 (1983).

²²⁴ 544 U.S. 269 (2005).

RHINES V. WEBER

JUSTICE O'CONNOR delivered the opinion of the Court.

We confront here the problem of a "mixed" petition for habeas corpus relief in which a state prisoner presents a federal court with a single petition containing some claims that have been exhausted in the state courts and some that have not. More precisely, we consider whether a federal district court has discretion to stay the mixed petition to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition.

I

[Justice O'Connor reviewed the procedural history of the case. Petitioner Charles Russell Rhines was convicted in South Dakota state court of first-degree murder and third-degree burglary and sentenced to death. After his state appeals became final, he filed a petition for writ of habeas corpus in the U.S. District Court of South Dakota. When he filed his federal habeas petition, he still had over 11 months before the expiration of AEDPA's statute of limitations. Court-appointed counsel filed a timely amended petition that asserted 35 claims of constitutional error, twelve of which the state alleged were unexhausted. The District Court agreed that eight of those claims were unexhausted. By this time, the AEDPA 1-year statute of limitations had run. As a result, if the District Court had dismissed Rhines' mixed petition at that point, he would have been unable to refile in federal court after exhausting the unexhausted claims. Rhines therefore moved the District Court to hold his pending habeas petition in abeyance while he presented his unexhausted claims to the South Dakota courts. On July 3, 2002, the District Court granted the motion and issued a stay "conditioned upon petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion." The state appealed the order, and the Eighth Circuit Court of Appeals ruled that the district court had no authority to hold a mixed petition in abeyance, and remanded with directions to dismiss Rhines' unexhausted claims. The Supreme Court granted certiorari to resolve a split in the Circuits regarding the propriety of the District Court's "stay-and-abeyance" procedure.]

II

[In *Rose v. Lundy*], we imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. *Id.*, at 522. When we decided *Lundy*, there was no statute of limitations on the filing of federal habeas corpus petitions. As a result, petitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitions with relative ease. See *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (dismissal without prejudice under *Lundy* "contemplated that the prisoner could return to federal court after the requisite exhaustion").

The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions. AEDPA preserved *Lundy's* total exhaustion requirement, see 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus... shall not be granted unless it appears that... the applicant has exhausted the remedies available in the courts of the State"), but it also imposed a 1-year statute of limitations on the filing of federal petitions, § 2244(d). Although the limitations period is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review," § 2244(d)(2), the filing of a petition for habeas corpus in federal court does not toll the statute of limitations, *Duncan [v. Walker]*, 533 U.S. 167, 181-182 (2001)].

As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. For example, if the District Court in this case had dismissed the petition because it contained unexhausted claims, AEDPA's 1-year statute of limitations would have barred Rhines from returning to federal court after exhausting the previously unexhausted claims in state court. Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refile his petition in federal court before the limitations period runs are slim. The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

We recognize the gravity of this problem and the difficulty it has posed for petitioners and federal district courts alike. In an attempt to solve the problem, some district courts have adopted a version of the "stay-and-abeyance" procedure employed by the District Court below. Under this procedure, rather than dismiss the mixed petition pursuant to *Lundy*, a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Once the petitioner exhausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court.

District courts do ordinarily have authority to issue stays, see *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), where such a stay would be a proper exercise of discretion, see *Clinton v. Jones*, 520 U.S. 681, 706 (1997). AEDPA does not deprive district of that authority, cf. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus... shall not be *granted* unless it appears that... the applicant has exhausted the remedies available in the courts of the State" (emphasis added)), but it does circumscribe their discretion. Any solution to this problem must therefore be compatible with AEDPA's purposes.

One of the statute's purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). See also *Duncan*, 533 U.S., at 179. AEDPA's 1-year limitations period "quite plainly serves the

well-recognized interest in the finality of state court judgments." *Ibid.* It "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Ibid.*

Moreover, Congress enacted AEDPA against the backdrop of *Lundy's* total exhaustion requirement. The tolling provision in § 2244(d)(2) "balances the interests served by the exhaustion requirement and the limitation period," "by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Duncan, supra*, at 179. AEDPA thus encourages petitioners to seek relief from state courts in the first instance by tolling the 1-year limitations period while a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2). This scheme reinforces the importance of *Lundy's* "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S., at 520.

Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. Cf. *Duncan, supra*, 533 U.S., at 180 ("[D]iminution of statutory incentives to proceed first in state court would... increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce").

For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Though, generally, a prisoner's "principal interest... is in obtaining speedy federal relief on his claims," *Lundy, supra*, at 520 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. See, e.g., *Zarvela*, 254 F.3d, at 381 ("[District courts] should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed").

And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all. See *id.*, at 380-381.

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. See *Lundy*, 455 U.S., at 522 (the total exhaustion requirement was not intended to "unreasonably impair the prisoner's right to relief"). In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief. See *id.*, at 520 (plurality opinion) ("[A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims").

The Court of Appeals erred to the extent it concluded that stay and abeyance is always impermissible. We therefore vacate the judgment of the Court of Appeals and remand the case for that court to determine, consistent with this opinion, whether the District Court's grant of a stay in this case constituted an abuse of discretion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

While I join the Court's opinion, I do so on the understanding that its reference to "good cause" for failing to exhaust state remedies more promptly... is not intended to impose the sort of strict and inflexible requirement that would "trap the unwary *pro se* prisoner." *Rose v. Lundy*, 455 U.S. 509 (1982); see also *Slack v. McDaniel*, 529 U.S. 473, 487 (2000).

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in part and concurring in the judgment.

I join the Court's opinion with one reservation, not doctrinal but practical. Instead of conditioning stay-and-abeyance on "good cause" for delay... I would simply hold the order unavailable on a demonstration of "intentionally dilatory litigation tactics"... The trickiness of some exhaustion determinations promises to infect issues of good cause when a court finds a failure to exhaust; *pro se* petitioners (as most habeas petitioners are) do not come well trained to address such matters. I fear that threshold enquiries into good cause will give the district courts too much trouble to be worth the time; far better to wait for the alarm to sound when there is some indication that a petitioner is gaming the system.

Questions and Comments:

1. **“Good cause” to allow exhaustion:** The Court requires a habeas corpus petitioner seeking a stay of execution and abeyance of federal proceedings pending exhaustion to demonstrate “good cause for [the] failure to exhaust, [that the] unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” How would habeas petitioners show that they satisfied each requirement? Would it be sufficient to show that dismissal of the petition or claim would preclude further federal review of the claim due to the federal statute of limitations? Are the merits of the claim relevant to the good cause showing? Should the petitioner have to make a substantial showing of the denial of a constitutional right? What if the prisoner was not diligent in previous attempts to invoke state remedies? What if the availability of a state remedy is unclear or uncertain under state law?
2. **“Good cause” and *pro se* status:** The “good cause” plus diligence standard has proven frustrating for some *pro se* petitioners. A *pro se* petitioner, unfamiliar with habeas corpus procedure, will no doubt make errors and omissions in attempting to vindicate constitutional claims. The First Circuit ruled that a habeas petitioner’s *pro se* status and unsuccessful attempts to obtain legal counsel for a postconviction motion did not constitute “good cause” under *Rhines v. Weber* because he had failed to file his state claim for six months while searching for counsel even though he filed it only two days after counsel entered his appearance in his case.²²⁵ However, the court maintains that a petitioner who has been diligent will satisfy the *Rhines v. Weber* standard. By contrast, in *Dixon v. Baker*, the appellate court ruled that the district court abused its discretion by denying a *Rhines* stay, reasoning that the petitioner’s lack of legal representation in state postconviction proceedings constituted good cause for his failure to exhaust new claims, at least one of which was meritorious, and that he had not engaged in dilatory litigation practices.²²⁶
3. **Attorney error as “good cause”:** Ineffective assistance of postconviction counsel can also satisfy *Rhines v. Weber*’s “good cause” standard. In *Blake v. Baker*, the Court clarified that “good cause does not require a showing of ‘extraordinary circumstances.’” Rather, its existence “turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify” a failure to exhaust.²²⁷ The State’s withholding of exculpatory information also qualifies as “good cause” under *Rhines*.²²⁸ The petitioner’s mental capacity may also be relevant in determining whether good cause exists for failing to exhaust state remedies. In *Newman v. Norris*, the court found that Newman’s mental illness, combined with the state’s failure to grant a full and fair hearing on his mental illness, justified a *Rhines* stay and also equitably tolled the federal habeas statute of

²²⁵ *Sena v. Kenneway*, 997 F.3d 378 (1st Cir. 2021).

²²⁶ 847 F.3d 714 (9th Cir. 2017).

²²⁷ 745 F.3d 977, 981, 982 (9th Cir. 2014); *Accord*, see *Bolin v. Baker*, 994 F.3d 1154 (9th Cir. 2021).

²²⁸ See *Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014); *Wogenstahl v. Mitchell*, 668 F.3d 307, 322 (6th Cir. 2012).

limitations.²²⁹

4. **“Good cause” found to pursue a state-law claim:** A *Rhines v. Weber* stay-and-abeyance order may be appropriate even in the absence of a mixed petition. In *Duke v. Gastelo*, the petitioner sought an abeyance of his habeas petition while he pursued a remedy under a newly enacted California statute, which did not itself involve a federal constitutional claim.²³⁰ The district court denied the *Rhines* abeyance order and dismissed the petition, but the court of appeals reversed, holding that Duke’s petition presented only exhausted claims and thus was not “mixed.” The court further noted that denying a *Rhines* stay “unnecessarily created a significant risk that [the petitioner] would lose his one chance for federal review of his constitutional claims.”²³¹ Similarly, in *Mena v. Long*, the court ruled that “a district court may stay a petition that raises *only* unexhausted claims.”²³² Generally, if the claim has merit and the petitioner has not been dilatory, “good cause” will be found where the denial of a *Rhines* stay would result in the loss of habeas review due to statute of limitations constraints or concerns about abuse of the writ.
5. ***Rhines v. Weber* orders unappealable:** An order granting a stay under *Rhines v. Weber* is not a final decision and is therefore not appealable.²³³

III. Concluding Thoughts on the Exhaustion Requirement

Perhaps the most important takeaway from this chapter for future practitioners is that the present availability of a state remedy is a threshold inquiry for each and every claim, regardless of the procedural status of the case. If a claim has already been fairly presented to the highest state court through the ordinary course of appellate procedure, it is exhausted and may be adjudicated in a federal habeas corpus petition. However, if a previously undiscovered claim has not been presented in state court, counsel must thoroughly research state procedures to determine whether a potential remedy remains available.

From a practice point of view, the state’s defense of exhaustion presents both challenges and opportunities. While it inevitably delays federal review, exhaustion offers potential relief from the prisoner’s conviction and sentence in state court. It may also provide an opportunity to present new claims and new evidence. Historically, federal courts generally were the more likely venue for prisoners to obtain relief, as discussed in the previous chapter. However, that is not always the

²²⁹ 2008 U.S. Dist. LEXIS 60142 (W.D. Ark., July 23, 2008).

²³⁰ 64 F.4th 1088 (9th Cir. 2023).

²³¹ *Id.* at 1099.

²³² 813 F.3d 907, 908 (9th Cir. 2016).

²³³ *Kell v. Benzon*, 925 F.3d 448 (10th Cir. 2019); *Accord*, *Howard v. Norris*, 616 F.3d 799 (8th Cir. 2010).

case. In the 21st century, many state judicial systems are more progressive than the federal bench within their respective districts.

The exhaustion doctrine played a critical role in shaping the state-federal system of postconviction review that evolved in the twentieth century. The typical postconviction case proceeds through three stages of review: (1) Direct review—consisting of a trial, appeal, and petition for certiorari to the U.S. Supreme Court; (2) Collateral or Postconviction Review—involving a motion for relief usually filed in the trial court followed by an appeal and a petition for certiorari to the U.S. Supreme Court; (3) Federal Habeas Corpus Review—beginning with a habeas corpus petition filed in U.S. District Court followed by an appeal to the Circuit Court of Appeals, and a petition for certiorari to the U.S. Supreme Court.

Each stage starts in a trial level fact-finding court, followed by appellate review, with the possibility of certiorari review at the conclusion of each stage. It is useful to visualize the nine standard steps that a criminal case typically follows before reaching its final conclusion:

Stages of Postconviction Review

Direct Review	Collateral Review	Federal Habeas
3. Certiorari (SCOTUS)	6. Certiorari (SCOTUS)	9. Certiorari (SCOTUS)
2. Appeal (State Appellate Court)	5. Appeal (State Appellate Court)	8. Appeal (Federal Circuit Court of Appeals)
1. Trial (State Trial Court)	4. Postconviction Motion (State Trial-level Court)	7. Habeas Corpus (Federal District Court)

In subsequent chapters, this chart will be revisited with notations indicating where various procedural obstacles may arise. For federal prisoners challenging a federal conviction, the chart will include two columns, with the second column reflecting collateral proceedings under 28 U.S.C. § 2255 along with the related appeals and certiorari proceedings.

When determining whether and at what stage a prisoner has fairly presented a claim to the state courts, it is crucial to identify all elements of the claim. A prisoner’s legal claim consists of two parts: (1) the *legal theory* supporting relief, such as the denial of the Sixth Amendment right to effective assistance of legal counsel; and (2) the *factual basis* for the claim, i.e., the act or omission that constitutes counsel’s deficient performance and the underlying context of the case that determines whether the prisoner was prejudiced by counsel’s deficient performance.

Especially after AEDPA, counsel must be able to clearly identify both aspects of a claim to assess whether the claim has been fairly presented and properly adjudicated. This distinction will be further explored in Chapter 7, Fact Development in Postconviction Proceedings.

In an ideal case, the trial is conducted in strict compliance with constitutional mandates. Effective defense counsel thoroughly investigates and acquires the necessary investigative and expert assistance that exposes all defenses and constitutional issues to present before the court and jury. Similarly, the prosecution diligently reviews the files of investigative agencies and government entities involved in the case, discloses any exculpatory evidence to the defense, and refrains from presenting false testimony or making improper arguments before the jury. The trial judge conscientiously rules on objections presented by both parties, allows the jury to hear the evidence, and prevents inadmissible evidence from the jury. Appellate counsel scours the record for potential issues and properly briefs the meritorious ones and carefully preserves constitutional claims for potential certiorari review in the Supreme Court. If, despite the diligent work and ethical conduct of counsel for both sides at trial and on appeal, important facts or issues are overlooked, the prisoner can file a postconviction motion raising additional claims. Many jurisdictions allow court-appointed counsel to assist in the investigation and development of claims. If meritorious claims are uncovered, they are fully litigated in postconviction and subsequent appellate proceedings. The state judges presumably render judgments on all issues of fact and law and prisoner's claims are fairly presented to the state court. Because fairly presented claims are exhausted, those claims are not procedurally barred and can be litigated in a federal forum on the merits. The federal court then has the power and the duty to grant habeas corpus relief on any of the prisoner's constitutional claims where the state court's decision was unreasonably wrong.²³⁴

However, perfectly tried cases are extremely rare, especially in jurisdictions where indigent defense is chronically underfunded. Typically, a lawyer entering the case in state postconviction proceedings will have numerous issues to investigate and properly raise. Ideally, competent postconviction counsel will obtain the necessary investigative and expert resources, conduct a thorough investigation using available open-records laws and discovery tools, and properly plead and present evidence in support of all reasonably available claims before the state postconviction and appellate court, each adjudicating the reasonably available claims in good faith. Again, such a

²³⁴ See *Williams v. Taylor*, 529 U.S. 362 (2000), interpreting the AEDPA limitation on the habeas remedy under 28 U.S.C. § 2254(d), which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard will be examined in more detail in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

client satisfies exhaustion requirements and is entitled to a federal habeas remedy for all claims on which the state court decision is unreasonably wrong. If all the prisoner's claims are properly aired in state court direct review and collateral proceedings, procedural barriers are minimized in federal court.

In reality, though, postconviction litigation is messy. Nearly all cases in this text involve mistakes by defense lawyers, prosecutors, and judges that raise issues of proper exhaustion and procedural default of factual and legal theories. Because few jurisdictions fund the right to counsel adequately,²³⁵ tensions of comity and federalism arise when a meritorious constitutional issue or evidence of innocence is discovered late in the process, facing a state or federal court with the dilemma between upsetting the finality of a criminal judgment or denying relief to a prisoner who clearly deserves to go free.²³⁶ A significant portion of postconviction litigation arises when someone acting on a prisoner's behalf uncovers new facts supporting a never-before-adjudicated constitutional claim, someone finds new evidence indicating that a previously considered claim was wrongly rejected, or changes in the law creates a new legal argument to challenge the prisoner's conviction or sentence. The first step in such cases is always to determine whether a state remedy is still available. It is essential that counsel be intimately familiar with available state remedies and the circumstances under which each available remedy may be invoked.

²³⁵ See Shubhangi Deoras, Norman Lefstein, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings (American Bar Ass'n 2004). Also see Sean D. O'Brien, *The Missouri Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853 (2010), recounting Missouri's unsuccessful ongoing struggle to implement *Gideon v. Wainwright*.

²³⁶ See, e.g., Stephen Bright and James Kwak, *THE FEAR OF TOO MUCH JUSTICE* (The News Press 2023), relating stories of the difficult fight to correct unjust convictions and sentences in the American South.

CHAPTER 4: PROCEDURAL BARS: INDEPENDENT, ADEQUATE STATE GROUNDS

The previous chapter briefly discussed procedural bar in relation to a habeas petitioner's duty to exhaust state remedies before filing his constitutional claims in federal court. A claim is properly exhausted when the facts and the law have been fairly presented to the state court. This chapter discusses cases in which the habeas petitioner either wholly failed to present claims in state court—and no state remedy is now available—or presented claims in a manner that was incomplete, inadequate, or in violation of state court rules of procedure. In such circumstances, a federal court may find that the state's denial of relief without considering the prisoner's constitutional claim rests on an independent and adequate state-law ground.²³⁷ Because a state court is the final arbiter of state law, including procedural law, federal courts will decline to hear a habeas claim that was denied on procedural grounds unless an exception applies. In addition to protecting state sovereignty from unwarranted federal intrusion, the doctrine of procedural default also discourages habeas petitioners from engaging in manipulative litigation behavior for strategic advantage, and it serves finality interests. The doctrine of procedural default therefore applies in cases brought under 28 U.S.C. § 2255 that do not involve issues of comity and federalism.

I. Introduction to Procedural Bar and Independent, Adequate State Ground Doctrine

The independent, adequate state ground doctrine reinforces interests of comity, federalism, and finality, preventing federal courts from reviewing state court judgments that are not based on federal constitutional law—even if the prisoner pleads a federal constitutional violation. On certiorari review, the independent, adequate state ground doctrine is jurisdictional. “[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”²³⁸ The Court explained, “Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.”²³⁹ Since the Michigan Supreme Court referenced state law only twice and primarily based its ruling on the Michigan Court of Appeals' misapplication of *Terry v. Ohio*,²⁴⁰ the U.S. Supreme Court determined “that the Michigan Supreme Court rested its decision primarily on federal law.”²⁴¹ The

²³⁷ A question that is closely related to the Independent, Adequate State Ground Doctrine is whether prisoners, by their imperfect litigation conduct, waive or forfeit constitutional rights that are not raised or imperfectly pled in state court or in prior federal habeas proceedings. See *Faye v. Noia*, 372 U.S. 391 (1963).

²³⁸ *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

²³⁹ *Id.* at 1040.

²⁴⁰ 392 U.S. 1 (1968).

²⁴¹ 463 U.S. at 1044.

Court presumes that a state court decision rests on federal grounds absent a “‘plain statement’ that a decision rests upon adequate and independent state grounds.”²⁴² The Supreme Court therefore had jurisdiction to review the Fourth Amendment issue raised by Michigan.

A similar analysis applies when a state prisoner seeks federal habeas relief after losing a claim in state court on procedural grounds, although in habeas corpus the doctrine is not jurisdictional. As a matter of comity and federalism, a federal court will not overturn a state court judgment that rests on a state procedural rule that is both independent of federal law and adequate to support the result. However, the application of the doctrine on habeas is different from its application on certiorari review by the Supreme Court. Six decades ago, the Court explained:

Certainly this Court has differentiated the two situations in its application of the adequate state-ground rule. While it has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights. That the Court nevertheless ordinarily gives effect to state procedural grounds may be attributed to considerations which are peculiar to the Court's role and function and have no relevance to habeas corpus proceedings in the Federal District Courts: the unfamiliarity of members of this Court with the minutiae of 50 States' procedures; the inappropriateness of crowding our docket with questions turning wholly on particular state procedures; the web of rules and statutes that circumscribes our appellate jurisdiction; and the inherent and historical limitations of such a jurisdiction.²⁴³

This chapter explores the circumstances under which a state procedural ruling will or will not be adequate to bar federal habeas corpus relief, but all begin with the preliminary question of whether a state decision citing procedural default grounds for denying a claim precludes federal habeas corpus review. The independent, adequate state ground doctrine itself suggests a starting point for the analysis: Did the state court reach the merits of the federal claim in spite of a potential procedural default?

A. Independence of the State Procedural Rule

The question of whether a claim is procedurally defaulted is generally triggered by a habeas petitioner's failure to invoke or properly invoke a state remedy for the deprivation of a federal right. Setting aside, for a moment, whether a prisoner has failed to properly assert constitutional claims in a state court proceeding—state courts have the discretion to overlook procedural errors

²⁴² *Id.* at 1042.

²⁴³ *Fay v. Noia*, 372 U.S. 391, 433 (1963).

and adjudicate a claim on the merits. When this occurs, the independent, adequate state ground doctrine does not preclude federal review because the state court adjudicated the merits of the claim. This principle was illustrated in *Ake v. Oklahoma*,²⁴⁴ which examined whether a defendant in a death penalty case was entitled to state funds to investigate potential defenses based on his impaired mental health.

Glen Burton Ake was charged in Oklahoma with attacking a family, killing the parents, and wounding their two children. During the arraignment, his behavior was so bizarre that the court *sua sponte* ordered a psychiatric evaluation to assess his competence to proceed. After a six-month commitment, state psychiatrists diagnosed him with schizophrenia and found him incompetent to stand trial because of his delusions and inability to regulate his emotions. After six more weeks of treatment and medication, he was found competent to proceed.²⁴⁵ However, the state examiners did not consider Ake's mental state at the time of the offense nor considered mitigating circumstances related to his impaired psychiatric condition.

Before trial, Ake's attorney advised the court of his intention to pursue an insanity defense permitted under Oklahoma statute, but because Ake was indigent, his counsel requested funding for an independent psychiatric evaluation, arguing that the Constitution required the state to fund an evaluation when reasonably necessary for the defense. The trial court denied the motion, and Ake was tried, convicted, and sentenced to death without the benefit of psychiatric assistance in his defense.²⁴⁶

Although trial counsel properly raised the due process claim for funding in a pretrial motion, the claim was omitted from his motion for a new trial. Under Oklahoma law, this error waived the claim. The Oklahoma Court of Criminal Appeals rejected Ake's claim, and he petitioned the U.S. Supreme Court for certiorari. A threshold question for the Court was whether Ake's procedural mistake barred his claim from federal review.

AKE V. OKLAHOMA

JUSTICE MARSHALL delivered the opinion of the Court.

Initially, we must address our jurisdiction to review this case. After ruling on the merits of Ake's claim, the Oklahoma court observed that in his motion for a new trial Ake had not repeated his request for a psychiatrist and that the claim was thereby waived... The court cited *Hawkins v. State*, 569 P. 2d 490 (Okla. Crim. App. 1977), for this proposition. The State argued in its brief to this Court that the court's holding on this issue therefore rested on an adequate and independent

²⁴⁴ 470 U.S. 68 (1985).

²⁴⁵ *Id.* at 71-72.

²⁴⁶ *Id.* at 72.

state ground and ought not be reviewed. Despite the court's state-law ruling, we conclude that the state court's judgment does not rest on an independent state ground and that our jurisdiction is therefore properly exercised.

The Oklahoma waiver rule does not apply to fundamental trial error. See *Hawkins v. State*, *supra*, at 493; *Gaddis v. State*, 447 P. 2d 42, 45-46 (Okla. Crim. App. 1968). Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51-52; see *Buchanan v. State*, 523 P. 2d 1134, 1137 (Okla. Crim. App. 1974) (violation of constitutional right constitutes fundamental error); see also *Williams v. State*, 658 P. 2d 499 (Okla. Crim. App. 1983). Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. See *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion"); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain"). In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court -- that the constitutional challenge presented here was waived -- depends on the court's federal-law ruling and consequently does not present an independent state ground for the decision rendered. We therefore turn to a consideration of the merits of Ake's claim.

Thus, Ake's "waiver" of his due process funding claim was not an independent, adequate State ground precluding the Supreme Court from exercising jurisdiction. Upon reviewing the merits of Ake's due process claim, the Court held "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."²⁴⁷

²⁴⁷ *Id.* at 77.

Questions and Comments:

1. **State grounds interwoven with federal law:** There is no question that Ake violated a state rule by omitting his due process funding claim from his motion for new trial. Nearly every jurisdiction has a similar rule requiring that trial errors be raised in a timely motion for new trial to be preserved for appellate review. It is also common for states to have a fundamental error rule, like Oklahoma's, which allows appellate courts the discretion to overlook procedural mistakes by litigants. Because Oklahoma had defined its "fundamental error" rule to be coextensive with constitutional error, a decision that the error was not "fundamental" was also a decision that there was no constitutional error in the case. Missouri refers to such errors as "plain error." Consider the language of Missouri's rule:

Allegations of error that are not briefed or are not properly briefed on appeal shall not be considered by the appellate court except errors respecting the sufficiency of the information or indictment, verdict, judgment, or sentence. Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.²⁴⁸

Does the language of the rule suggest that a federal court should reach the same outcome with respect to plain error that the Supreme Court reached in *Ake v. Oklahoma*? What other research would be necessary to decide whether or not a Missouri court's determination that there was no plain error in the case is intertwined with federal law? Can it be argued that "substantial rights," "manifest injustice," or "miscarriage of justice" are coextensive with constitutional error? What is different about the language of Missouri's rule that might produce a different result from *Ake*? Many courts have held that state plain error provisions are independent, adequate state law grounds for denial of a claim that asserts a federal right.²⁴⁹

2. **Common orderly procedures:** All courts in the United States publish rules and decide cases that require litigants to abide by rules and standards in the presentation of legal claims and evidence. The Court recognizes that these rules serve a valid purpose; they channel the resolution of legal disputes toward an orderly resolution. Courts routinely enforce pleading requirements, notice requirements, and time deadlines, often with sanctions that foreclose issues from consideration. In *Coleman v. Thompson*, appointed counsel representing Roger Coleman neglected to file a timely notice of appeal from a district court order denying Coleman's motion for postconviction relief. Because of this failure, the Virginia Supreme

²⁴⁸ Missouri Rule 30.20-Errors Considered.

²⁴⁹ See, e.g., *Nitschke v. Belleque*, 680 F.3d 1105, 1111 (9th Cir. 2012) (Oregon's plain error rule is independent of federal law); *Rocha v. Thaler*, 619 F.3d 387, 403-04 (5th Cir. 2010) ("The First, Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits hold that [plain error] exceptions do not ordinarily deprive state court rulings of their 'independent' character."). Also see *Clark v. Bertsch*, 780 F.3d 873, 877 (8th Cir. 2015).

Court dismissed Coleman's appeal based on Virginia's mandatory ten-day time limit for filing. Such deadlines are common throughout the United States. It is also a rule that is easy to follow; in most cases, it requires the would-be appellant to fill out a one or two-page preprinted form with basic case information. On habeas corpus review, the Fourth Circuit Court of Appeals found that Coleman's postconviction claims were procedurally barred because the Virginia Supreme Court's decision was based on an independent, adequate state ground. In affirming this result, the Supreme Court explained the differences between the independent, adequate state ground doctrine as a jurisdictional bar to review on certiorari and a potential bar to review on habeas corpus:

The basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court. When this Court reviews a state court decision on direct review pursuant to 28 U. S. C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do. This is not the case in habeas. When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U. S. C. § 2254, it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." *Ibid.* The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*. See *Fay v. Noia*, 372 U.S. 391, 430 (1963).

Nonetheless, a state prisoner is in custody *pursuant* to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. See *id.*, at 469 (Harlan, J., dissenting). In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's

jurisdiction and a means to undermine the State's interest in enforcing its laws.²⁵⁰

Coleman argued that the summary dismissal of his untimely appeal did not include a plain statement that the decision rested on independent, adequate state grounds. The Court rejected the application of a conclusive presumption in habeas cases in which “it is simply not true that the “most reasonable explanation” is that the state judgment rested on federal grounds.”²⁵¹

3. **Exhaustion is the analytical starting point:** Use of an analytical framework for procedural bar questions matters. If the inquiry were to begin and end with the question of whether Glen Ake’s attorney violated a procedural rule that waived his claim under Oklahoma law, this case might have had a different outcome. But if the state court decided the merits of the federal question, principles of comity and federalism do not require the federal court to abstain from exercising jurisdiction. But as subsequent sections will demonstrate, whether a state procedural ruling satisfies the independent, adequate state ground doctrine has many layers. Whether or not the state’s decision in fact rests on grounds independent of federal law is merely the first layer.

1. Determining whether the federal claim was denied on state procedural grounds

As *Ake v. Oklahoma* suggests, it is not always easy to determine whether a state court decision denying relief from a conviction and sentence rests primarily on procedural grounds. Federal courts generally presume that an unexplained denial of a petition is a ruling on the merits of the federal claim. In *Harris v. Reed*,²⁵² the Court extended the “plain statement” standard of *Michigan v. Long* to procedural default questions. Since the independent, adequate state grounds rule is the basis for withholding federal jurisdiction, the Court reasoned that the plain statement rule of *Michigan v. Long* also applies in habeas corpus review. The California Supreme Court had denied Harris’ ineffective assistance of counsel claim without analyzing the merits, stating only that the claim “could have been raised on direct appeal.”²⁵³ The Court held that “this statement falls short of an explicit reliance on a state-law ground”²⁵⁴ and remanded the case for adjudication on the merits of Harris’ petition.

It is not uncommon in postconviction or habeas corpus cases that state appellate courts deny relief in cursory, one-line orders, even in capital cases in which a prisoner presents a

²⁵⁰ *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

²⁵¹ *Id.* at 737.

²⁵² 489 U.S. 255 (1989).

²⁵³ *Harris v. Reed*, *supra* at 266.

²⁵⁴ *Id.*

voluminous petition containing many claims. In that situation, how is a federal court to know whether the state appellate court relied on an Independent, Adequate State-Law Ground? Under *Harris v. Reed*, federal habeas petitioners could argue that the absence of a plain statement that the ruling rested on independent, adequate state grounds required the federal court to presume the federal claims presented and summarily denied in such petitions were decided on the merits, and therefore not procedurally barred. The Court revisited the issue in *Ylst v. Nunnemaker*,²⁵⁵ in which a habeas petitioner attempted this tactic to return to federal court with his claims exhausted and free of independent, adequate state grounds—even as to grounds that the California Court of Appeals found to be procedurally barred. The Court elaborated on the *Harris v. Reed* presumption:

We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman*, ante, at 740, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits. This approach accords with the view of every Court of Appeals to consider the matter, save the court below.²⁵⁶

Applying this “look-though” presumption, the Court examined the most recent reasoned opinion that predated the California Supreme Court’s summary denial of Nunnemaker’s *Miranda* claim. Because that decision rested on an explicit finding that the claim was procedurally defaulted, the Court remanded the case to determine whether Nunnemaker could overcome his procedural default. Also see *Coleman v. Thompson*, discussed in the previous section allowing the federal court to enforce a procedural default where “it does not fairly appear that the state court rested its decision on federal grounds.”²⁵⁷

B. The Adequacy of State Procedural Rules

Prisoners seeking federal relief from their convictions must fairly present the facts and the federal law supporting their claims for relief to the state court in the first instance. The issue of procedural default arises when the respondent alleges that the prisoner did not comply with state

²⁵⁵ 501 U.S. 797 (1991).

²⁵⁶ *Ylst v. Nunnemaker*, *supra* at 803.

²⁵⁷ *Coleman v. Thompson*, *supra*, at 737.

procedures, and there is no presently available procedure for doing so. Glenn Ake’s attorney’s failure to include his due process claim in his motion for a new trial is an example of such a failure; Ake was fortunate that the Oklahoma plain error rule required the appellate court to reach the merits of his claim anyway. But cases in which the state court declines to reach the merits of the federal claim on allegations that the prisoner violated a procedural rule can result in the complete denial of federal review as well. For example, in *Picard v. Connor*,²⁵⁸ Connor alleged in state court that his indictment was defective under state law. After losing in state court, Connor petitioned for habeas corpus relief, claiming that the same alleged defect in the indictment violated his right to due process of law. Because Connor did not present his due process argument to the state court, the Supreme Court concluded that his federal claim should be rejected as unexhausted because Connor failed to give the Massachusetts courts “an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.”²⁵⁹ The Court reasoned that the exhaustion rule “would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.”²⁶⁰ Like the petitioner in *O’Sullivan v. Boerckel*,²⁶¹ discussed in the previous chapter, Connor’s claim was subject to the state’s defense of procedural default because his presentation to the state court was flawed or incomplete. Thus, the principles of fair presentation and procedural forfeitures are related; a claim that was fairly presented to the state court in compliance with state procedures is both properly exhausted and not procedurally barred. Exhaustion and procedural default are separate issues governed by different doctrines but are two sides of the same coin—they serve interests of finality and limit federal intrusion into state sovereignty.

Arguably, habeas petitioners who have diligently attempted a fair presentation of the facts and law substantiating their claims in state court should not be foreclosed from habeas corpus review based on a procedural technicality. That was a unifying principle in the Court’s incorporation-era cases, with few exceptions. More recently, procedural default has become an extremely strict doctrine, and even byzantine and cumbersome state procedural regimes are often given deference as adequate and independent. It seems that habeas petitioners who obtain federal review of the merits of their federal claims are the exception rather than the rule.²⁶² Due to the

²⁵⁸ 404 U.S. 270 (1971).

²⁵⁹ 404 U.S. at 277.

²⁶⁰ *Id.* The dissent disagreed, arguing that “a due process point is plainly raised where an accused claims that no grand jury found “probable cause” to indict him, that its only finding concerned someone unknown at the time.” *Id.* at 279 (Douglas, J., dissenting). It is also worth noting that Connor did raise a Fifth Amendment claim that he was not indicted by a grand jury, but that, too, rested on different facts and law, and did not serve to exhaust his claim of inadequate notice.

²⁶¹ 526 U.S. 838, 847 (1999).

²⁶² A recent study determined that only 42% of unsuccessful non-capital habeas petitioners received merits review on at least one claim. Nancy J. King, Fred L. Cheesman II, Brian J. Ostrom, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS, AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS

complexity of procedural technicalities in federal habeas corpus review, this chapter examines cases using a framework that first determines whether the state procedural default ruling is *both* independent of federal law and adequate to deny the federal claim.

Determining whether a prisoner's claim is procedurally barred is complex with potentially severe consequences. Prisoner's claims are often denied because of a procedural technicality, even when they obviously have merit.²⁶³ Because "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question,"²⁶⁴ a state may prevent "its own courts from revisiting criminal convictions without putting a similar damper on federal courts."²⁶⁵ The cases discussed in this chapter are chosen because they demonstrate circumstances in which a petitioner was alleged to have defaulted a claim, but the federal court concluded that the state procedure was not independent of the federal claim, e.g., *Ake v. Oklahoma*, or because the procedural ground was not adequate to bar federal review.

Remember that the exhaustion rule requires a claim to be fairly presented to the highest court of jurisdiction in the normal course of postconviction review.²⁶⁶ An allegation that a claim is defaulted means that it was not presented, or it was presented defectively, in the appropriate state forum. It is important to begin a procedural default analysis by identifying the stage of appellate or postconviction review where the alleged default occurred, and also to identify the stages of state review where the claim was or should have been properly presented. The chart outlining the nine stages of postconviction review that was referenced in previous chapters is helpful here as well. It helps illustrate the critical distinction between fact-finding courts and those that decide legal issues based solely on existing records, highlighting the challenges prisoners face in properly presenting claims: An ill-informed decision to abandon or truncate the presentation of a claim at one stage of review can prevent further development and consideration of the claim further down the line. When a prisoner makes a mistake *once*, the doctrine of procedural default means that they lose *all their remedies, state and federal, with respect to that claim*. For example, a trial lawyer who objects to that admission of a non-testifying co-defendant's statement raising

UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 45 (United States Department of Justice 2007).

²⁶³ Justice Blackmun criticized the Court's modern tendency to value finality over fairness, referring to Warren McCleskey and Roger Keith Coleman as "victims of the 'new habeas'" because they were executed without adjudication of apparently meritorious constitutional claims. *Sauyer v. Whitley*, 505 U.S. 333, 358 (1992) (Blackmun, J., dissenting), citing *Coleman v. Thompson*, 501 U.S. 722 (1991), and *McCleskey v. Zant*, 499 U.S. 467 (1991).

²⁶⁴ *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

²⁶⁵ *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990).

²⁶⁶ *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999)

only hearsay grounds, and making no reference to the Sixth Amendment Confrontation Clause violation,²⁶⁷ may forever waive the Sixth Amendment claim arising from the same evidence.²⁶⁸

Stages of Postconviction Review

Direct Review	Collateral Review	Federal Habeas
3. Certiorari (SCOTUS)	6. Certiorari (SCOTUS)	9. Certiorari (SCOTUS)
2. Appeal (State Appellate Court)	5. Appeal (State Appellate Court)	8. Appeal (Federal Circuit Court of Appeals)
2. Trial (State Trial Court)	4. Postconviction Motion (State Trial-level Court)	7. Habeas Corpus (Federal District Court)

Of nine stages, only three—trial (stage one), postconviction motion (stage four), and federal habeas corpus proceedings in U.S. District Court (stage seven)—allow for factual development.²⁶⁹ Appellate courts and the Supreme Court at stages 2, 3, 5, 6, 8, and 9 decide issues of law based on the facts as found by the trial level judges. In limited circumstances, an appellate judge may reject fact-findings that are not supported by the record or clearly erroneous, but they typically do not receive new evidence.

Understanding the state procedure is essential to analyzing a procedural default allegation. Counsel must know what claims are cognizable in which proceedings, and comply with procedural rules for raising them, beginning at the trial level. This distinction between the function of trial and appellate courts also informs the forum in which a claim is cognizable. As noted in Chapter 1, Introduction to Habeas Corpus, the direct review process is for adjudicating issues raised and developed at the trial of the case; the appellate court will not hear new evidence. Claims of trial error, e.g., rulings on pretrial motions, objections to evidence, and other matters of trial procedure, generally must be raised on the direct appeal. Examples of procedural defaults at the trial level include the failure to file pretrial motions, such as motions to suppress based on Fourth, Fifth, or Sixth Amendment violations, the failure to lodge a contemporary objection to evidence or

²⁶⁷ *Bruton v. United States*, 391 U.S. 123 (1968),

²⁶⁸ Cf. *Picard v. Connor*, *supra*, presenting a similar scenario in which the prisoner challenged his indictment on state law grounds only, thereby forfeiting his Fourteenth Amendment Due process claim.

²⁶⁹ AEDPA puts significant restrictions on the federal habeas court’s ability to hold evidentiary hearings. *See* 28 U.S.C. § 2254(e) and *Cullen v. Pinholster*, 563 U.S. 170 (2011), discussed in Chapter 9.

testimony at trial, or the failure to raise a claim in a timely motion for new trial, as in *Ake v. Oklahoma*. Rules of appellate procedure regulate the content, length, and format of briefs. The failure to submit a claim in a brief in proper form, or the failure to file timely post-decision motions in state court, may also result in a procedural default, as in *O'Sullivan v. Boerckel*.

Claims that cannot be litigated on the four corners of the trial court record and require the admission of new evidence must be raised in collateral review proceedings, beginning with the postconviction motion (stage four). Claims that require the introduction of new evidence, such as ineffective assistance of counsel or suppression of exculpatory evidence, are usually cognizable in the first instance in collateral review proceedings because they typically involve the introduction of new evidence.²⁷⁰ Some states have combined collateral review proceedings with the direct appeal in an attempt to expedite the review process. In those jurisdictions, usually special procedures are adopted to allow the appellate court to remand the case to a trial level court for further fact development.²⁷¹

Government lawyers commonly allege that habeas corpus claims should be denied because the petitioner has committed a procedural default somewhere in state court proceedings. Assuming the procedural rule is independent of the federal claim, as discussed in *Ake v. Oklahoma*, the next question is whether the alleged procedural default is adequate to justify the denial of a federal right. To be adequate, the rule has to meet minimum criteria for fairness. But before that question is addressed, it's important to determine whether the prisoner's conduct violated the rule in the first place. If the rule was in fact violated, then the rule must be examined to determine whether the rule itself is adequate to bar the prisoner's claim. Is the rule clear enough for litigants to understand it and comply? Is the procedural rule consistently applied? A rule that does not pass muster cannot satisfy the "adequacy" prong of the independent, adequate state ground doctrine.

1. Did the petitioner violate a state procedural rule?

In *Ford v. Georgia*,²⁷² the state court denied James Ford's race discrimination claim based on a procedural rule that did not exist at the time of his trial. Ford, a Black man, was charged with the kidnapping, rape, and murder of a white woman in Coweta County, Georgia. Before trial, Ford moved to prohibit the prosecutor from using peremptory challenges from eliminating Black jurors,

²⁷⁰ For example, an allegation that trial counsel was ineffective for failing to interview and call defense witnesses may require testimony from trial counsel and the witnesses so that the court can apply the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), that asks whether counsel's performance was deficient, and whether the defendant was thereby prejudiced. Claims that the state withheld material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) also require the production of evidence outside the trial court record and are therefore commonly raised in collateral review proceedings.

²⁷¹ States which require claims of ineffective assistance of counsel to be raised on direct appeal must also have adequate procedures for developing facts in support of those claims, which is commonly accomplished by remanding the case to the trial court for an evidentiary hearing. See, e.g., *Calene v. State*, 846 P.2d 679 (Wyo. 1993), outlining a procedure for such remands. Cf. *Barkell v. Crouse*, 468 F.3d 684 (10th Cir. 2006), finding *Calene's* pleading requirements insufficiently specific to bar federal review.

²⁷² 498 U.S. 411 (1991).

alleging that the prosecution had a “history and a pattern” of striking Black jurors in cases where the defendant is Black.²⁷³ The trial court denied the motion. The case proceeded to trial, and the prosecution used nine of its ten peremptory challenges to strike Black venirepersons from the jury. The trial court acknowledged the racial pattern in the prosecutor’s strikes but denied relief. Ford was convicted and sentenced to death. In his motion for new trial, he again raised his jury discrimination claim.²⁷⁴ Although Ford framed his discrimination claim as a violation of the Sixth Amendment’s fair cross-section requirement, the Georgia Supreme Court considered both fair cross-section and Equal Protection Clause precedents in its opinion denying relief.²⁷⁵

Ford petitioned the U.S. Supreme Court for a writ of certiorari, and while his petition was pending, the Court decided *Batson v. Kentucky*,²⁷⁶ which fundamentally changed the Equal Protection Clause standard governing a party’s discriminatory use of peremptory challenges. Since Ford’s petition was still pending when *Batson* was decided, the Supreme Court summarily granted certiorari, vacated the Georgia Supreme Court’s decision affirming Ford’s conviction, and remanded the case for reconsideration.²⁷⁷

On remand, the Georgia Supreme Court, without briefing or argument, ruled that Ford’s discrimination claim was procedurally barred.²⁷⁸ In the interim, the Georgia Supreme Court had decided *State v. Sparks*,²⁷⁹ which held that an equal protection claim under *Batson* must be raised after jury selection but before the jury is sworn. A divided Georgia Supreme Court denied Ford’s *Batson* claim because he had failed to follow the procedural rule outlined in *Sparks*. The U.S. Supreme Court again granted Ford’s petition for writ of certiorari.

FORD V. GEORGIA

JUSTICE SOUTER delivered the opinion of a unanimous Court.

²⁷³ *Id.* at 414-415.

²⁷⁴ *Id.* at 416-417.

²⁷⁵ *Ford v. State*, 255 Ga. 81, 83, 335 S.E.2d 567, 572 (1985); The Georgia Supreme Court relied on the standard for establishing an equal protection violation first described in *Swain v. Alabama*, 380 U.S. 202 (1965). *Ford v. Georgia*, *supra* at 417.

²⁷⁶ 476 U.S. 79 (1986).

²⁷⁷ *Ford v. Georgia*, *supra* at 417.

²⁷⁸ *Ford v. State*, 257 Ga. 661, 362 S.E.2d 764 (1987).

²⁷⁹ 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987).

We now face the question whether Georgia can bar consideration of [Ford's] *Batson* claim as untimely raised. If we were to focus only on the fact of the state court's conclusion that petitioner had raised a *Swain* claim, the issue of the *Batson* claim's timeliness under state law could be resolved with the simplicity of a syllogism. Under Georgia's precedent, its Supreme Court will review a constitutional claim on the merits only if the record is clear that the claim "was directly and properly made in the court below and distinctly passed upon by the trial judge." *Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 719, 130 S.E.2d 490, 494 (1963) (emphasis added). The fact that the court reviewed petitioner's *Swain* claim on the merits, as noted in the court's second opinion, therefore presupposes the claim's timeliness. Because *Batson* merely modified the allegations and evidence necessary to raise and prove the equal protection claim in question, it would be reasonable to conclude that the state court's concession of timeliness under *Swain* must govern its treatment of the *Batson* claim as well.

The Supreme Court of Georgia, nonetheless, rested its contrary conclusion on the rule from *State v. Sparks*, that "hereafter, any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 257 Ga. at 98, 355 S.E.2d at 659. Although this language clearly sets the time after which a *Batson* claim would be too late, it did not so clearly set a time before which such a claim would be premature. The second Georgia opinion in this case, however, makes it obvious that the court understood *Sparks* to require an objection to be raised after the jurors are chosen. Thus, the court noted that petitioner made "no contemporaneous objection to the composition of the jury as selected," 257 Ga. at 663, 362 S.E.2d at 766, and "no objection to the composition of the jury after it was selected and before the trial commenced." *Id.*, at 664, 362 S.E.2d at 766. We assume that these observations by the court announced no new refinement of *Sparks*, but merely reflected the better reading of its opinion as originally written. In any event, the Georgia court regarded *Sparks* as so interpreted to be a "valid state procedural bar" to petitioner's claim, citing our decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977), thus apparently deciding the federal question whether the *Sparks* procedural rule bars federal review of petitioner's claim. [footnote 6 omitted]

The requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule. The imposition of this rule is nevertheless subject to our standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the national Constitution. A review of these standards reveals the inadequacy of Georgia's rule in *Sparks* to foreclose consideration of the *Batson* claim in this case.

The appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim is, of course, clear. In *Batson* itself, for example, we imposed no new procedural rules and declined either "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," or to decide when an objection must be made to be timely. 476 U.S. at 99-100. Instead, we recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and we left it to the trial courts, with their wide "variety of jury selection practices," to implement *Batson*

in the first instance. *Id.*, at 99, n.24. Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected.

In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958). In the *NAACP* case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence." *Id.*, at 457. In *James v. Kentucky*, 466 U.S. 341 (1984), we held that only a "firmly established and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim. *Id.*, at 348-351; see also *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar our review); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (procedural rule no bar to our review when state court had never applied it with the "pointless severity shown here").

The Supreme Court of Georgia's application of its decision in *Sparks* to the case before us does not even remotely satisfy the requirement of *James* that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been "firmly established and regularly followed" by the time as of which it is to be applied. At the time of petitioner's trial, Georgia's procedural law was just what it was when the *Sparks* defendant was tried, for *Sparks* was decided more than two years after petitioner in this case filed his motion on the prosecution's use of peremptory challenges and long after petitioner's trial was over. When petitioner filed his pretrial motion, he was subject to the same law that had allowed the defendant in *Sparks* to object even after the jury had been sworn. The very holding in *Sparks* was that the defendant was not procedurally barred from raising a *Batson* claim after the jury had been sworn and given preliminary instructions, and after the trial court had held a lengthy hearing on an unrelated matter. The court entertained the claim as having been raised "relatively promptly" because no prior decision of the Supreme Court of Georgia had required an earlier objection.

To apply *Sparks* retroactively to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of *James*. Indeed, the Georgia court itself in *Sparks* disclaimed any such effect for that decision. It was only as to cases tried "hereafter [that] any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 257 Ga. at 98, 355 S.E.2d at 659 (emphasis added). This case was not tried "hereafter," and the rule announced prospectively in *Sparks* would not, even by its own terms, apply to petitioner's case. Since the rule was not firmly established at the time in question, there is no need to dwell on the further point that the state court's inconsistent application

of the rule in petitioner's case and Sparks would also fail the second James requirement that the state practice have been regularly followed. [footnote 7 omitted]

III

The Supreme Court of Georgia erred both in concluding that petitioner's allegation of an equal protection violation under *Swain* failed to raise a *Batson* claim, and in apparently relying on *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Sparks* rule, adopted long after petitioner's trial, cannot bar federal judicial review of petitioner's equal protection claim. The judgment below is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Did Ford violate a procedural rule?** Did James Ford do anything wrong in the presentation of his jury discrimination case? The state argued he should be denied relief because he raised it at the wrong time, in violation of *State v. Sparks*, which had not been decided when Ford's jury was selected. The Court's decision in *Ford* illustrates the importance of examining the procedural rules in effect *at the time of the alleged noncompliance*. The Court acknowledged that *Sparks* was a perfectly valid and reasonable procedure for the litigation of *Batson v. Kentucky* claims; the foul was to announce it after Ford's trial, and then to apply it retroactively to deny him a ruling on his federal claim. The procedure was not adequate to bar Ford's federal claim because there was no procedure in place at the time of trial. In essence, the Georgia courts moved the goal post.
2. **Did Georgia decide Ford's Equal Protection Clause claim in spite of the alleged default?** Note that *Ford* is a certiorari case, not a habeas case, but it nevertheless reinforces the principle that a procedural bar is not independent of federal law if the state court did not provide a clear statement that its decision rests on independent, adequate state grounds. The State of Georgia argued that Ford defaulted his *Batson* claim by failing to allege that the prosecutor's discrimination against Black jurors violated the Fourteenth Amendment Equal Protection Clause. How important was it that the Georgia Supreme Court cited *Swain v. Alabama* in first rejecting Ford's jury discrimination claim? The Court determined that the Georgia Supreme Court decided the Equal Protection claim, and therefore it had jurisdiction to remedy the violation on certiorari.
3. **Changing the rules after the fact?** *Ford v. Georgia* is a simple rule of fairness: Ford could not be denied a remedy because he did not follow a procedure that did not exist when he sought a remedy. It is important for practitioners to determine the state of procedural rules *at the time of the prisoner's alleged non-compliance*. Another example is *Barkell v.*

Crouse,²⁸⁰ where the Wyoming Supreme Court in *Calene v. State*²⁸¹ announced a new procedure for raising claims of ineffective assistance of counsel but gave no guidance on pleading standards. Barkell filed a motion invoking the *Calene* procedure in a pleading consistent with the one used by Calene himself, but the Wyoming Supreme Court found his pleading insufficient to merit a remand for an evidentiary hearing. Because no such standards were in place when Barkell filed his motion, he did not violate a state procedural rule. Also see section 2, below, addressing whether a state rule is inadequate because it is not clearly announced.

4. **Procedural default is a federal question:** The Plain Statement rule of *Michigan v. Long* implied that it is up to the states to determine whether their procedures are independent and adequate grounds to bar a federal claim from federal review, but that is only half true. The Court clarified in *Douglas v. Alabama*²⁸² that “the adequacy of state procedural bars to the assertion of federal questions is itself a federal question,” citing *Wright v. Georgia*.²⁸³ The Alabama courts found that Douglas had waived his Sixth Amendment Confrontation Clause claim because he had not sufficiently objected to the admission of an alleged co-actor’s confession and obtained a ruling from the trial court. The Court rejected the argument, noting that Douglas had objected *three times* to the admission of the statement, and the prosecution agreed that his objection had been preserved. The Court described the standard for determining whether a defendant’s trial objection is adequate to avoid a procedural default:

In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.²⁸⁴

The Court concluded, “No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair.” *Id.* The broader principle articulated by the Court is that “whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”²⁸⁵

²⁸⁰ 468 F.3d 684 (10th Cir. 2006).

²⁸¹ 846 P.2d 679 (Wyo. 1993).

²⁸² 380 U.S. 415, 422 (1965).

²⁸³ 373 U.S. 284, 289-291 (1963).

²⁸⁴ *Douglas v. Alabama*, *supra* at 422.

²⁸⁵ *Wright v. Georgia*, *supra*, at 289, quoting *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

As the foregoing cases indicate, determining whether a claim is procedurally defaulted requires a deep examination of the state court record. For example, in *Clemmons v. Delo*,²⁸⁶ a series of courts found that Clemmons' due process claim under *Brady v. Maryland*²⁸⁷ and a related Sixth Amendment Confrontation Clause claim had not been presented to the Missouri Court of Appeals when he appealed the denial of his postconviction motion challenging his murder conviction and death sentence. Clemmons' public defender on appeal from his state postconviction motion refused to brief his *Brady* claim, so Clemmons filed his own *pro se* brief, which the Missouri Court of Appeals simply ignored. Did this constitute "fair presentation" of his claim? Should it be considered fair presentation and adequate under these circumstances? What if the state court had a rule prohibiting the consideration of *pro se* briefs and motions?²⁸⁸ Remarkably, the filing of Clemmons' *pro se* brief went undiscovered through most of his federal habeas corpus proceedings. The Eighth Circuit had affirmed the denial of Clemmons' habeas corpus petition on the grounds that his *Brady* claim was procedurally barred, *Clemmons v. Delo*,²⁸⁹ and the only thing standing between Clemmons and his execution was a petition for writ of certiorari to the U.S. Supreme Court. That said, new counsel appointed for Clemmons scoured the record, found Clemmons' *pro se* brief, and moved for rehearing the procedural default ruling. Rehearing was granted, and the court issued a new opinion granting rehearing and reversing the denial of habeas corpus relief. The court reasoned:

The client, however, is and always remains the master of his cause. Here, Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself. We do not criticize that Court for refusing leave to file the supplemental brief. Such matters are within the Court's discretion. Our own practice is usually to refuse leave to file supplemental briefs in cases in which counsel has appeared. The fact remains that Clemmons called the attention of the Missouri Supreme Court to his *Brady* claim, among many others. We do not know what else he could have done, as a practical matter, to present the claim to that Court for decision on the merits. We therefore hold that the claim was fairly

²⁸⁶ 124 F.3d 944 (8th Cir. 1997).

²⁸⁷ 373 U.S. 83 (1963).

²⁸⁸ The court noted that Missouri had no rule allowing or prohibiting *pro se* briefs, and also noted, "Sometimes Missouri courts allow *pro se* briefs, and sometimes they do not. That is their prerogative. But in the absence of regularly applied criteria, the decision not to allow such a brief cannot be said to rest on a regularly applied rule of state procedural law.: *Clemons v. Delo* at 949, n. 4. In this light, the procedural bar of Clemmons' claim fails to qualify as a rule that is regularly and consistently applied.

²⁸⁹ 100 F.3d 1394 (8th Cir. 1996).

presented, and that the merits are now open for decision on federal habeas corpus.²⁹⁰

After the Eighth Circuit granted Clemmons habeas corpus relief, he was retried and acquitted by a jury after having served fourteen years on death row for a crime he did not commit.²⁹¹ Clemmons' close call underscores the critical importance of obtaining and thoroughly examining the state court record.

The importance of meticulously reviewing the record is good practice for any attorney in any postconviction case.²⁹² In *Dobbs v. Zant*,²⁹³ for example, the Court summarily reversed a judgment denying habeas corpus relief and remanded for reconsideration after the discovery of a previously missing trial transcript which the state claimed never existed. Dobbs' ineffective assistance of counsel claim had been denied based on trial counsel's testimony explaining his strategy and argument to the jury, but when the transcript was produced, it "flatly contradicted the account given by counsel in key respects."²⁹⁴ The Court held that "the Court of Appeals erred when it refused to consider the full sentencing transcript."²⁹⁵ Review of the whole record will reveal whether and when the petitioner raised claims and supporting facts at every appropriate level in state courts. It can also reveal the basis of the state courts' decisions, and the reasonableness of a state court's refusal to decide a federal claim. As in *Dobbs* and *Clemmons*, it can establish whether a decision to deny a claim on the merits or procedurally is supported by the record as a whole. A complete state court record may consist of thousands or tens of thousands of pages or more; this is one reason that habeas litigation is so challenging and complex, and it is made more so by procedural technicalities.²⁹⁶

²⁹⁰ 124 F.3d at 948-949 (footnotes omitted).

²⁹¹ ERIC CLEMMONS, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3110> (last visited March 19, 2024).

²⁹² A similar issue arose in *Dobbs v. Zant*, 506 U.S. 357 (1993) (per curiam), in which the Court summarily reversed a judgment denying habeas corpus relief and remanded for reconsideration after the discovery of a previously missing trial transcript which the State claimed never existed. Dobbs' ineffective assistance of counsel claim had been denied based on trial counsel's testimony explaining his strategy and argument to the jury, but when the transcript was produced, it "flatly contradicted the account given by counsel in key respects." *Id.* at 358. The Court held that "the Court of Appeals erred when it refused to consider the full sentencing transcript." *Id.* at 357.

²⁹³ 506 U.S. 357 (1993) (per curiam).

²⁹⁴ *Id.* at 358.

²⁹⁵ *Id.* at 357.

²⁹⁶ The King study found that the state's reliance on procedural defenses tended to increase the time required for disposition:

among the capital cases that had already terminated, a ruling that a claim was time-barred added 47% to 112% more days to disposition compared to cases without such a ruling, on average and after controlling for other factors. Procedural default rulings appear to slow down processing time

2. Is the state procedural rule clearly announced and consistently applied?

This section examines cases where a prisoner did not comply with a state procedural rule, and the state court denied the prisoner's claims solely on that basis without addressing the federal constitutional issue. This circumstance differs from *Ford v. Georgia*, discussed earlier. In *Ford*, the prisoner did not violate a procedural rule because no such procedural rule was in place when he tried to raise his legal argument—an argument that would later be recognized as a *Batson* violation. The cases in this section involve established procedural rules, but questions arise concerning the operation of the rules, calling into question their adequacy. An *adequate* rule must be clearly announced, consistently and regularly applied, and not so difficult to follow that it obstructs federal rights.

The procedural bar in *Ford v. Georgia* failed this standard when the Georgia Supreme Court introduced a new procedural requirement *after* Ford had attempted to assert his jury discrimination claim. The rule was not clearly announced—indeed, it did not exist—when Ford made a good-faith effort to raise his claim. Thus, the procedural rule could not serve as an adequate state ground for denying relief. A state procedural rule may also fail to reach this standard if the rule is vaguely worded or open to multiple interpretations. *James v. Kentucky*²⁹⁷ exemplifies this issue because the state court decision rested on a procedural rule that did not qualify as an independent, adequate state ground.

JAMES V. KENTUCKY

JUSTICE WHITE delivered the opinion of the Court.

In *Carter v. Kentucky*, 450 U.S. 288 (1981), we held that a trial judge must, if requested to do so, instruct the jury not to draw an adverse inference from the defendant's failure to take the stand. In this case, the Kentucky Supreme Court found that the trial judge was relieved of that obligation because defense counsel requested an "admonition" rather than an "instruction."

I

Petitioner Michael James was indicted for receipt of stolen property, burglary, and rape. [footnote 1 omitted] James had been convicted of two prior felonies -- forgery and murder -- and the prosecution warned that were James to take the stand it would use the forgery conviction to impeach his testimony. During *voir dire*, defense counsel asked the prospective jurors how they would feel were James not to testify. After a brief exchange between counsel and one member of the venire, the trial judge interrupted, stating: "They have just said they would try the case solely

of terminated cases as well. Cases including at least one claim rejected as defaulted took 30% to 57% longer than cases without such a ruling, holding other factors constant.

King, et al., *HABEAS LITIGATION IN U.S. DISTRICT COURTS*, pp. 84-85, *supra*, n. 24.

²⁹⁷ 466 U.S. 341 (1984).

upon the law and the evidence. That excludes any other consideration." App. 30. [footnote 2 omitted] With that, *voir dire* came to a close. James did not testify at trial.

At the close of testimony, counsel and the judge had an off-the-record discussion about instructions. When they returned on the record, James' lawyer noted that he objected to several of the instructions being given, and that he "requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled." *Id.*, at 95. ²⁹⁸³ The judge then instructed the jury, which returned a verdict of guilty on all counts. At a subsequent persistent felony offender proceeding, the jury sentenced James to life imprisonment in light of his two previous convictions.

On appeal, James argued that the trial judge's refusal to tell the jury not to draw an adverse inference from his failure to testify violated *Carter v. Kentucky*, 450 U.S. 288 (1981). The Kentucky Supreme Court conceded that *Carter* requires the trial judge, upon request, to instruct the jury not to draw an adverse inference. 647 S. W. 2d 794, 795 (1983). The court noted, however, that James had requested an admonition rather than an instruction, and there is a "vast difference" between the two under state law. He "was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." *Id.*, at 795-796. We granted certiorari, 464 U.S. 913 (1983), to determine whether petitioner's asserted procedural default adequately supports the result below. We now reverse.

II

In *Carter* we held that, in order fully to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so. James argues that the essence of the holding in *Carter* is that the judge must afford some form of guidance to the jury, and that the admonition he sought was the "functional equivalent" of the instruction required by *Carter*. The State responds that the trial judge was under

²⁹⁸ [Court's footnote 3] The relevant portion of the transcript reads, in its entirety, as follows:

"JUDGE MEIGS: Call your witness. You have closed, I am sorry.

"MR. PEALE [defense counsel]: We have closed and has [*sic*] a matter in regards to the instructions.

"OFF THE RECORD.

"MR. PEALE: Note that the defendant objects to several of the instructions being given to the jury.

"JUDGE MEIGS: Overruled.

"MR. PEALE: The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

"JUDGE MEIGS: Ladies and gentlemen of the jury, these are your instructions..." Tr. of Hearing (Jan. 19, 1982), pp. 3-4.

no obligation to provide an admonition when under Kentucky practice James should have sought an instruction. An examination of the state-law background is necessary to understand these arguments.

A

Kentucky distinguishes between "instructions" and "admonitions." [citations omitted]

The substantive distinction between admonitions and instructions is not always clear or closely hewn to. Kentucky's highest court has recognized that the content of admonitions and instructions can overlap. In a number of cases, for example, it has referred to a trial court's failure either to instruct *or* to admonish the jury on a particular point, indicating that either was a possibility. *E.g.*, *Caldwell v. Commonwealth*, 503 S. W. 2d 485, 493-494 (1972) ("instructions" did not contain a particular "admonition," but the "failure to admonish or instruct" was harmless); *Reeves v. Commonwealth*, 462 S. W. 2d 926, 930, cert. denied, 404 U.S. 836 (1971). See also *Bennett v. Horton*, 592 S. W. 2d 460, 464 (1979) ("instructions" included the "admonition" that the jury could make a certain setoff against the award); *Carson v. Commonwealth*, 382 S. W. 2d 85, 95 (1964) ("The fourth instruction was the usual reasonable doubt admonition"). The court has acknowledged that "sometimes matters more appropriately the subject of admonition are included with or as a part of the instructions." *Webster v. Commonwealth, supra*, at 36.

In pre-*Carter* cases holding that a defendant had no right to have the jury told not to draw an adverse inference, Kentucky's highest court did not distinguish admonitions from instructions. See, *e. g.*, *Luttrell v. Commonwealth*, 554 S. W. 2d 75, 79-80 (1977) ("instruction"); *Scott v. Commonwealth*, 495 S. W. 2d 800, 802 ("written admonition," "admonition"), cert. denied, 414 U.S. 1073 (1973); *Green v. Commonwealth*, 488 S. W. 2d 339, 341 (1972) ("instruction"); *Dixon v. Commonwealth*, 478 S. W. 2d 719 (1972) ("an instruction admonishing the jury"); *Jones v. Commonwealth*, 457 S. W. 2d 627, 630 (1970) ("admonition" during another witness' testimony), cert. denied, 401 U.S. 946 (1971); *Roberson v. Commonwealth*, 274 Ky. 49, 50, 118 S. W. 2d 157, 157-158 (1938) ("admonition"), citing *Hanks v. Commonwealth*, 248 Ky. 203, 205, 58 S. W. 2d 394, 395 (App. 1933) ("instruction"). A statement to the jury not to draw an adverse inference from the defendant's failure to testify would seem to fall more neatly into the admonition category than the instruction category. Cautioning the jury against considering testimony *not* given differs little from cautioning it not to consider testimony that was.²⁹⁹ However, the Kentucky Criminal Rules treat it as an instruction. See n. 4, *supra*.

One procedural difference between admonitions and instructions is that the former are normally oral, while the latter, though given orally, are also provided to the jury in writing. See

²⁹⁹ [Court's footnote 5] Indeed, such a statement is substantively indistinguishable from an "admonition" given in this very case. When James was brought into court for the persistent-felony-offender hearing, he was in handcuffs. After requesting and being denied a mistrial, his attorney asked: "Can we at least have an admonition to the jury, your Honor?" The judge obliged, telling the jury it was "admonished not to consider the fact that the defendant was brought into the courtroom shackled and handcuffed. That should have nothing to do, no bearing at all, on your decision in this case." 5 Tr. 4.

generally 1 *Palmore*, ch. 12. However, this distinction is not strictly adhered to. As the cases cited above indicate, "admonitions" frequently appear in the written instructions. See also *id.*, at 21 ("An 'admonition' . . . need not be in writing. However, it is not error to give such admonition in writing as an instruction"); *id.*, at 17. Conversely, instructions may be given only orally if the defendant waives the writing requirement. Brief for Respondent 25; Tr. of Oral Arg. 31, 38-39. The State contends, though without citing any authority, that the instructions must be all in writing or all oral, and that it would have been reversible error for the trial judge to have given this "instruction" orally. Yet the Kentucky Court of Appeals has held, for example, that there was no error where the trial court, after reading the written instructions, told the jury orally that its verdict must be unanimous, a statement normally considered an "instruction." *Freeman v. Commonwealth*, 425 S. W. 2d 575, 579 (1968). And in several cases the Court of Appeals has found no error where the trial court gave oral explanations of its written instructions. *E. g.*, *Allee v. Commonwealth*, 454 S. W. 2d 336, 342 (1970), cert. *dism'd sub nom. Green v. Kentucky*, 401 U.S. 950 (1971); *Ingram v. Commonwealth*, 427 S. W. 2d 815, 817 (1968). Finally, given Kentucky's strict contemporaneous-objection rule, see, *e. g.*, *Webster v. Commonwealth*, 508 S. W. 2d, at 36; *Reeves v. Commonwealth*, *supra*, at 930; Ky. Rule Crim. Proc. 9.54(2), it would be odd if it were reversible error for the trial court to have given a *Carter* instruction orally at the defendant's request. See also *Weichhand v. Garlinger*, 447 S. W. 2d 606, 610 (Ky. App. 1969) (harmless error to give oral admonition where written instruction was requested and appropriate).

B

There can be no dispute that, for federal constitutional purposes, James adequately invoked his substantive right to jury guidance. See *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). The question is whether counsel's passing reference to an "admonition" is a fatal procedural default under Kentucky law adequate to support the result below and to prevent us from considering petitioner's constitutional claim. In light of the state-law background described above, we hold that it is not. Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights. Cf. *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). *Carter* holds that if asked to do so the trial court must tell the jury not to draw the impermissible inference. To insist on a particular label for this statement would "force resort to an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958), and would further no perceivable state interest, *Henry v. Mississippi*, 379 U.S. 443, 448-449 (1965). See also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). "Admonition" is a term that both we³⁰⁰ and the State Supreme Court have used in this context and which is reasonable under state law and normal usage. As Justice Holmes wrote 60 years ago: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably

³⁰⁰ [Court's footnote 6] See *Bruno v. United States*, 308 U.S. 287, 294 (1939) (Court unwilling to assume "that jurors, if properly admonished, neither could nor would heed the instructions of the trial court" not to draw an improper inference).

made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

* * * *

Reversed and remanded.

Questions and Comments:

1. **The substance of James' request:** James told the trial court what he wanted the jury to be told about his right to remain silent when he asked for an admonition. What might have motivated the trial court to refuse his request? Is it believable that the denial was motivated by his use of "admonish" instead of "instruct"? A reasonable judge would no doubt have understood that James wanted his jury told that it could draw no adverse inference from the fact that he did not testify. Did the Supreme Court reject Kentucky's decision because it thought the distinction between "admonish" and "instruct" was trivial or meaningless, or for some other reason? What if Kentucky law had been perfectly consistent over the years that an "admonition" is an oral caution to the jury, and "instruction" is written guidance given to the jury? Would the result have been the same? If Kentucky wanted to enforce that distinction in future cases, and have the rule respected by a federal court, what would it have to do? Why did Kentucky's effort to enforce the admonition/instruction distinction fail in this case?
2. **The limits of local practice:** In *James*, the Court relies on authority arising from state-federal litigation in a variety of areas, not just habeas corpus cases. For example, *Davis v. Wechsler*³⁰¹ involved a personal injury action against a railroad that was under federal control. The Missouri courts engaged in questionable logic to find that Davis "waived" his objection to venue which was grounded in federal law. The arbitrary deprivation of the defendant's venue argument caused the Court to state, "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."³⁰² This language repeatedly appears in the Court's habeas cases when arbitrary procedural rules are used to avoid a litigant's constitutional claims. The Court also said, "The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary."³⁰³ Put another way, "local practice shall not be allowed to put unreasonable

³⁰¹ 287 U.S. 22 (1923).

³⁰² 262 U.S. at 23.

³⁰³ *Id.*

obstacles in the way [of federal law.]”³⁰⁴

3. **Procedures or state actors hostile to federal rights:** Another important precedent outside of habeas corpus jurisprudence, but not unrelated, is *NAACP v. Patterson*,³⁰⁵ where Alabama sued to prohibit the NAACP from doing business in the State of Alabama, and was granted an *ex parte* restraining order on the same day the suit was filed. This case went to the Supreme Court twice, first after the Alabama court held the NAACP in contempt of Court for failing to produce a membership list. The legal effect of the contempt citation was to foreclose the NAACP from obtaining a hearing on its petition, or challenge the restraining order, until it purged itself of the contempt. Similar to the state court’s conduct in *Ford v. Georgia*, the Alabama courts kept moving the goalposts. The NAACP petitioned for certiorari to the Alabama appellate courts, but the state court said it should have petitioned for mandamus.³⁰⁶ The Supreme Court rejected the State’s argument that this procedural ruling constituted an independent, adequate state ground for the decision, noting that the Alabama Supreme Court’s reasoning was inconsistent with its own precedent, citing multiple Alabama appellate decisions,³⁰⁷ much as the Court had done in *James v. Kentucky*. The Court noted that Alabama had previously exercised certiorari jurisdiction to review an identical claim brought by the Ku Klux Klan to challenge a contempt citation for failing to disclose its membership list.³⁰⁸ The Court concluded that even if there were such a rule in Alabama, the NAACP “could not fairly be deemed to have been apprised of its existence.”³⁰⁹ The Court added, “Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.”³¹⁰ Even on remand from the United States Supreme Court, Alabama courts persisted to frustrate the NAACP’s lawsuit with procedural artifice. On remand, the Alabama Supreme Court reinstated the contempt judgment, and the Supreme Court again reversed the contempt judgment and remanded the case for further proceedings. *NAACP v. Alabama ex rel. Patterson*.³¹¹ On this second remand, Alabama courts refused a hearing and continued to avoid adjudication of the NAACP’s federal rights.³¹² A third trip to the Supreme Court allowed the NAACP to take its claims to the United States District Court in Alabama.³¹³

³⁰⁴ *Id.*

³⁰⁵ 377 U.S. 288 (1964).

³⁰⁶ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958).

³⁰⁷ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958).

³⁰⁸ *Id.*, citing *Ex parte Morris*, 252 Ala. 551, 42 So. 2d 17 (1949).

³⁰⁹ *Id.* at 457.

³¹⁰ *Id.* at 457-58.

³¹¹ 360 U.S. 240 (1959) (*per curiam*).

³¹² *NAACP v. Alabama*, 377 U.S. 288, 291, quoting *NAACP v. Gallion*, 290 F.2d 337, 343 (5th Cir. 1961).

³¹³ *NAACP v. Gallion*, 368 U.S. 16 (1961).

The Court observed that it searched for, but did not find, cases in which Alabama courts “applied their rules respecting the preparation of briefs with the pointless severity shown here.”³¹⁴ Several things are remarkable about the procedural history of this case. First is the Alabama Supreme Court’s transparent resort to unprecedented procedural artifice to frustrate the First Amendment rights of the NAACP to assemble and advocate for racial justice in Alabama. Second is the patience and respect of the Supreme Court for principles of federalism and state sovereignty. Third is the Court’s scrupulous and honest search through the State court record to determine for itself whether there was any legal or factual support for the state court’s procedural behavior. Most importantly, in the end the Court balanced principles of comity and federalism in favor of adjudicating constitutional claims on the merits and enforcing them against the State of Alabama in unambiguous, albeit diplomatic, terms. This case presents a good example of the Court’s commitment to balance the competing imperatives of enforcing the Constitution while respecting state sovereignty.

4. **Condemning procedural arbitrariness:** *James v. Kentucky* also relied on a union case, *Staub v. City of Baxley*.³¹⁵ Rose Staub was convicted of violating a city ordinance requiring union organizers to engage in a complex application process and disclose detailed personal information in support of a petition to the city council for permission to solicit new members. For holding a union organizing meeting in a private home, Ms. Staub was sentenced to 30 days and to pay a fine of \$300. Although she objected to the prosecution on First Amendment grounds, sought an injunction against the prosecution, and raised her First Amendment objections on appeal, the Georgia Court of Appeals ruled that Ms. Staub forfeited her claim because she had not applied for a permit, and because she attacked only one section of the ordinance, and not the whole thing.³¹⁶ On certiorari, the Supreme Court rejected the state’s claim that these were independent, adequate state grounds. The Court said, “Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.”³¹⁷ The Court reasoned, “It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.”³¹⁸ Addressing the argument that Ms. Staub had failed to apply for a permit, the Court held, “The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality,

³¹⁴ *Id.* at 297.

³¹⁵ 355 U.S. 313 (1957).

³¹⁶ 355 U.S. at 318.

³¹⁷ *Id.* at 319, quoting *First National Bank v. Anderson*, 269 U.S. 341, 346 (1926).

³¹⁸ *Id.*, quoting *Ward v. Love County*, 253 U.S. 17, 22 (1920).

because he has not yielded to its demands.”³¹⁹ How is the Supreme Court’s reasoning relevant to a habeas petitioner faced with similar procedural barriers?

5. **Norms of constitutional adjudication:** *James v. Kentucky* and the cases on which it relied for its reasoning reflect that certain norms of adjudication are part-and-parcel of the system of comity and federalism. What principles of litigation can be derived from the cases discussed in this section? The Court has shown considerable respect for the right of the state judiciary to govern the behavior of litigants so that cases proceed in a fair, efficient, and orderly manner. Examine each of the cases in which the court ruled that state procedures were inadequate to defeat constitutional claims or federal rights. What do those rulings have in common? What litigation behaviors do the NAACP, Rose Staub, and Michael James proceedings have in common? What characteristics do the state procedural rulings in *James v. Kentucky*, *NAACP v. Patterson*, and *Staub v. City of Baxley* have in common?
6. **Procedural bars and state incentives:** The foregoing cases provide examples of procedural rules that were not adequate to defeat federal rights. In this respect, they are exceptional; procedural denials of habeas claims in federal court is common. The fact that federal courts tend to strictly enforce state procedures by refusing to adjudicate defaulted claims creates its own incentives to develop byzantine state procedural regimes to minimize the chance of federal review. Habeas scholars Ronald Tabak and Mark Lane observed, “The true motivation for stricter state procedural bars is often a desire to preclude the federal courts from reviewing (and their more likely upholding) meritorious constitutional claims.”³²⁰ How would one go about establishing that a procedure is not adequate to bar a federal claim, either generally or in a particular case?
7. **Reasonable rules applied unreasonably:** Finally, a rule can be reasonable on its face, but there can be issues with the manner in which it is enforced, and sometimes the application of a procedural rule will turn on a question of fact. Often such questions can be decided based on the state court record, but what if the issue of waiver or forfeiture depends on evidence outside the state court record? In *Henry v. Mississippi*,³²¹ the record was silent on whether Henry’s lawyer intentionally bypassed an opportunity to object to an unlawful search. The Court decided that such a decision by counsel would be binding on the client, and constitute an independent, adequate state ground for Mississippi’s rejection of the claim, but that Henry was entitled to an evidentiary hearing on the question, and the matter was remanded for hearing.

³¹⁹ *Jones v. Opelika*, 316 U.S. 584, 602, dissenting opinion, adopted *per curiam* on rehearing, 319 U.S. 103, 104 (1943).

³²⁰ Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 42 (1991)

³²¹ 394 U.S. 443 (1965).

II. Procedural Bar, Waiver, and Equity: The Tension Between Fairness and Finality

A. Waiver or Forfeiture

Procedural default issues arise when a prisoner's claim is improperly presented, abandoned, or simply not raised in state courts because no state procedure was available when the supporting facts finally surfaced. In states with underfunded public defender systems or where prisoners are not provided counsel after their first appeal, prisoners often fail to raise a valid claim because they are either unaware of the factual basis or lack the legal knowledge to assert the claims properly. Pro se litigants are expected to investigate their cases, research the law, and obtain the necessary documents from the confines of their prison cells, but the vast majority are indigent and unable to pay for the substantial resources needed to investigate their cases thoroughly. Even when prisoners are represented by counsel, attorneys may fail to uncover key facts or raise viable legal claims in the proper state proceedings. In some cases, facts affirmatively concealed by state actors remained undiscovered until the prisoner was beyond the time limit for invoking a state remedy.³²² Much of the procedural complexity surrounding habeas corpus results from the fact that new evidence surfaces, new decisions are handed down, or new witnesses are discovered after the case has progressed through layers of appellate and postconviction review. When the prisoner attempts to invoke a remedy for that newly discovered or newly available claim, the state can be counted on to assert procedural defenses. These procedural technicalities can produce harsh results and bar courts from considering compelling claims and evidence that might have persuaded a judge, jury, or trial prosecutor to support a different outcome. To allow these claims to be heard and remedied threatens finality and consumes litigation resources, but to refuse to hear them may perpetuate a grave injustice. Courts have struggled repeatedly over the decades with this inevitable tension between finality and fairness, at various times putting its thumb on one side of the scale or the other when a prisoner brings a new legal claim late in the process.

This section examines courts' attempts to resolve untimely or defaulted claims. Unquestionably the trend has been toward stricter application of rules that foreclose litigation of new claims, and greater emphasis on the finality of criminal convictions. This unit explores various reasons courts have given for enforcing procedural rules, such as forfeiture, waiver, or simply finality for its own sake. It will also explore reasons that courts *should* entertain such claims. These generally involve equities on the prisoner's side, such as the prisoner's lack of fault, use of due diligence, actual innocence, or other equitable principles establishing that it would be unfair to deny review of a claim.

The prisoner's litigation behavior is relevant to this balance. Can a claim be procedurally defaulted if the prisoner is without fault for its untimeliness or imperfect presentation, as seen in

³²² See, for example, *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. 2011), granting habeas corpus relief because the prosecutor's concealment of his interview with a potential defense witness was not discovered until the time had run for the prisoner to present the claim in his postconviction motion.

James v. Kentucky and *Ford v. Georgia*? What if the prisoner's failure to comply with a procedural rule was unintentional or the prisoner is not at fault for violating the procedural rule? Is it fair to impose a "waiver" on a prisoner who seeks to enforce a constitutional right but is unaware of a claim's factual basis or lacks legal representation? In *Fay v. Noia*,³²³ the Supreme Court examined the issue of earlier procedural defaults in state and federal proceedings to determine what standard should govern these questions. While the Court has since overruled *Fay v. Noia* in federal habeas law,³²⁴ its standard for overcoming procedural barriers remains influential in many state courts and represents an important historical phase of habeas corpus jurisprudence in America.

FAY V. NOIA

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents important questions touching the federal habeas corpus jurisdiction, 28 U. S. C. §§ 2241 *et seq.*, in its relation to state criminal justice. The narrow question is whether the respondent Noia may be granted federal habeas corpus relief from imprisonment under a New York conviction now admitted by the state to rest upon a confession obtained from him in violation of the *Fourteenth Amendment*, after he was denied state post-conviction relief because the coerced confession claim had been decided against him at the trial and Noia had allowed the time for a direct appeal to lapse without seeking review by a state appellate court.

Noia was convicted in 1942 with Santo Caminito and Frank Bonino in the County Court of Kings County, New York, of a felony murder in the shooting and killing of one Hammeroff during the commission of a robbery. The sole evidence against each defendant was his signed confession. Caminito and Bonino, but not Noia, appealed their convictions to the Appellate Division of the New York Supreme Court. These appeals were unsuccessful, but subsequent legal proceedings resulted in the releases of Caminito and Bonino on findings that their confessions had been coerced and their convictions therefore procured in violation of the *Fourteenth Amendment*. Although it has been stipulated that the coercive nature of Noia's confession was also established,³²⁵ the United States District Court for the Southern District of New York held in Noia's federal habeas corpus proceeding that because of his failure to appeal he must be denied relief under the provision of 28 U. S. C. § 2254 whereby "An application for a writ of habeas corpus in

³²³ 372 U.S. 391 (1963)

³²⁴ See *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991),, overruling *Fay v. Noia* as the standard for overcoming procedural bar, and *McCleskey v. Zant*, 499 U.S. 467 (1991), overruling *Fay v. Noia* as the standard for entertaining a second or successive habeas petition.

³²⁵ [Court's footnote 2] * * * The facts surrounding the taking of the three confessions were essentially the same. A vivid statement of these facts is given in *United States ex rel. Caminito v. Murphy*, *supra*. The Court of Appeals condemned in strong terms the methods used to obtain the confessions. "All decent Americans soundly condemn satanic practices, like those described above, when employed in totalitarian regimes. It should shock us when American police re-sort to them, for they do not comport with the barest minimum of civilized principles of justice. . . ." 222 *F.2d*, at 701.

behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State" 183 F. Supp. 222 (1960).³²⁶ The Court of Appeals questioned whether § 2254 barred relief on federal habeas corpus where the applicant had failed to exhaust state remedies no longer available to him at the time the habeas proceeding was commenced (here a direct appeal from the conviction), but held that in any event exceptional circumstances were present which excused compliance with the section. The court also rejected other arguments advanced in support of the proposition that the federal remedy was unavailable to Noia. The first was that the denial of state post-conviction *coram nobis* relief on the ground of Noia's failure to appeal barred habeas relief because such failure constituted an adequate and independent state ground of decision, such that this Court on direct review of the state *coram nobis* proceedings would have declined to adjudicate the federal questions presented. *** The second argument was that Noia's failure to appeal was to be deemed a waiver of his claim that he had been unconstitutionally convicted. The Court of Appeals rejected this argument on the ground that no waiver could be inferred in the circumstances. *Id.*, at 351-352.

The District Court held a hearing limited to an inquiry into the facts surrounding Noia's failure to appeal but made no findings as to Noia's reasons. Noia and the lawyer who defended him at his trial testified. Noia said that while aware of his right to appeal, he did not appeal because he did not wish to saddle his family with an additional financial burden and had no funds of his own. The gist of the lawyer's testimony was that Noia was also motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial. The trial judge, not bound to accept the jury's recommendation of a life sentence, had said when sentencing him, "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance." Record, ff. 2261-2262. Noia's confession included an admission that he was the one who had actually shot the victim.

We granted certiorari. 369 U.S. 869. We affirm the judgment of the Court of Appeals but reach that court's result by a different course of reasoning. We hold: (1) Federal courts have *power* under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state

³²⁶ [Court's footnote 3] After Caminito and Bonino were released, Noia, unable to employ the procedure of a motion for reargument since he had not appealed from his conviction, made an application to the sentencing court in the nature of *coram nobis*. The Kings County Court set aside his conviction. *People v. Noia*, 3 Misc. 2d 447, 158 N. Y. S. 2d 683 (1956). The Appellate Division of the Supreme Court reversed and reinstated the judgment of conviction, 4 App. Div. 2d 698, 163 N. Y. S. 2d 796 (1957). The New York Court of Appeals affirmed the Appellate Division *sub nom. People v. Caminito*, 3 N. Y. 2d 596, 148 N. E. 2d 139 (1958). The Court of Appeals held that "[Noia's] failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize . . . *coram nobis* And this is so even though the asserted error or irregularity relates to a violation of constitutional right. . . ." 3 N. Y. 2d, at 601, 148 N. E. 2d, at 143. Certiorari was denied *sub nom. Noia v. New York*, 357 U.S. 905. Noia then brought the instant federal habeas corpus proceeding in the District Court for the Southern District of New York.

remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. (2) Noia's failure to appeal was not a failure to exhaust "the remedies available in the courts of the State" as required by § 2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief.

I.

The question has been much mooted under what circumstances, if any, the failure of a state prisoner to comply with a state procedural requirement, as a result of which the state courts decline to pass on the merits of his federal defense, bars subsequent resort to the federal courts for relief on habeas corpus. [footnote 4 omitted] Plainly it is a question that has important implications for federal-state relations in the area of the administration of criminal justice. It cannot be answered without a preliminary inquiry into the historical development of the writ of habeas corpus.

* * * *

It was settled in *Brown v. Allen*, *supra*, that the use of a coerced confession in a state criminal trial could be challenged in a federal habeas corpus proceeding. Yet actually the principle had been foreshadowed much earlier -- indeed, in the very first case in which this Court reversed a state conviction on the ground that coerced confessions had been used in evidence. "That complaint is . . . of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey*. And the proceeding thus vitiated could be challenged in any appropriate manner." *Brown v. Mississippi*, 297 U.S. 278, 286-287. Under the conditions of modern society, Noia's imprisonment, under a [conviction procured by a confession held by the Court of Appeals in *Caminito v. Murphy* to have been coerced, and which the State here concedes was obtained in violation of the *Fourteenth Amendment*, is no less intolerable than was Bushell's under the conditions of a very different society; and habeas corpus is no less the appropriate remedy.

III.

We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time

the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.

A number of arguments are advanced against this conclusion. One, which concedes the breadth of federal habeas power, is that a state prisoner who forfeits his opportunity to vindicate federal defenses in the state court has been given all the process that is constitutionally due him, and hence is not restrained contrary to the Constitution. But this wholly misconceives the scope of due process of law, which comprehends not only the right to be heard but also a number of explicit procedural rights -- for example, the right not to be convicted upon evidence which includes one's coerced confession -- drawn from the *Bill of Rights*. As Mr. Justice Holmes explained in *Moore v. Dempsey*, see pp. 421-422, *supra*, a mob-dominated trial is no less a denial of due process because the State Supreme Court believed that the trial was actually a fair one. *A fortiori*, due process denied in the proceedings leading to conviction is not restored just because the state court declines to adjudicate the claimed denial on the merits.

A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds. But a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured. Would Noia's failure to appeal have precluded him from bringing an action under the Civil Rights Acts against his inquisitors? The Act of February 5, 1867, like the Civil Rights Acts, was intended to furnish an independent, collateral remedy for certain privations of liberty. The conceptual difficulty of regarding a default as extinguishing the substantive right is increased where, as in Noia's case, the default fore-closes extraordinary remedies. In what sense is Noia's custody not in violation of federal law simply because New York will not allow him to challenge it on *coram nobis* or on delayed appeal? But conceptual problems aside, it should be obvious that to turn the instant case on the meaning of "custody in violation of the Constitution" is to reason in circles. The very question we face is how completely federal remedies fall with the state remedies; when we have answered this, we shall know in what sense custody may be rendered lawful by a supervening procedural default.

A practical appraisal of the state interest here involved plainly does not justify the federal courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule. We fully grant, see p. 438, *infra*, that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts. Surely no stricter rule is a realistic necessity. A man under conviction for crime has an

obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. See *Rogers v. Richmond*, 365 U.S. 534, 547-548. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution. For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision.

What we have said substantially disposes of the further contention that 28 U. S. C. § 2254 embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought. This contention is refuted by the language of the statute and by its history. It was enacted to codify the judicially evolved rule of exhaustion, particularly as formulated in *Ex parte Hawk*, 321 U.S. 114. See the review of the legislative history in *Darr v. Burford*, 339 U.S. 200, 211-213. Nothing in the *Hawk* opinion points to past exhaustion. Very little support can be found in the long course of previous decisions by this Court elaborating the rule of exhaustion for the proposition that it was regarded at the time of the revision of the Judicial Code as jurisdictional rather than merely as a rule ordering the state and federal proceedings so as to eliminate unnecessary federal-state friction. There is thus no warrant for attributing to Congress, in the teeth of the language of § 2254, intent to work a radical innovation in the law of habeas corpus. We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court. [footnote 43, omitted] Parenthetically, we note that our holding in *Irvin v. Dowd*, 359 U.S. 394, is not inconsistent. Our holding there was that since the Indiana Supreme Court had reached the merits of Irvin's federal claim, the District Court was not barred by § 2254 from determining the merits of Irvin's constitutional contentions.

IV.

Noia timely sought and was denied certiorari here from the adverse decision of the New York Court of Appeals on his *coram nobis* application, and therefore the case does not necessarily draw in question the continued vitality of the holding in *Darr v. Burford*, *supra*, that a state prisoner must ordinarily seek certiorari in this Court as a precondition of applying for federal habeas corpus. But what we hold today necessarily overrules *Darr v. Burford* to the extent it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari in this Court from an adverse state decision. Furthermore, our decision today affects all procedural

hurdles to the achievement of swift and imperative justice on habeas corpus, and because the hurdle erected by *Darr v. Burford* is unjustifiable under the principles we have expressed, even insofar as it may be deemed merely an aspect of the statutory requirement of present exhaustion, that decision in that respect also is hereby overruled.

Moreover, comity does not demand that such a price in squandered judicial resources be paid; the needs of comity are adequately served in other ways. The requirement that the habeas petitioner exhaust state court remedies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide.

V.

Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464 -- "an intentional relinquishment or abandonment of a known right or privilege" -- furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits -- though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon

the applicant's default. Cf. *Price v. Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. [footnote 44 omitted] Cf. *Carnley v. Cochran*, 369 U.S. 506, 513-517; *Moore v. Michigan*, 355 U.S. 155, 162-165. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E. g., *Rice v. Olson*, 324 U.S. 786.

The application of the standard we have adumbrated to the facts of the instant case is not difficult. Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. See, e. g., *Palko v. Connecticut*, 302 U.S. 319. He declined to play Russian roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures. This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts. In the instant case, the language of the judge in sentencing Noia, see note 3, *supra*, made the risk that Noia, if reconvicted, would be sentenced to death, palpable and indeed unusually acute.

VI.

Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy.

Affirmed.

MR. JUSTICE CLARK, dissenting.

I agree fully with and join the opinion of my Brother HARLAN. Beyond question the federal courts until today have had no power to release a prisoner in respondent Noia's predicament, there being no basis for such power in either the Constitution or the statute. But the Court today in releasing Noia makes an "abrupt break" not only with the Constitution and the statute but also with its past decisions, disrupting the delicate balance of federalism so foremost in the minds of the Founding Fathers and so uniquely important in the field of law enforcement. The

short of it is that Noia's incarceration rests entirely on an adequate and independent state ground - namely, that he knowingly failed to perfect any appeal from his conviction of murder.

Questions and Comments:

1. **Waiver or forfeiture?** In *Fay v. Noia*, the Court gave state prisoners a federal forum for their constitutional claims unless they had waived their opportunity to present their claims in state court, and the standard for such waiver required “an intentional relinquishment or abandonment of a known right or privilege.”³²⁷ If the prisoner made a conscious and informed choice to deliberately by-pass a state procedure for asserting a claim, then the federal court could deny that claim for that reason alone. Even so, the prisoner might be entitled to an evidentiary hearing on the question of whether such a waiver had occurred. *Fay* became known as the “deliberate by-pass” standard, and it was relatively friendly to habeas petitioners. It was criticized as encouraging “sandbagging” on the part of defense lawyers, “who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.”³²⁸ Would such conduct on the part of a defense attorney be ethical? Would it serve the client’s best interests, or would a competent attorney try to raise constitutional error at the earliest opportunity? The Court in *Wainwright v. Sykes* did not think so, and limited the *Fay v. Noia* standard to cases in which the default occurred in proceedings in which the prisoner was unrepresented by counsel. Justice Brennan dissented, arguing, among other things, that *Fay* was necessary to protect a defendant from negligent or incompetent counsel and to protect *pro se* litigants. *Wainwright v. Sykes*.³²⁹ The majority in *Wainwright v. Sykes* were more concerned about “sandbagging” litigants than about the unintentional forfeiture of a defendant’s constitutional rights and imposed a more stringent standard for overcoming a procedural default committed by counsel. What interests are advanced by elevating the standard for reaching defaulted claims? What interests or values were more important to the *Fay v. Noia* Court?
2. **Common procedural requirements:** As noted in the previous chapter, states enacted their own systems for adjudicating prisoners’ postconviction constitutional claims for vacating or modifying convictions and sentences. Every state has adopted postconviction procedures by constitution, statute, or court rule that functions generally like the federal habeas corpus procedure. Each system has pleading requirements, fact development procedures, and adjudication standards. Procedural default issues arise when a prisoner or the prisoner’s counsel does not comply with a state’s procedure either by defective pleading, failures of proof, or omission of claims. *Faye v. Noia* would examine alleged

³²⁷ *Fay v. Noia*, supra at 439, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³²⁸ *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977).

³²⁹ 433 U.S. at 100.

failures case-by-case to determine whether, under the circumstances, that failure satisfied the elements of a knowing, voluntary, and intelligent waiver, or deliberate by-pass, of that claim. In subsequent cases and in Chapter 5, Abuse of the Writ, we will examine the Court's retreat from the *Fay v. Noia* standard in favor of a less forgiving "cause-and-prejudice" standard that puts the onus of compliance with state procedures on the prisoner.

3. **Procedure over substance?** The Court's elevation of finality over fairness has turned habeas corpus litigation into a procedural battleground. As Warren McCleskey's case demonstrates, one can have a meritorious constitutional claim, concealed by state actors, and still be refused an adjudication of the claim on procedural technicalities. *Fay v. Noia* is an early chapter in this development. In subsequent chapters, we will discuss the procedural obstacles elevated by the Burger and Rehnquist Courts, and by the Antiterrorism and Effective Death Penalty Act of 1996.

B. Equitable Exceptions: Cause and Prejudice

When a prisoner procedurally defaults legal claims in state court by violating a procedural requirement, the federal court will not review the claim unless the prisoner can provide a legally adequate reason to reach the merits of his federal claim. The Supreme Court's decision in *Fay v. Noia* viewed the issue as one of waiver: a federal court should consider any claim presented by the prisoner unless the prisoner "deliberately by-passed" the claim. The key question was whether the prisoner intentionally waived a known right. This standard protected prisoners' access to federal courts for their constitutional claims by requiring federal habeas courts to hear the claim unless the prisoner knowingly and voluntarily waived it.

Some jurists considered *Fay* too lenient and advocated for a stricter standard. The Burger Court answered that call in *Wainwright v. Sykes*,³³⁰ which limited the *Fay* standard for overcoming procedural bars to the circumstances in *Fay*'s case—decisions made personally by the habeas petitioner. If the default occurred while the prisoner was represented by counsel, the focus shifted away from requiring knowing, voluntary, and intelligent waivers of constitutional rights. Instead, the focus became when and how a lawyer's decision binds the client. Given this shift, how would you categorize the new standard under *Wainwright v. Sykes*? Is it best described as waiver, forfeiture, or something else entirely?

WAINWRIGHT V. SYKES

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), a claim which the Florida courts have previously refused to consider

³³⁰ 433 U.S. 72 (1977).

on the merits because of noncompliance with a state contemporaneous-objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he told his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police and told them the same thing. Sykes was immediately arrested and taken to the police station.

Once there, it is conceded that he was read his *Miranda* rights, and that he declined to seek the aid of counsel and indicated a desire to talk. He then made a statement, which was admitted into evidence at trial through the testimony of the two officers who heard it, to the effect that he had shot Gilbert from the front porch of his trailer home. There were several references during the trial to respondent's consumption of alcohol during the preceding day and to his apparent state of intoxication, facts which were acknowledged by the officers who arrived at the scene. At no time during the trial, however, was the admissibility of any of respondent's statements challenged by his counsel on the ground that respondent had not understood the *Miranda* warnings. Nor did the trial judge question their admissibility on his own motion or hold a factfinding hearing bearing on that issue.

Respondent appealed his conviction, but apparently did not challenge the admissibility of the inculpatory statements.³³¹ He later filed in the trial court a motion to vacate the conviction and, in the State District Court of Appeals and Supreme Court, petitions for habeas corpus. These filings, apparently for the first time, challenged the statements made to police on grounds of involuntariness. In all of these efforts respondent was unsuccessful.

Having failed in the Florida courts, respondent initiated the present action under 28 U. S. C. § 2254, asserting the inadmissibility of his statements by reason of his lack of understanding of the *Miranda* warnings.³³² The United States District Court for the Middle District of Florida ruled that *Jackson v. Denno*, 378 U.S. 368 (1964), requires a hearing in a state criminal trial prior to the admission of an inculpatory out-of-court statement by the defendant. It held further that respondent had not lost his right to assert such a claim by failing to object at trial or on direct appeal, since only "exceptional circumstances" of "strategic decisions at trial" can create such a bar to raising

³³¹ At one point early in the trial defense counsel did object to admission of any statements made by respondent to the police, on the basis that the basic elements of an offense had not yet been established. The judge ruled that the evidence could be admitted "subject to [the crime's] being properly established later." *Id.*, at 16.

³³² Respondent expressly waived "any contention or allegation as regards ineffective assistance of counsel" at his trial. App. A-47. He advanced an argument challenging the jury instructions relating to justifiable homicide, but the District Court concluded in a single paragraph that the instructions had been adequate.

federal constitutional claims in a federal habeas action. The court stayed issuance of the writ to allow the state court to hold a hearing on the "voluntariness" of the statements.

Petitioner warden appealed this decision to the United States Court of Appeals for the Fifth Circuit. That court first considered the nature of the right to exclusion of statements made without a knowing waiver of the right to counsel and the right not to incriminate oneself. It noted that *Jackson v. Denno, supra*, guarantees a right to a hearing on whether a defendant has knowingly waived his rights as described to him in the Miranda warnings, and stated that under Florida law "[t]he burden is on the State to secure [a] prima facie determination of voluntariness, not upon the defendant to demand it." 528 F.2d 522, 525 (1976).

The simple legal question before the Court calls for a construction of the language of 28 U. S. C. § 2254(a), which provides that the federal courts shall entertain an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

* * * *

Only the . . . adequacy of state grounds to bar federal habeas review is presented in this case. The foregoing discussion of the other three is pertinent here only as it illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.

As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. For *Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules. The adequacy of such an independent state *procedural ground to prevent federal habeas review of the underlying federal issue has been treated very differently than where the state-law ground is substantive. The pertinent decisions marking the Court's somewhat tortuous efforts to deal with this problem are: Ex parte Spencer*, 228 U. S. 652 (1913); *Brown v. Allen*, 344 U. S. 443 (1953); *Fay v. Noia, supra*; *Davis v. United States*, 411 U. S. 233 (1973); and *Francis v. Henderson*, 425 U. S. 536 (1976).

In *Brown, supra*, petitioner Daniels' lawyer had failed to mail the appeal papers to the State Supreme Court on the last day provided by law for filing, and hand delivered them one day after that date. Citing the state rule requiring timely filing, the Supreme Court of North Carolina refused to hear the appeal. This Court, relying in part on its earlier decision in *Ex parte Spencer, supra*, held that federal habeas was not available to review a constitutional claim which could not have

been reviewed on direct appeal here because it rested on an independent and adequate state procedural ground. 344 U. S., at 486-487.

In *Fay v. Noia, supra*, respondent Noia sought federal habeas to review a claim that his state-court conviction had resulted from the introduction of a coerced confession in violation of the *Fifth Amendment to the United States Constitution*. While the convictions of his two codefendants were reversed on that ground in collateral proceedings following their appeals, Noia did not appeal and the New York courts ruled that his subsequent *coram nobis* action was barred on account of that failure. This Court held that petitioner was nonetheless entitled to raise the claim in federal habeas, and thereby overruled its decision 10 years earlier in *Brown v. Allen, supra*:

"[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." 372 U. S., at 399.

As a matter of comity but not of federal power, the Court acknowledged "a limited discretion in the federal judge to deny relief... to an applicant who had deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id., at 438*. In so stating, the Court made clear that the waiver must be knowing and actual - "an intentional relinquishment or abandonment of a known right or privilege." *Id., at 439*, quoting *Johnson v. Zerbst*, 304 U.S., at 464. Nothing petitioner's "grisly choice" between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death, the Court concluded that there had been no deliberate bypass of the right to have the federal issues reviewed through a state appeal.

We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See *Henry v. Mississippi*, 379 U. S. 443 (1965). We thus come to the crux of this case. Shall the rule of *Francis v. Henderson, supra*, barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer that question in the affirmative.

[S]ince *Brown v. Allen*, 344 U. S. 443 (1953), it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of *Brown v. Allen* is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta

in *Fay v. Noia*, 372 U. S. 391 (1963), which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.

The reasons for our rejection of it are several. The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. While the 1966 amendment to § 2254 requires deference to be given to such determinations made by state courts, the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds.

A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to § 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

We think that the rule of *Fay v. Noia*, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off. The refusal of federal habeas courts to honor contemporaneous-objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of *Fay v. Noia*, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal *habeas* tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views.

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case

in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

The "cause"-and-"prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial,³³³ [Court's fn 14] and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.

Last Term in *Estelle v. Williams, supra*, the Court reiterated the burden on a defendant to be bound by the trial judgments of his lawyer.

"Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." 425 U. S., at 512.

³³³ [Court's footnote 14] In *Henry v. Mississippi*, 379 U. S., at 451, the Court noted that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where "the circumstances are exceptional."

We accordingly conclude that the judgment of the Court of Appeals for the Fifth Circuit must be reversed, and the cause remanded to the United States District Court for the Middle District of Florida with instructions to dismiss respondent's petition for a writ of habeas corpus.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Over the course of the last decade, the deliberate-bypass standard announced in *Fay v. Noia*, 372 U.S. 391, 438-439 (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States' interests in the integrity of their judicial procedural regimes. The Court today decides that this standard should no longer apply with respect to procedural defaults occurring during the trial of a criminal defendant. In its place, the Court adopts the two-part "cause"-and-"prejudice" test originally developed in *Davis v. United States*, 411 U. S. 233 (1973), and *Francis v. Henderson*, 425 U.S. 536 (1976). As was true with these earlier cases, however, today's decision makes no effort to provide concrete guidance as to the content of those terms. More particularly, left unanswered is the thorny question that must be recognized to be central to a realistic rationalization of this area of law: How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel? Because this key issue remains unresolved, I shall attempt in this opinion a re-examination of the policies that should inform - and in *Fay* did inform - the selection of the standard governing the availability of federal habeas corpus jurisdiction in the face of an intervening procedural default in the state court.

* * * *

Thus, I remain concerned that undue deference to local procedure can only serve to undermine the ready access to a federal court to which a state defendant otherwise is entitled. But federal review is not the full measure of Sykes' interest, for there is another of even greater immediacy: assuring that his constitutional claims can be addressed to *some* court. For the obvious consequence of barring Sykes from the federal courthouse is to insulate Florida's alleged constitutional violation from any and all judicial review because of a lawyer's mistake. From the standpoint of the habeas petitioner, it is a harsh rule indeed that denies him "any review at all where the state has granted none," *Brown v. Allen*, 344 U. S., at 552 (Black, J., dissenting) - particularly when he would have enjoyed both state and federal consideration had his attorney not erred.

* * * *

In sum, I believe that *Fay's* commitment to enforcing intentional but not inadvertent procedural defaults offers a realistic measure of protection for the habeas corpus petitioner seeking federal review of federal claims that were not litigated before the State. The threatened creation of a more "airtight system of forfeitures" would effectively deprive habeas petitioners of the opportunity for litigating their constitutional claims before any forum and would disparage the paramount importance of constitutional rights in our system of government. Such a restriction of habeas corpus jurisdiction should be countenanced, I submit, only if it fairly can be concluded that

Fay's focus on knowing and voluntary forfeitures unduly interferes with the legitimate interests of state courts or institutions. The majority offers no suggestion that actual experience has shown that *Fay's* bypass test can be criticized on this score. And, as I now hope to demonstrate, any such criticism would be unfounded.

III

A regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such;¹⁰ Florida's courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure. The relevant inquiry is whether more is required - specifically, whether the fulfillment of important interests of the State necessitates that federal courts be called upon to impose additional sanctions for inadvertent noncompliance with state procedural requirements such as the contemporaneous-objection rule involved here.

* * * *

In short, I believe that the demands of our criminal justice system warrant visiting the mistakes of a trial attorney on the head of a habeas corpus applicant only when we are convinced that the lawyer actually exercised his expertise and judgment in his client's service, and with his client's knowing and intelligent participation where possible. This, of course, is the precise system of habeas review established by *Fay v. Noia*.

IV

...although some four years have passed since its introduction in *Davis v. United States*, 411 U.S. 233 (1973), the only thing clear about the Court's "cause"-and-"prejudice" standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints. Hence, as of today, all we know of the "cause" standard¹⁵ is its requirement that habeas applicants bear an undefined burden of explanation for the failure to obey the state rule, *ante*, at 91. Left unresolved is whether a habeas petitioner like Sykes can adequately discharge this burden by offering the commonplace and truthful explanation for his default: attorney ignorance or error beyond the client's control. The "prejudice" inquiry, meanwhile, appears to bear a strong resemblance to harmless-error doctrine. Compare *ante*, at 91, with *Chapman v. California*, 386 U. S. 18, 24 (1967). I disagree with the Court's appraisal of the harmlessness of the admission of respondent's confession, but if this is what is meant by prejudice, respondent's constitutional contentions could be as quickly and easily disposed of in this regard by permitting federal courts to reach the merits of his complaint. In the absence of a persuasive alternative formulation to the bypass test, I would simply affirm the judgment of the Court of Appeals and allow Sykes his day in court on the ground that the failure of timely objection in this instance was not a tactical or deliberate decision but stemmed from a lawyer's error that should not be permitted to bind his client.

Questions and Comments:

1. **Departure from *Faye v. Noia*:** How would Sykes' *Miranda* claim be treated under *Fay v. Noia*? Would the record described in this opinion support a knowing, voluntary, and intelligent waiver of his claim? Does the majority opinion's discussion of the facts supporting Sykes' *Miranda* claim provide any indication of the outcome, had it been decided on the merits? Is there a relationship between the procedural status of the claim in the lower courts and the development of the evidentiary record on the merits of the claim? When the Court announces a new standard, as it did in *Sykes*, it often remands the case to the lower court for reconsideration under the new standard. Why didn't the Court do so here?
2. **Defaults committed by counsel:** Chief Justice Burger, concurring, argued that Sykes' representation by counsel changed the procedural default analysis:

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate - and ultimate - responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.³³⁴

Is it fair to permanently bar the client from raising claims due to their lawyer's decisions? Under what circumstances could a habeas petitioner overcome a procedural default resulting from their lawyer's conduct? What level of malfeasance or nonfeasance on the lawyer's part must a petitioner show to excuse or overcome procedural default?

3. **The burden of compliance shifts to the client:** *Fay v. Noia* focused on the habeas petitioner's intent when a state procedural rule was violated or bypassed. The Court relied on *Johnston v. Zerbst*, which held that a prisoner's waiver of constitutional rights must be knowing, voluntary, and intelligent.³³⁵ What is the focus of *Wainwright v. Sykes*? Is the habeas petitioner's personal awareness or desire to pursue a claim still relevant? What options would defendants in Sykes' position have if they disagreed with their counsel's handling of the case? While *Faye v. Noia* facilitated access to a federal forum for vindication of federal rights, the *Wainwright v. Sykes* cause-and-prejudice standard was

³³⁴ *Wainwright v. Sykes*, *supra*, at 93.

³³⁵ 304 U.S. 458 (1938).

criticized for limiting the reach of the Great Writ.³³⁶ Consider *Clemons v. Delo*, where Eric Clemmons' postconviction public defender refused to raise an ineffective assistance of counsel claim.³³⁷ Clemons raised it in a *pro se* motion and in a *pro se* brief on appeal, but Missouri courts ignored *pro se* filings; there were state rules prohibiting them. The U.S. District Court ruled that Clemons' ineffective assistance of counsel claim was procedurally barred and denied it without addressing its merits. What should the Court of Appeals do? Is Clemmons' claim defaulted? What more could he have done to preserve his claim?

4. **Procedural default vs. abuse of the writ:** Even after *Wainwright v. Sykes*, courts continued to apply *Fay v. Noia* as the standard for filing second or successive federal petitions for a writ of habeas corpus. Is there a reason for treating the issue of procedural bar and abuse of the writ differently? Is one doctrine more intrusive upon state judicial decisions than the other? Does the federal judiciary's power and duty to ensure the integrity of its own judgments justify a more lenient standard for reopening a federal judgment denying habeas corpus relief to a state prisoner?
5. **Do prisoners really withhold arguments for vacating convictions?** How real is the Court's concern about prisoners "sandbagging?" Are there incentives for state prisoners to withhold legal claims or evidence from state courts by "saving" them for later federal habeas corpus review? Under what circumstances would a prisoner strategically withhold a claim? This question will be revisited in Chapter 7, Fact Development in Postconviction Proceedings.
6. ***Faye v. Noia's* gradual demise:** *Wainwright v. Sykes* did not outright overrule *Fay v. Noia* but instead limited *Fay* to cases where the client personally waived the claim. It was not until *Coleman v. Thompson*, that the Supreme Court overruled *Fay* as the standard for overcoming procedural defaults and applied *Sykes'* cause-and-prejudice standard to all cases where a prisoner sought to overcome procedural default.³³⁸
7. **Stricter procedural rules only matter when claims have merit:** *Fay* and *Sykes* serve as threshold standards for determining whether a habeas petitioner's claims can be reviewed on the merits. Prisoners with meritless claims will lose under either standard. In what types of cases will *Wainwright v. Sykes* actually affect the outcome? Clearly some meritorious claims will be denied. For example, prisoners who can prove that a constitutional violation probably affected the outcome of their trial will be denied review unless they can also show some external factor, independent of the prisoner or counsel, interfered with their ability to discover or present the claim. Scholar-advocate Charles Eric Hintz suggests supplementing the cause-prejudice standard with a "plain error" standard which would allow federal courts to review claims that "affect[] substantial rights" or "seriously affect[] the fairness,

³³⁶ See Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 665–75 (1984).

³³⁷ 124 F.3d 944 (8th Cir. 1997).

³³⁸ 501 U.S. 722 (1991).

integrity, or public reputation of judicial proceedings.”³³⁹

After *Wainwright v. Sykes*, the cause-and-prejudice standard became the most common gateway for reviewing the merits of a defaulted claim. In *Murray v. Carrier*,³⁴⁰ the Court clarified the standard for proving cause, stating: “[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.” The Court provided examples of circumstances that qualify as “cause” for noncompliance with a state procedural rule, such as: “a showing that the factual or legal basis for a claim was not reasonably available to counsel,” or when there was “some interference by officials” preventing compliance.³⁴¹ Thus, the mere absence of a claim from a prisoner’s state court litigation does not automatically trigger procedural default—“default” implies that the prisoner is at fault for failing to raise the claim. Stated differently, an equitable process would allow a diligent prisoner the right to federal review of the merits of their claim.

1. Impediments external to the defense—concealment by the state

For purposes of applying the cause-and-prejudice standard, “cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.”³⁴² Attorney error can constitute cause to overcome a procedural default only if counsel’s performance is constitutionally deficient. “So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.”³⁴³ Aside from that statement defining what is *not* cause, the only guidance given by the Court is that “cause” must be “some objective factor external to the defense” which impedes compliance with the state procedural rule.

³³⁹ Charles, Eric Hintz, *The Plain Error of Cause and Prejudice*, 53 Seton Hall L. Rev. 439, 440 (2022).

³⁴⁰ 477 U.S. 478, 488 (1986).

³⁴¹ *Id.*

³⁴² *Murray v. Carrier*, 477 U.S. 478, 492 (1986).

³⁴³ *Id.* at 488.

Government interference is one factor that would satisfy the cause prong of the cause-prejudice standard. In *Amadeo v. Zant*³⁴⁴ the habeas petitioner by pure happenstance found evidence that an Alabama jury commissioner deliberately omitted Black candidates from the venire panel sent to the courtroom for Amadeo's trial. When Mr. Amadeo's counsel raised the newly discovered jury discrimination claim, Alabama's counsel alleged that the claim was defaulted.

AMADEO V. ZANT

JUSTICE MARSHALL delivered the opinion of the Court.

In considering petitioner's motion for a writ of habeas corpus, the District Court concluded that petitioner successfully established cause for his failure to raise in the state trial court a constitutional challenge to the composition of the juries that indicted him, convicted him, and sentenced him to death. This case presents the question whether the factual findings upon which the District Court based its conclusion were clearly erroneous.

I

Petitioner Tony B. Amadeo was convicted of murder and criminal attempt to commit theft in November 1977 in the Superior Court of Putnam County, Georgia. The jury returned a recommendation of death for the murder charge, and the court imposed the death sentence. In addition, the court imposed a 10-year sentence for the attempted theft charge.

Nine months later, while petitioner was pursuing his direct appeal to the Georgia Supreme Court, an independent civil action in federal court brought to light a scheme by the District Attorney and the Jury Commissioners of Putnam County to underrepresent black people and women on the master jury lists from which all grand and traverse (petit) juries were drawn. See *Bailey v. Vining*, Civ. Action No. 76-199 MAC (MD Ga., Aug. 17, 1978). *Bailey* involved a challenge to the at-large voting procedures in Putnam County. In the course of researching the case, one of the plaintiffs' attorneys reviewed the master jury lists for a period of 20 to 30 years and uncovered a handwritten memorandum on a sheet of legal paper. The missive bore no caption or other designation, no signature, no date, and no file stamp from the court Clerk's office. Under the heading "Result," the sheet listed figures for the number of black people and women to be placed on the master jury lists that would result in their underrepresentation on grand and traverse juries by a range of 5 to 11%. App. 4. The attorney who discovered the memorandum asked the Clerk of the court where it came from, and the Clerk responded that it was instructions from the District Attorney's Office to the Jury Commissioners about the master jury lists. *Id.*, at 45. According to the Clerk, the Jury Commissioners followed the memorandum's instructions. *Id.*, at 9.

³⁴⁴ 486 U.S. 214 (1988)

The District Court in *Bailey* found that the memorandum was intentionally designed to underrepresent black people and women on grand and traverse juries without giving rise to a prima facie case of racial discrimination under this Court's opinion in *Swain v. Alabama*, 380 U.S. 202, 208-209, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965) (underrepresentation of less than 10% is insufficient to prove intentional discrimination), and the Fifth Circuit's opinion in *Preston v. Mandeville*, 428 F.2d 1392, 1393-1394 (1970) (13.3% underrepresentation constitutes prima facie case). See App. 10, 78. Concluding that the master jury lists could not be used for any purpose until the discrimination had been corrected, the District Court ordered the Jury Commissioners to reconstitute the lists in conformity with the Constitution. *Bailey v. Vining*, *supra*, at 7.

Citing the District Court's order in *Bailey*, petitioner's attorneys raised a challenge to the composition of the Putnam County juries that had indicted, convicted, and sentenced petitioner in their opening brief on direct appeal to the Georgia Supreme Court. In addition, petitioner's attorneys filed a supplemental brief devoted solely to the jury composition issue, in which they argued that the challenge had not been waived in Superior Court because they had not had any opportunity to discover the purposeful discrimination. See App. 14-18. The Georgia Supreme Court nevertheless affirmed petitioner's convictions and sentences, rejecting his challenge to the jury on the ground that it "comes too late."² *Amadeo v. State*, 243 Ga. 627, 629, 255 S.E.2d 718, 720, cert. denied, 444 U.S. 974, 62 L. Ed. 2d 389, 100 S. Ct. 469 (1979). Petitioner twice sought a writ of habeas corpus in the state courts without success, and this Court denied certiorari both times.

After exhausting his state remedies, petitioner sought a writ of habeas corpus in Federal District Court. Petitioner's habeas petition was heard by the same District Judge who had decided the *Bailey* case. The court noted that *Bailey* established that the Putnam County Jury Commissioners had composed the master jury lists so as deliberately to under-represent black citizens without giving rise to a prima facie case of intentional discrimination. App. 78. Accordingly, the court concluded that "clearly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries." *Ibid*. The court went on to explain that in light of the Georgia Supreme Court's finding of waiver under state law, petitioner could assert his constitutional claim in the federal habeas proceeding only if he established cause and prejudice within the meaning of this Court's decision in *Francis v. Henderson*, 425 U.S. 536, 542, 48 L. Ed. 2d 149, 96 S. Ct. 1708 (1976). Observing that petitioner's lawyers had raised the discrimination claim as soon as the inculpatory evidence came to light, the court found that they had engaged in no "sandbagging" or "deliberate bypass" -- the principal concerns behind the cause and prejudice requirement. Concluding that to overlook the intentional discrimination in this case would result in a "miscarriage of justice," the District Court found sufficient cause and prejudice to excuse the procedural default and granted the writ on the basis of petitioner's constitutional challenge. App. 80.

The Court of Appeals for the Eleventh Circuit remanded the case for an evidentiary hearing. *Amadeo v. Kemp*, 773 F.2d 1141 (1985). Acknowledging that neither party had requested a hearing before the District Court, the Court of Appeals nonetheless found the record

insufficiently developed for proper review of the question of cause *Id.*, at 1145. The Court of Appeals requested that the District Court establish on remand "the specifics of the alleged unconstitutional method of selecting the jurors and whether this method was so devious and hidden as to be nondiscoverable." *Ibid.*

On remand, the District Court held an evidentiary hearing at which it received testimony from petitioner's two trial lawyers, a lawyer who assisted petitioner's lawyers in developing the jury challenge on direct appeal, and the lawyer who discovered the memorandum in the *Bailey* case. At the conclusion of the hearing, the judge issued an oral order and memorandum opinion in which he reaffirmed his earlier conclusion that petitioner had demonstrated adequate cause to excuse his procedural default. App. 90-93. The court observed that the District Attorney had made no attempt to deal honestly with petitioner's lawyers and reveal that he had guided the Jury Commissioners' manipulation of the jury lists. *Id.*, at 92. The court concluded that, in light of all the circumstances of the case, "it was reasonable for [petitioner's lawyers] at the time that they were appointed, to not challenge the list," *ibid.*, adding, "I don't think it was a deliberate by-pass in any sense." *Id.*, at 93. The court specifically found that if petitioner's lawyers had known of the District Attorney's memorandum, they would have challenged the composition of the jury. *Id.*, at 92.

A divided panel of the Eleventh Circuit reversed. *Amadeo v. Kemp*, 816 F.2d 1502 (1987). The court noted that the District Court had found that the racial disparity on the jury lists was concealed by county officials, *id.*, at 1507, but the court stated simply that it "disagree[d] with that conclusion." *Ibid.* The court found instead that "the memorandum detailing the county's efforts to alter the racial composition of the master jury lists . . . was readily discoverable in the county's public records" and that petitioner's lawyers "would have found the memorandum" had they examined the records. *Ibid.* The court further found that petitioner's lawyers had "made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire," *ibid.*, although the court acknowledged that there had been conflicting testimony at the evidentiary hearing on this point. *Id.*, at 1507, n. 9. In light of these findings, the court concluded that petitioner had not established cause for his failure to raise his constitutional challenge in accordance with Georgia procedural law.

The dissenting judge argued as a threshold matter that the majority ignored its obligation to defer to the trial court's factual findings unless they are clearly erroneous. *Id.*, at 1508, 1510, 1511. More broadly, the dissent maintained that "where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." *Id.*, at 1513.

We granted certiorari, 484 U.S. 912 (1987), and we now reverse.

II

In *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), this Court adopted the "cause and prejudice" requirement of *Francis v. Henderson*, *supra*, for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court. The *Sykes* Court did

not elaborate upon this requirement, but rather left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U.S. at 87. Although more recent decisions likewise have not attempted to establish conclusively the contours of the standard, they offer some helpful guidance on the question of cause. In *Reed v. Ross*, 468 U.S. 1, 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984), the Court explained that although a "tactical" or "intentional" decision to forgo a procedural opportunity normally cannot constitute cause, *id.*, at 13-14, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." *Id.*, at 14. The Court later elaborated upon *Ross* and stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). We explained that "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable, would constitute cause under this standard." *Ibid.* (citations omitted).

The Court of Appeals did not contest, nor could it, that the facts found by the District Court in this case permitted the District Court's legal conclusion that petitioner had established cause for his procedural default. If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents. The situation described by the District Court fits squarely, indeed almost verbatim, within our holdings in *Ross* and *Carrier*. First, the District Court essentially found that the basis for petitioner's claim was "reasonably unknown" to petitioner's lawyers, *Reed v. Ross*, *supra*, at 14, because of the "objective factor" of "some interference by officials." *Murray v. Carrier*, *supra*, at 488 (citation omitted). Second, the District Court's finding of no deliberate bypass amounted to a conclusion that petitioner's lawyers did not make a "tactical" or "intentional" decision to forgo the jury challenge. *Reed v. Ross*, *supra*, at 13-14.

* * * *

A

The first factual finding rejected by the Court of Appeals is the District Court's conclusion that the District Attorney's memorandum was concealed by county officials and therefore was not reasonably available to petitioner's lawyers. The Court of Appeals acknowledged that the District Court had found these facts. See 816 F.2d at 1507. But without examining the record or discussing its obligations under *Rule 52(a)*, the court simply expressed disagreement and substituted its own factual findings for those of the District Court. See *ibid.* (finding that the memorandum was "not concealed," but rather "was readily discoverable in the county's public records").

Even assuming, somewhat generously, that the Court of Appeals recognized and applied the appropriate standard of review, we cannot agree that the District Court's factual findings were clearly erroneous. The District Court's finding of concealment is supported by the nature of the

memorandum itself, which was part of the documentary record before the court. See App. 44. The District Attorney's memorandum was handwritten, unsigned, unstamped, and undesignated -- physical characteristics that strongly belie the notion that the document was intended for public consumption. Moreover, the attorney who originally discovered the memorandum testified that he did so as part of a sweeping investigation of 20 to 30 years' worth of jury lists. *Id.*, at 42. He further testified that the memorandum was "not on the first page of the materials that I was perusing but somewhere within the stack of materials that [the court Clerk] gave me." *Id.*, at 44. This testimony was not disputed, and the District Court permissibly could have concluded that the memorandum was discovered by mere fortuity and that it would not have been "readily discoverable" had petitioner's attorneys investigated the jury lists that were relevant to petitioner's trial. Indeed, the Court of Appeals identified no evidence in the record -- aside from the fact that the memorandum eventually was discovered -- that contradicted the District Court's conclusions about the concealment and availability of the memorandum. The Court of Appeals therefore should not have set aside as clearly erroneous the District Court's findings on these matters.

B

The second factual finding rejected by the Court of Appeals is the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge. Here the Court of Appeals drew more heavily upon the record below, citing testimony from the evidentiary hearing in the District Court to the effect that petitioner's lawyers considered a jury challenge, thought they could win it, but decided not to bring the challenge because they were pleased with the jury ultimately empaneled. See *816 F.2d at 1506*. The Court of Appeals emphasized that petitioner is a white man with a history of assaulting black people and that petitioner's lawyers therefore were not eager to have more black people on the jury. *Ibid.* The court also cited testimony from the lawyers that they were satisfied with the jury venire because it contained several members of a charismatic religious group that had seemed sympathetic to petitioner. *Ibid.* Most damaging to petitioner's case on habeas was the court's reliance on the statement of one of his lawyers that "we made a tactical decision, a knowing, tactical decision not to challenge the array." *Ibid.*, quoting 2 Record 13, App. 23.

In the face of this potent testimony from petitioner's trial lawyers, petitioner argues that even if the lawyers did consider and deliberately bypass a jury challenge, the challenge that they bypassed was not the same challenge that is now being pressed, because the only argument available at the time of trial was a statistical challenge rather than a challenge based on direct evidence of intentional discrimination. The dissenting Circuit Judge also advanced this argument. *816 F.2d at 1510-1511* (Clark, J., dissenting). In the alternative, petitioner argues that the District Court's finding of no deliberate bypass was supported by other testimony and evidence in the record and thus should not have been set aside by the Court of Appeals.

It is not necessary to address the merits of petitioner's first argument, because we agree that the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge was not clearly erroneous. Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record

to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 94 L. Ed. 150, 70 S. Ct. 177 (1949), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 72 L. Ed. 2d 606, 102 S. Ct. 2182 (1982). We reaffirm that stricture today.

First, the District Court reasonably could have concluded that the lawyers' statements that they considered but ultimately rejected a jury challenge simply were not credible. Petitioner's trial lawyers, who were no longer representing him when they testified at the evidentiary hearing, had significant incentive to insist that they had considered every possible angle: they had lost a capital murder trial, and another lawyer had uncovered evidence of serious constitutional error in the proceedings. Moreover, the lawyers' statements that they thought they could win a jury challenge if they brought it are open to serious doubt. For one thing, the lawyers were quite wrong that they could have won a jury challenge; the underrepresentation of blacks and women on the master jury lists was engineered precisely to avoid a successful statistical challenge. Absent the "smoking gun" of the memorandum or some other direct evidence of discrimination, a statistical challenge would have certainly failed. In addition, the lawyers, when pressed, could offer no explanation for why they thought they could win such a jury challenge.³⁴⁵ ⁴ Thus, it was reasonable for the District Court to reject the lawyers' testimony and conclude that "ignorance" of the strength of the jury challenge -- rather than strategy -- was the true reason for the lawyers' failure to raise the claim at trial. App. 93.

Second, the District Court's refusal to credit the testimony of petitioner's lawyers was supported by the directly contradictory testimony of two other witnesses. Christopher Coates, the lawyer who discovered the memorandum in the *Bailey* case, testified that when he told E. R. Lambert, one of petitioner's lawyers, about the memorandum and the result in the *Bailey* case, Lambert said: "Well, we did not know that . . . I wish that we had known it because we were looking for every issue to raise because it was a serious case." App. 47. In addition, C. Nelson Jarnagin, a lawyer who assisted Lambert on appeal, testified that Lambert told him: "If I'd known about this jury issue prior to trial, I would've raised it." *Id.*, at 59-60. It was within the District Court's discretion as factfinder to credit these statements over the potentially self-interested testimony of petitioner's lawyers. ⁵ See *Anderson v. Bessemer City*, *supra*, at 575 (stressing the special deference accorded determinations regarding the credibility of witnesses). Indeed, the Court of Appeals even noted the conflict in the testimony before the District Court, see *816 F.2d*

³⁴⁵ [Court's footnote 4] See App. 28:

"THE COURT: But I mean what led you to believe you would win if you challenged [the jury] . . . ?

"WITNESS PRIOR: I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know -- I don't think we had any investigation to back that up."

See also *id.*, at 39 (witness Lambert offering no specific answer to the same question).

at 1507, n. 9, and its failure to defer to the District Court's findings in light of this recognition is difficult to fathom.

To be sure, the testimony of these two witnesses was hearsay, and Jarnagin's statement was prompted by a leading question on redirect examination. Nonetheless, no objection to either statement was made at the hearing, and the State does not argue that the District Court's admission of the statements was "plain error" under *Federal Rule of Evidence 103(d)*.

Finally, the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge was supported by events contemporaneous with the jury selection process. Petitioner's lawyers filed pretrial motions for a change of venue and for a continuance to the next term of Superior Court, both of which, if granted, would have resulted in an entirely different jury venire. See App. 61-65. Both motions cited juror prejudice and claimed that a fair trial was not possible in Putnam County at that time. The District Court permissibly could have concluded that these motions and sworn statements undercut the lawyers' statements that they were completely satisfied with the jury venire they had drawn. Indeed, the District Court might well have considered this evidence more persuasive than the after-the-fact assessments of petitioner's lawyers or the other witnesses.

* * * *

The Court of Appeals thus erred in holding petitioner's jury challenge to be procedurally barred from federal habeas review. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

Respondent seems to argue, however, that even if cause is found to be established, petitioner suffered no cognizable prejudice. See Tr. of Oral Arg. 57-58. This argument is irreconcilable with respondent's predecessor's failure to dispute in either the District Court or the Court of Appeals that the finding in *Bailey* of intentional racial discrimination in the composition of the master jury lists satisfies the requirement of prejudice. See 2 Record 67; *Amadeo v. Kemp*, 773 F.2d at 1145, n. 6. Having conceded this point in both courts below, respondent will not be heard to dispute it here. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n. 20, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979) (alternative ground for affirmance must be properly raised below).

It is so ordered.

Questions and Comments:

1. **Unconditional default?** The state's argument in *Amadeo* hinges on the claim that the memo instructing the jury commissioner to underrepresent black prospective jurors on Amadeo's venire panel was in the jury commissioner's file and discoverable to anyone who looked. State attorneys frequently argue that if federal habeas counsel uncovered facts supporting a claim, prior counsel could have done the same. What flaw in this reasoning

led the Court to reject it? What would be the consequences if the Court accepted the state's argument? How would that affect trial counsel's duty to investigate? What would be the impact on the criminal justice system if the only reasonable investigation exhausts all conceivable avenues of investigation whether a reasonable attorney would pursue them or not? How would such a rule affect public defenders struggling under heavy caseloads?

2. **Same claim or new claim?** The Court in *Amadeo* sidestepped the petitioner's argument that "even if the lawyers did consider and deliberately bypass a jury challenge, the challenge that they bypassed was not the same challenge that is now being pressed." While the memo altered the nature of the claim, an underrepresentation claim based on statistics relies on the same Fourteenth Amendment Equal Protection principles as an underrepresentation claim based on deliberate jury pool manipulation. What is the effect of treating the new claim as different? This question will be revisited in the unit on the Antiterrorism and Effective Death Penalty Act.
3. **Concealment as "cause":** *Wainwright v. Sykes* left open the question of what circumstances satisfy the "cause" requirement for excusing procedural default. *Amadeo* clarifies that a prosecutor's covert action or concealment of evidence qualifies as cause. A prosecutor's failure to disclose evidence material to the defense in violation of *Brady v. Maryland*³⁴⁶ constitutes cause under the cause-and-prejudice standard.³⁴⁷
4. **Other impediments as "cause":** Other less egregious factors also qualify as cause under the *Wainwright v. Sykes* standard. In *Wilkins v. Bowersox*, for example, a document establishing an attorney-client relationship between the prosecutor and the capital defendant had been incorrectly reported as destroyed by the Department of Mental Health.³⁴⁸ When the document surfaced after the time had run for Wilkins to raise a claim at the state level, the federal court heard Wilkins' conflict-of-interest claim because "factors external to the defense prevented the discovery of the only existing document showing [the prosecutor's] prior representation established by that document." In *Parkus v. Delo*, a records custodian for a state mental hospital incorrectly advised counsel that a capital defendant's patient files had been destroyed when they had not.³⁴⁹ That custodian's inadvertent misrepresentation was cause excusing Parkus' failure to pursue claims related to mental impairments documented in that file, including schizophrenia and intellectual disability. The case was remanded for a hearing on the merits of his claim of ineffective assistance of counsel.
5. **Claims undiscoverable by diligence:** Diligence and fault play a crucial role in determining whether a habeas petitioner has shown cause to excuse procedural default. The

³⁴⁶ 873 U.S. 83 (1963).

³⁴⁷ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999), *Banks v. Dretke*, 540 U.S. 668, 696 (2004), and *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. W.D. 2011), finding that the State's violation of its duty to disclose exculpatory evidence proved cause to excuse failure to raise a meritorious *Brady* claim.

³⁴⁸ 933 F. Supp. 1496, 1521 (W.D.Mo. 1996).

³⁴⁹ 33 F.3d 933, 936 (8th Cir. 1994).

Supreme Court addressed this in *Williams v. Taylor*.³⁵⁰ The Court granted certiorari to determine whether evidence was barred from consideration under 28 U.S.C. § 2254(e), which prohibits federal courts from considering evidence that the petitioner “failed to develop” in state court. At issue was a juror misconduct claim based on a juror’s silence in response to questions about being related to a witness; she was the ex-wife of the sheriff, who was a witness, and the prosecutor had represented her in her divorce. The juror’s silence in response to questions relevant to her qualifications to serve supported a Sixth Amendment biased juror claim, but the relationship was not discovered until all state appeals had concluded and Williams had filed his federal habeas petition. The Court concluded that Williams had not “failed to develop” this claim in state court because he was not at fault for not having done so. The Court reasoned that Williams had not failed in his duty of diligence because he “had no reason to believe [the juror] had been married to [the sheriff] or been represented by [the prosecutor].”³⁵¹ Although the Court’s analysis was conducted for § 2254(e)’s limitations on evidentiary hearings, the Court observed, “Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance.”³⁵²

6. **Mental impairment as cause:** Is a severe cognitive or psychiatric impairment on the part of the petitioner a factor “external” to the petitioner that could excuse a failure to raise a claim in a proper or timely fashion? Courts have found a prisoner’s mental incapacity to be sufficient justification to excuse compliance with time limits and other procedural requirements.³⁵³ There is a compelling case that severe psychiatric impairments should qualify as cause to excuse a procedural bar. See Joshua D. Marcin, *Expanding Cause: How Federal Courts Should Address Severe Psychiatric Impairments that Impact State Post-Conviction Review*, 60 AMER. CRIM. L. REV. 79 (2023).

2. Impediments external to the defense—novelty of legal issues

On rare occasions, the nature of the claim itself constitutes cause to excuse a procedural default—often called the “novelty” exception to procedural bar. Just as the Court has been reluctant to impose a no-fault rule of procedural bar on facts that comprise a habeas claim—fearing it would require a scorched earth investigation in every case—the Court is likewise reluctant to impose a similar duty to raise all conceivable legal claims despite merit or binding precedent. In

³⁵⁰ 529 U.S. 420 (2000).

³⁵¹ 529 U.S. at 443.

³⁵² *Id.* at 444.

³⁵³ See, e.g., *Ferguson v. State*, 677 S.E.2d 600, 602 (S.C. 2009) (allowing a prisoner to file a untimely state postconviction motion because the failure to file on time “was due to mental incompetency”); *Fitzgerald v. Myers*, 402 P.3d 442, 447, 450 (Ariz. 2017) (noting that a petitioner could file a new claim if the failure to file previously was due to “mental incompetency.”).

Reed v. Ross,³⁵⁴ the Court explicitly acknowledged the problems that would arise under a contrary rule.

REED ET AL. V. ROSS

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving lack of malice. *Id.*, at 704. Two years later, *Hankerson v. North Carolina*, 432 U.S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury instruction on the burden of proof.

I

A

In 1970, this Court decided *In re Winship*, 397 U.S. 358, the first case in which we directly addressed the constitutional foundation of the requirement that criminal guilt be established beyond a reasonable doubt. That case held that "[lest] there remain any doubt about the constitutional stature of the reasonable-doubt standard. the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364.

Five years after *Winship*, the Court applied the principle to the related question of allocating burdens of proof in a criminal case. *Mullaney v. Wilbur*, *supra*. *Mullaney* arose in the context of a Maine statute providing that "[whoever] unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." *Id.*, at 686, n. 3. The trial judge had instructed the jury under this statute that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.*, at 686. Thus, despite the fact that malice was an element of the offense of murder, the law of Maine provided that, if the defendant contended that he acted without malice, but rather "in the heat of passion on sudden provocation," he, not the prosecution, was required to bear the burden of persuasion by a "fair preponderance of the evidence." *Ibid*. Noting that "[the] result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous

³⁵⁴ 468 U.S. 1 (1984).

murder conviction," *id.*, at 701, *Mullaney* held that due process requires the prosecution to bear the burden of persuasion with respect to each element of a crime.

Finally, *Hankerson v. North Carolina*, *supra*, held that *Mullaney* was to have retroactive application. In reaching this conclusion, the Court followed *Ivan V. v. City of New York*, 407 U.S. 203 (1972), which had held that *Winship* was retroactively applicable.

* * * *

B

Ross was tried for murder under the same North Carolina burden-of-proof law that gave rise to Hankerson's claim in *Hankerson v. North Carolina*. That law, followed in North Carolina for over 100 years, was summarized by the North Carolina Supreme Court in *State v. Hankerson*, 288 N. C. 632, 647, 220 S. E. 2d 575, 586 (1975), as follows:

"[When] it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If the defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter."

[The jury at Ross' trial was instructed in accordance with this well-settled state law.]

On the basis of these instructions, Ross was convicted of first-degree murder. Although Ross appealed his conviction to the North Carolina Supreme Court on a number of grounds, *In re Burrus*, 275 N. C. 517, 169 S. E. 2d 879 (1969), he did not challenge the constitutionality of these instructions -- we may confidently assume this was because they were sanctioned by a century of North Carolina law and because *Mullaney* was yet six years away.

* * * *

Where, as in this case, a defendant has failed to abide by a State's procedural rule requiring the exercise of legal expertise and judgment, the competing concerns implicated by the exercise of the federal court's habeas corpus power have come to be embodied in the "cause and prejudice" requirement: When a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of "cause and actual

prejudice." *Engle v. Isaac*, 456 U.S., at 129; *Wainwright v. Sykes*, 433 U.S. 72 (1977). See *id.*, at 91-94 (BURGER, C. J., concurring); *id.*, at 94-95 (STEVENS, J., concurring). Cf. *id.*, at 98-99 (WHITE, J., concurring in judgment). We therefore turn to the question whether the cause-and-prejudice test was met in this case.

B

As stated above, petitioners have conceded that Ross suffered "actual prejudice" as a result of the trial court's instruction imposing on him the burden of proving self-defense or lack of malice. 704 F.2d, at 707. At trial, Ross testified that he had been stabbed in the neck immediately prior to the shooting for which he was convicted and that when he felt the stab wound he "turned around shooting." In corroboration of this testimony, another witness stated that Ross was bleeding from the neck when Ross left the scene of the shooting. Therefore, were it not for the fact that Ross was required to bear the burden of proving lack of malice and self-defense, he might not have been convicted of first-degree murder. Thus the only question for decision is whether there was "cause" for Ross' failure to raise the *Mullaney* issue on appeal.

The Court of Appeals held that there was cause for Ross' failure to raise the *Mullaney* issue on appeal because of the "novelty" of the issue at the time. As the Court of Appeals characterized the legal basis for raising the *Mullaney* issue at the time of Ross' appeal, there was merely "[a] hint here and there voiced in other contexts," which did not "[offer] a reasonable basis for a challenge to frequently approved jury instructions which had been used in North Carolina, and many other states, for over a century." 704 F.2d, at 708.

Engle v. Isaac, *supra*, left open the question whether the novelty of a constitutional issue at the time of a state-court proceeding could, as a general matter, give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures. *Id.*, at 131. Today, we answer that question in the affirmative.

* * * *

Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, as the *Mullaney* issue currently does, when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose. Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand. Raising such a claim in state court, therefore, would not promote either the fairness or the efficiency of the state criminal justice system. It is true that finality will

be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition. Particularly disturbed by this prospect, Judge Haynsworth, writing for the Court of Appeals in this case, stated:

"If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how farfetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable."
704 F.2d, at 708.

Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures. We therefore turn to the question whether the *Mullaney* issue, which respondent Ross has raised in this action, was sufficiently novel at the time of the appeal from his conviction to excuse his attorney's failure to raise it at that time.

C

As stated above, the Court of Appeals found that the state of the law at the time of Ross' appeal did not offer a "reasonable basis" upon which to challenge the jury instructions on the burden of proof. *704 F.2d, at 708.* We agree and therefore conclude that Ross had cause for failing to raise the issue at that time. Although the question whether an attorney has a "reasonable basis" upon which to develop a legal theory may arise in a variety of contexts, we confine our attention to the specific situation presented here: one in which this Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application. In *United States v. Johnson, 457 U.S. 537 (1982)*, we identified three situations in which a "new" constitutional rule, representing "a clear break with the past," might emerge from this Court. *Id., at 549* (quoting *Desist v. United States, 394 U.S. 244, 258-259 (1969)*). First, a decision of this Court may explicitly overrule one of our precedents. *United States v. Johnson, 457 U.S., at 551.* Second, a decision may "[overturn] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Ibid.* And, finally, a decision may "[disapprove] a practice this Court arguably has

sanctioned in prior cases." *Ibid.* By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement. Cases falling into the third category, however, present a more difficult question. Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.

This case is covered by the third category. At the time of Ross' appeal, *Leland v. Oregon*, 343 U.S. 790 (1952), was the primary authority addressing the due process constraints upon the imposition of the burden of proof on a defendant in a criminal trial. In that case, the Court held that a State may require a defendant on trial for first-degree murder to bear the burden of proving insanity beyond a reasonable doubt, despite the fact that the presence of insanity might tend to imply the absence of the mental state required to support a conviction. See *id.*, at 806 (Frankfurter, J., dissenting). *Leland* thus confirmed "the long-accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant," *Patterson v. New York*, 432 U.S. 197, 211 (1977), and arguably sanctioned the practice by which a State crafts an affirmative defense to shift to the defendant the burden of disproving an essential element of a crime. As stated above, North Carolina had consistently engaged in this practice with respect to the defenses of lack of malice and self-defense for over a century. See *supra*, at 5-7. Indeed, it was not until five years after Ross' appeal that the issue first surfaced in the North Carolina courts, and even then it was rejected out of hand. *State v. Sparks*, 285 N. C. 631, 643-644, 207 S. E. 2d 712, 719 (1974). See also *State v. Wetmore*, 287 N. C. 344, 353-354, 215 S. E. 2d 51, 56-57 (1975); *State v. Harris*, 23 N. C. App. 77, 79, 208 S. E. 2d 266, 268 (1974).

Moreover, prior to Ross' appeal, only one Federal Court of Appeals had held that it was unconstitutional to require a defendant to disprove an essential element of a crime for which he is charged. *Stump v. Bennett*, 398 F.2d 111 (CA8 1968). Even that case, however, involved the burden of proving an alibi, which the Court of Appeals described as the "denial [of] the possibility of [the defendant's] having committed the crime by reason of being elsewhere." *Id.*, at 116. The court thus contrasted the alibi defense with "an affirmative defense [which] generally applies to justification for his admitted participation in the act itself," *ibid.*, and distinguished *Leland* on that basis, 398 F.2d, at 119. In addition, at the time of Ross' appeal, the Superior Court of Connecticut had struck down, as violative of due process, a statute making it unlawful for an individual to possess burglary tools "without lawful excuse, the proof of which excuse shall be upon him." *State v. Nales*, 28 Conn. Supp. 28, 29, 248 A. 2d 242, 243 (1968). Because these cases provided only indirect support for Ross' claim, and because they were the only cases that would have supported Ross' claim at all, we cannot conclude that they provided a reasonable basis upon which Ross could have realistically appealed his conviction.

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court reached the opposite conclusion with respect to the failure of a group of defendants to raise the *Mullaney* issue in 1975. That case differs from this one, however, in two crucial respects. First, the procedural defaults at issue there occurred five years after we decided *Winship*, which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S., at 364. As the Court in *Engle v. Isaac* stated, *Winship* "laid the basis for [the habeas petitioners'] constitutional claim." 456 U.S., at 131. Second, during those five years, "numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses" (footnotes omitted). See *id.*, at 132, n. 40 (citing cases). Moreover, as evidence of the reasonableness of the legal basis for raising the *Mullaney* issue in 1975, *Engle v. Isaac* emphasized that "dozens of defendants relied upon [*Winship*] to challenge the constitutionality of rules requiring them to bear a burden of proof." 456 U.S., at 131-132. None of these bases of decision relied upon in *Engle v. Isaac* is present in this case.

III

We therefore conclude that Ross' claim was sufficiently novel in 1969 to excuse his attorney's failure to raise the *Mullaney* issue at that time. Accordingly, we affirm the decision of the Court of Appeals with respect to the question of "cause."

It is so ordered.

Questions and Comments:

1. **The dissent complains about retroactivity:** Justice Rehnquist dissented, joined by Chief Justice Burger, Justice Blackmun, and Justice O'Connor, stating that the Court's decision creates "the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final."³⁵⁵ Is this statement accurate? Since *Reed* likely applies only when the Supreme Court retroactively applies one of its decisions, wouldn't this situation be an exception rather than an anomaly? The dissent emphasizes the underlying principles of *Mullaney v. Wilber*—specifically, *In re Winship*'s reaffirmation that the state must bear the burden of proving every element of a crime beyond a reasonable doubt, concluding "that there was an adequate basis for raising an objection in this case." Justice Rehnquist reasoned that "the State's interests in the finality of its judgments require an attorney to raise an objection."³⁵⁶ Would you agree, even if such an objection would likely have been deemed frivolous at the time given decades of

³⁵⁵ *Reed v. Ross*, 468 U.S. 1 at 21 (Rehnquist, J., dissenting).

³⁵⁶ *Id.* at 22.

state court precedent?

2. **“Reasonably available” claims:** In Chapter 6, Retroactivity, we will examine how *Reed’s* holding applies in cases where the Supreme Court decides a question for a convicted defendant before the conviction becomes final. For example, will a defendant whose conviction on a 10-2 verdict became final after *Ramos v. Louisiana* was decided benefit from *Ramos* even if trial counsel did not object to his conviction on a nonunanimous verdict? What does it suggest about the defense counsel’s duty to decide what objections to raise and which claims to winnow from an appellate brief? Is Justice Rehnquist’s tendency to give controlling weight to the state’s procedural requirements justified in such circumstances? What if this issue has been raised and rejected many times in certiorari petitions? Does that make it available to a trial or appellate lawyer?

3. Impediments caused by attorney error at trial and on appeal

The Court’s decision in *Wainwright v. Sykes* distinguished between the standard applied to defaults flowing from decisions made by the habeas petitioner and defaults caused by the petitioner’s counsel. This raises questions about counsel’s decisions that prevent the client from raising issues that were bypassed—deliberately or otherwise—by the attorney. In *Murray v. Carrier*,³⁵⁷ the Court granted certiorari to decide “whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.”

Clifford Carrier was convicted by a Virginia jury of kidnapping and raping a woman. Defense counsel moved to compel discovery of the victim’s statements to police describing her assailants, the car they had used, and the location where the assault took place. Counsel also asked for discovery of the victim’s other pretrial statements. The trial court denied the motion, and trial counsel included this discovery issue in the assignments of error listed in his notice of appeal. However, without consulting Carrier, appellate counsel omitted the discovery claim from the petition for appeal, despite Virginia Supreme Court Rule 5:21 stating that appellate courts will only consider errors assigned in the petition for appeal. A year later, acting *pro se*, Carrier filed a habeas corpus petition in state court alleging that the prosecutor’s failure to disclose the victim’s statements deprived him of due process. The habeas court denied the claim, ruling that it should have been presented on appeal, and the Virginia Supreme Court denied certiorari review of that decision.

Carrier then filed for federal habeas corpus relief on his due process-discovery claim, but the district court denied relief, accepting the state’s argument that (1) Carrier defaulted his claim by omitting it from the petition to appeal, and (2) Carrier had not exhausted his claim that his appellate counsel was ineffective for causing the default because Carrier never presented that argument to the state courts. The Fourth Circuit disagreed and held that Carrier would be bound

³⁵⁷ 477 U.S. 478 (1986).

by counsel's deliberate tactical decisions, but not by decisions resulting from ignorance or inadvertence.³⁵⁸ The Court also ruled that because Carrier was using counsel's deficient conduct as a procedural argument and not as an independent constitutional claim, Carrier did not need to exhaust that argument in state court. The Fourth Circuit Court of Appeals remanded the case to the district court for a hearing on whether counsel's omission of Carrier's due process claim was deliberate strategy or the result of ignorance or mistake. The Supreme Court granted certiorari and reversed.

MURRAY V. CARRIER

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

* * * *

The thrust of . . . [*Engle v. Isaac*] is unmistakable: the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. At least with respect to defaults that occur at trial, the Court of Appeals' holding that ignorant or inadvertent attorney error is cause for any resulting procedural default is plainly inconsistent with *Engle*. It is no less inconsistent with the purposes served by the cause and prejudice standard. That standard rests not only on the need to deter intentional defaults but on a judgment that the costs of federal habeas review "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." *Engle*, 456 U.S., at 128. Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and "exact[s] an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129. Clearly, these considerable costs do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim.

* * * *

We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, *supra*, we discern no inequity in requiring him to bear the risk of

³⁵⁸ Carrier v. Hutto, 754 F.2d 520 (1985).

attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed v. Ross*, 468 U.S., at 16, or that "some interference by officials," *Brown v. Allen*, 344 U.S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.

Similarly, if the procedural default is the result of ineffective assistance of counsel, the *Sixth Amendment* itself requires that responsibility for the default be imputed to the State, which may not "[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine, which is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *Rose v. Lundy*, 455 U.S. 509, 518 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause -- a question of federal law -- without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," *Darr v. Burford*, 339 U.S. 200, 204 (1950), and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

It is clear that respondent failed to show or even allege cause for his procedural default under this standard for cause, which *Engle* squarely supports. Respondent argues nevertheless that his case is not controlled by *Engle* because it involves a procedural default on appeal rather than at trial. Respondent does not dispute, however, that the cause and prejudice test applies to procedural defaults on appeal, as we plainly indicated in *Reed v. Ross*, 468 U.S., at 11. *Reed*, which involved a claim that was defaulted *on appeal*, held that a habeas petitioner could establish cause for a procedural default if his claim is "so novel that its legal basis is not reasonably available to counsel," *id.*, at 16. That holding would have been entirely unnecessary to the disposition of the prisoner's claim if the cause and prejudice test were inapplicable to procedural defaults on appeal.

* * * *

We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative

magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. "Each State's complement of procedural rules . . . [channels], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Id.*, at 10. It is apparent that the frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and "[undercuts] the State's ability to enforce its procedural rules." *Engle*, 456 U.S., at 129. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Nor do we agree that the possibility of "sandbagging" vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful. Moreover, we see little reason why counsel's failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim. The fact that the latter error can be characterized as a misjudgment, while the former is more easily described as an oversight, is much too tenuous a distinction to justify a regime of evidentiary hearings into counsel's state of mind in failing to raise a claim on appeal.

The real thrust of respondent's arguments appears to be that on appeal it is inappropriate to hold defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by a rule equivalent to *Fay v. Noia's* "deliberate bypass" standard, under which only personal waiver by the defendant would require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard, see *Wainwright v. Sykes*, 433 U.S., at 88, n. 12, but, for the reasons already given, we hold that counsel's failure to raise a *particular* claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.

* * * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Systemic lawyer incompetence:** Before *Murray v. Carrier*, prisoners commonly used deficient performance by trial, appellate, or postconviction counsel as an adequate legal excuse for not properly raising claims in state courts. Justice Blackmun noted, “Without question, ‘the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings.’”³⁵⁹ Professor Robbins reported for an ABA task force appointed to study issues of fairness and delay in the system of capital punishment. Justice Blackmun summarized the task force’s findings that a key cause of delay and inefficiency in the system of capital punishment was the unavailability of qualified attorneys to represent defendants in capital cases. The task force found shocking instances in which indigent prisoners were defended by lawyers with no experience or training in capital defense cases and were paid as little as \$5.00 an hour—fees so low it made the adequate defense of a client impossible without risking personal bankruptcy. Justice Blackmun gave multiple well documented examples of egregious lawyer incompetence in death penalty cases.³⁶⁰ That problem of unqualified lawyers is compounded by a lack of funding for investigators and reasonably necessary expert witnesses.³⁶¹ The underfunding of indigent defense is not limited to capital cases.³⁶² Judicial surveys reflect that when *Murray v. Carrier* was decided, judges commonly believed that many criminal defense attorneys who appeared before them were incompetent.³⁶³ The absence of qualified counsel is an essential factor in evaluating procedural default issues resulting from counsel’s deficient performance.
2. **Strickland’s subjective standard:** One might assume that the systemic underfunding of defense counsel would make it easier for habeas petitioners to obtain review of claims defaulted by their attorneys. Even still, that has not been the case. Justice Blackmun noted, “The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective assistance claims have been denied. Because *Strickland’s* standard is so deferential to counsel’s strategic judgment, successes under this standard were relatively

³⁵⁹ *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from the denial of certiorari) (quoting Professor Ira Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, Report of the American Bar Association’s Recommendations Concerning Death Penalty Habeas Corpus, 40 Am. U. L. Rev. 1, 16 (1990)).

³⁶⁰ See *McFarland* at 1256-1260; see also Steve Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994).

³⁶¹ *McFarland*, at 1257.

³⁶² See Stephen B. Bright and Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152-55 (2013).

³⁶³ Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 431-32 (1988); See also *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, 16-19 (2004), (<https://perma.cc/WG55-D6Z2>).

rare.”³⁶⁴ He gave the example of *Young v. Kemp*, in which habeas review was denied and John Young was executed even though the record showed that he “was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges.”³⁶⁵ Under *Strickland’s* two-prong test, a habeas petitioner must show trial counsel performed beneath prevailing norms of practice *and* that counsel’s deficient performance likely influenced the outcome. Courts often presume that the action alleged to be deficient performance actually reflects deliberate strategic judgment.³⁶⁶ The subjective prejudice prong, which requires a reviewing court to conclude that a judge or jury would probably have reached a different outcome had counsel performed competently, has stymied success on ineffective assistance of counsel claims.³⁶⁷

3. **Exhausting “cause”:** *Murray v. Carrier’s* reliance on the *Strickland* standard put procedural fairness out of reach for many habeas petitioners, and imposed the additional burden of exhausting one’s argument that an attorney’s deficient performance satisfies the cause-and-prejudice standard. This new requirement means that a habeas petition can procedurally default the equitable grounds that might have been available to overcome a procedural default.
4. For a thoughtful discussion of how a habeas petition can best navigate this treacherous legal terrain, see Eve Bensike Primus’ Article: *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*.³⁶⁸

4. Attorney error on collateral review

The Court in *Murray v. Carrier* did not address whether ineffective assistance of counsel in postconviction proceedings satisfies cause under the cause-and-prejudice standard. At the same time, the Court used the term “*constitutionally* ineffective” performance by counsel. Lower courts are split on whether the Court’s use of that term indicated that ineffectiveness should be evaluated using the same standard applied for assessing a constitutional ineffective assistance claim,³⁶⁹ or whether the Court intended that ineffective assistance of counsel satisfies the cause-and-prejudice

³⁶⁴ *McFarland* at 1260.

³⁶⁵ 727 F. 2d 1489 (1984).

³⁶⁶ See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 633-34 (1986), (finding that trial strategy is the most common reason given by appellate courts for denying ineffective assistance of counsel claims).

³⁶⁷ See Cecelia Klingele, *Editor’s Observations, Vindicating the Right to Counsel*, 25 FED. SENT’G REP. 87, 87 (2012) (observing that “*Strickland’s* prejudice prong has proven to be a formidable obstacle in vindicating the right to counsel”).

³⁶⁸ 72 STANFORD L. REV. 1581 (2020).

³⁶⁹Cf. *Thomas v. State*, 510 P.3d 754 (Nev. 2022), remanding for a hearing to determine whether postconviction counsel’s ineffectiveness excused a procedural default, and *Jenson v. State*, 396 S.W.3d 369 (Mo. App. 2013), holding that ineffective assistance of postconviction counsel does not excuse a procedural default.

standard only where states are constitutionally required to provide counsel. *Murray* suggested the latter by acknowledging that ineffective assistance of appellate counsel qualifies as cause, since the Court held that criminal defendants have a right to effective assistance of counsel on direct appeal.³⁷⁰ The Court also ruled that there is no right to appointed counsel—or to claim ineffective assistance of counsel—in postconviction proceedings³⁷¹ or federal habeas corpus, even in a death penalty case.³⁷² It granted certiorari on this issue in the case of Roger Keith Coleman, a Virginia death row inmate.

COLEMAN V. THOMPSON³⁷³

JUSTICE O'CONNOR delivered the opinion of the Court.

This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

I

A Buchanan County, Virginia, jury convicted Roger Keith Coleman of rape and capital murder and fixed the sentence at death for the murder. The trial court imposed the death sentence, and the Virginia Supreme Court affirmed both the convictions and the sentence. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied certiorari. 465 U.S. 1109 (1984).

Coleman then filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County, raising numerous federal constitutional claims that he had not raised on direct appeal. After a 2-day evidentiary hearing, the Circuit Court ruled against Coleman on all claims. App. 3-19. The court entered its final judgment on September 4, 1986.

Coleman filed his notice of appeal with the Circuit Court on October 7, 1986, 33 days after the entry of final judgment. Coleman subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth of Virginia, as appellee, filed a motion to dismiss the appeal. The sole ground for dismissal urged in the motion was that Coleman's notice of appeal had been filed late. Virginia Supreme Court Rule 5:9(a) provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment.

The Virginia Supreme Court did not act immediately on the Commonwealth's motion, and both parties filed several briefs on the subject of the motion to dismiss and on the merits of the

³⁷⁰ *Evitts v. Lucey*, 469 U.S. 387 (1985).

³⁷¹ *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

³⁷² *Murray v. Giarratano*, 492 U.S. 1 (1989).

³⁷³ 501 U.S. 722 (1991).

claims in Coleman's petition. On May 19, 1987, the Virginia Supreme Court issued the following order, dismissing Coleman's appeal:

"On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

"Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

"Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." App. 25-26.

This Court again denied certiorari. *Coleman v. Bass*, 484 U.S. 918 (1987).

Coleman next filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia. In his petition, Coleman presented four federal constitutional claims he had raised on direct appeal in the Virginia Supreme Court and seven claims he had raised for the first time in state habeas. The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims. App. 38-39. The District Court nonetheless went on to address the merits of all 11 of Coleman's claims. The court ruled against Coleman on all of the claims and denied the petition. *Id.*, at 40-52.

The United States Court of Appeals for the Fourth Circuit affirmed. 895 F.2d 139 (1990). The court held that Coleman had defaulted all of the claims that he had presented for the first time in state habeas. Coleman argued that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, and therefore the federal courts could not treat it as such under the rule of *Harris v. Reed*, 489 U.S. 255 (1989). The Fourth Circuit disagreed. It concluded that the Virginia Supreme Court had met the "plain statement" requirement of *Harris* by granting a motion to dismiss that was based solely on procedural grounds. 895 F.2d at 143. The Fourth Circuit held that the Virginia Supreme Court's decision [rested on independent and adequate state grounds and that Coleman had not shown cause to excuse the default. *Id.*, at 143-144. As a consequence, federal review of the claims Coleman presented only in the state habeas proceeding was barred. *Id.*, at 144. We granted certiorari, 498 U.S. 937 (1990), to resolve several issues concerning the relationship between state procedural defaults and federal habeas review, and now affirm.

* * * *

Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.

Murray v. Carrier considered the circumstances under which attorney error constitutes cause. *Carrier* argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy: It deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. 477 U.S., at 487. We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.*, at 488.

Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default."

Coleman attempts to avoid this reasoning by arguing that *Carrier* does not stand for such a broad proposition. He contends that *Carrier* applies by its terms only in those situations where it is possible to state a claim for ineffective assistance of counsel. Where there is no constitutional right to counsel, Coleman argues, it is enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent *Sixth Amendment* claim is possible.

This argument is inconsistent not only with the language of *Carrier*, but with the logic of that opinion as well. We explained clearly that "cause" under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him: "We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S., at 488. For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard." *Ibid.* See also *id.*, at 492 ("Cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").

Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Id.*, at 488. See *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-

agent"); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92 (1990) (same). Attorney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that "the lawyer ceases to be an agent of the petitioner." Brief for Petitioner 29. In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule would be contrary to well-settled principles of agency law. See, e. g., Restatement (Second) of Agency § 242 (1958) (master is subject to liability for harm caused by negligent conduct of servant within the scope of employment). Rather, as *Carrier* explains, "if the procedural default is the result of ineffective assistance of counsel, the *Sixth Amendment* itself requires that responsibility for the default be imputed to the State." 477 U.S., at 488. In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i. e.*, "imputed to the State." See also *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").

Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.

Among the claims Coleman brought in state habeas, and then again in federal habeas, is ineffective assistance of counsel during trial, sentencing, and appeal. Coleman contends that, at least as to these claims, attorney error in state habeas must constitute cause. This is because, under Virginia law at the time of Coleman's trial and direct appeal, ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas. See *Walker v. Mitchell*, 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983); *Dowell v. Commonwealth*, 3 Va. App. 555, 562, 351 S.E.2d 915, 919 (1987). Coleman argues that attorney error in failing to file timely in the first forum in which a federal claim can be raised is cause.

We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. *Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel before that court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Douglas v. California, 372 U.S. 353 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. *Evitts v. Lucey*, *supra*, held that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. We based our holding in *Douglas* on that "equality demanded by the *Fourteenth Amendment*." 372 U.S. at 358. Recognizing that "absolute equality is not required," we nonetheless held that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.*, at 357 (emphasis in original).

Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from *that* determination. Our case law will not support it.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. We held in *Ross* that neither the fundamental fairness required by the Due Process Clause nor the *Fourteenth Amendment's* equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S. at 616. Similarly, in *Finley* we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review. 481 U.S. at 556 (citing *Ross*, *supra*).

These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claims of trial error.

Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas. As Coleman does not argue in this Court that federal review of his claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing these claims in federal habeas. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

* * * *

Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

The Court cavalierly claims that "this is a case about federalism," *ante*, at 726, and proceeds without explanation to assume that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state-court judgment. Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions." Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 442 (1961). See also The Federalist No. 51, p. 324 (C. Rossiter ed. 1961) (J. Madison) ("Justice is the end of government. It is the end of civil society"). In this context, it cannot lightly be assumed that the interests of federalism are fostered by a rule that impedes federal review of federal constitutional claims.

* * * *

Having abandoned the plain-statement rule with respect to a summary order, the majority must consider Coleman's argument that the untimely filing of his notice of appeal was the result of attorney error of sufficient magnitude as to constitute cause for his procedural default. In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors -- even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court -- because this attribution of risk represents the appropriate "allocation of costs." *Ante*, at 754. Whether unprofessional attorney conduct in a state postconviction proceeding should bar federal habeas review of a state prisoner's conviction and sentence of death is not a question of *costs* to be allocated most efficiently. It is, rather, another circumstance where this Court must determine whether federal rights should yield to state interests. In my view, the obligation of a federal habeas court to correct fundamental constitutional violations, particularly in capital cases, should not accede to the State's "discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987).

* * * *

The rule foreshadowed by this language, which the majority today evades, most faithfully adheres to a principled view of the role of federal habeas jurisdiction. As noted above, federal courts forgo the exercise of their habeas jurisprudence over claims that are procedurally barred out of respect for the state interests served by those rules. Recognition of state procedural forfeitures discourages petitioners from attempting to avoid state proceedings and accommodates the State's interest in finality. No rule, however, can deter gross incompetence. To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's

interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

The majority's conclusion that Coleman's allegations of ineffective assistance of counsel, if true, would not excuse a procedural default that occurred in the state postconviction proceeding is particularly disturbing because, at the time of Coleman's appeal, state law precluded defendants from raising certain claims on direct appeal. As the majority acknowledges, under state law as it existed at the time of Coleman's trial and appeal, Coleman could raise his ineffective-assistance-of-counsel claim with respect to counsel's conduct during trial and appeal only in state habeas. *Ante*, at 755. This Court has made clear that the *Fourteenth Amendment* obligates a State "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," *Pennsylvania v. Finley*, 481 U.S. at 556, quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), and "require[s] that the state appellate system be 'free from unreasoned distinctions,'" *id.*, at 612. While the State may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the *Fourteenth Amendment*, structure it in such a way as to deny indigent defendants meaningful access. Accordingly, if a State desires to remove from the process of direct appellate review a claim or category of claims, the *Fourteenth Amendment* binds the State to ensure that the defendant has effective assistance of counsel for the entirety of the procedure where the removed claims may be raised. Similarly, fundamental fairness dictates that the State, having removed certain claims from the process of direct review, bear the burden of ineffective assistance of counsel in the proceeding to which the claim has been removed.

Ultimately, the Court's determination that ineffective assistance of counsel cannot constitute cause of a procedural default in a state postconviction proceeding is patently unfair. In concluding that it was not inequitable to apply the cause and prejudice standard to procedural defaults that occur on appeal, the *Murray* Court took comfort in the "additional safeguard against miscarriages of justice in criminal cases": the right to effective assistance of counsel. 477 U.S. at 496. The Court reasoned: "The presence of such a safeguard may properly inform this Court's judgment in determining 'what standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims." *Ibid.*, quoting *Reed v. Ross*, 468 U.S. at 9. "Fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). It is the quintessence of inequity that the Court today abandons that safeguard while continuing to embrace the cause and prejudice standard.

I dissent.

Questions and Comments:

1. **Is the Court placing the right focus on litigation incentives?** Much of the Court's language in habeas procedure cases focuses on the incentive that prisoners might have to "sandbag" state courts by withholding claims for later federal litigation. The Court's resort to unforgiving standards of procedural default is purportedly intended to give prisoners incentive to develop their claims in state courts. But in *Coleman*'s case, is the prisoner's incentive the real problem facing the Court? What is the state's incentive when providing fair postconviction procedures and qualified counsel? Justice Blackmun's dissenting opinion in *McFarland* illustrates the perverse incentive that the Court's departure from *Fay v. Noia*'s deliberate by-pass standard gives to states: by refusing competent counsel to indigent prisoners in postconviction proceedings, the state insulates a state's decision to underfund indigent defense from federal habeas corpus review. The mistakes of court-appointed trial counsel are procedurally unreachable by a federal habeas court if the prisoner's court-appointed state postconviction attorney fails to investigate and present the prisoner's claims. Between *Fay v. Noia* and *Murray v. Carrier*, which standard gives the best incentive to states to provide enough money to indigent representation?
2. **Open question: ineffective counsel in the first available forum:** Note what the Court in *Coleman* did not decide—is there an exception to *Murray* and *Coleman* for attorney error "where state collateral review is the first place a prisoner can present a challenge to his conviction[?]"³⁷⁴ The Court in *Coleman* declined to answer that question because the attorney error was failing to file a timely notice of appeal from the denial of *Coleman*'s first state postconviction petition. Even so, lower federal courts treated the Court's decisions in *Murray v. Carrier* and *Coleman v. Thompson* as eliminating ineffective assistance of postconviction counsel as cause to excuse a procedural default. Justice White later said that "[s]uch was the intended effect of those cases." *Keeney v. Tamayo-Reyes*.³⁷⁵ The Court would wait twenty years to address the question it left unanswered in *Coleman*. When a state postconviction petition is the first proceeding in which a prisoner's claim is cognizable, and counsel in that proceeding commits a procedural default, will that lawyer's ineffectiveness trigger the cause-and-prejudice inquiry?

5. The fair right to counsel in "initial collateral review proceedings"

Coleman's argument had two parts. First, *Coleman* argued that because postconviction proceedings were the first proceedings under Virginia law in which a prisoner can raise a claim of ineffective assistance of trial counsel, it should be considered the equivalent of the direct appeal regarding that claim, so the Fourteenth Amendment Due Process Clause requires the effective assistance of counsel as provided in *Evitts v. Lucey*.³⁷⁶ Reviewing its line of cases finding a Due Process right to meaningful access to the courts, the Court concluded that "the services of a lawyer

³⁷⁴ *Coleman*, at 755.

³⁷⁵ 504 U.S. 1, 10 (1992).

³⁷⁶ 469 U.S. 387 (1985).

will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.”³⁷⁷ The same argument could be made for the postconviction litigant claiming that trial counsel performed deficiently. However, the Court has repeatedly rejected the claim that the Constitution mandates appointment of counsel in postconviction proceedings brought after the conviction has become final.

The second layer of Coleman’s argument was that—even if the Constitution does not mandate the appointment of counsel for a postconviction petitioner—equitable principles that support the cause-and-prejudice gateway for reaching defaulted claims should be triggered by an attorney’s deficient performance in a proceeding that is the functional equivalent of a direct appeal regarding the defaulted claim.

Twenty years later, the Court granted certiorari in *Martinez v. Ryan*³⁷⁸ to address the unresolved questions in *Coleman*.

MARTINEZ V. RYAN

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings. In the instant case, however, petitioner's postconviction counsel did not raise the ineffective-assistance claim in the first collateral proceeding, and, indeed, filed a statement that, after reviewing the case, she found no meritorious claims helpful to petitioner. On federal habeas review, and with new counsel, petitioner sought to argue he had received ineffective assistance of counsel at trial and in the first phase of his state collateral proceeding. Because the state collateral proceeding was the first place to challenge his conviction on grounds of ineffective assistance, petitioner maintained he had a constitutional right to an effective attorney in the collateral proceeding. While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

I

A jury convicted petitioner, Luis Mariano Martinez, of two counts of sexual conduct with a minor under the age of 15. The prosecution introduced a videotaped forensic interview with the victim, Martinez's 11-year-old stepdaughter. It also put in evidence the victim's nightgown, with traces of Martinez's DNA. As part of his defense, Martinez introduced evidence of the victim's recantations, including testimony from the victim's grandmother and mother and a second

³⁷⁷ *Id.* at 393.

³⁷⁸ 566 U.S. 1 (2012).

videotaped interview in which the victim denied any abuse. The victim also denied any abuse when she testified at trial. App. to Pet. for Cert. 38a-39a. To explain the inconsistencies, a prosecution expert testified that recantations of child-abuse accusations are caused often by reluctance on the part of the victim's mother to lend support to the child's claims. Pet. for Cert. 3. After considering the conflicting evidence, the jury convicted Martinez. He was sentenced to two consecutive terms of life imprisonment with no possibility of parole for 35 years. App. to Pet. for Cert. 39a.

The State appointed a new attorney to represent Martinez in his direct appeal. *Ibid.*; Pet. for Cert. 4. She made numerous arguments on Martinez's behalf, including a claim that the evidence was insufficient and that newly discovered evidence warranted a new trial. App. to Pet. for Cert. 39a. Arizona law, however, did not permit her to argue on direct appeal that trial counsel was ineffective. *State v. Spreitz*, 202 Ariz. 1, 3, 39 P. 3d 525, 527 (2002). Arizona instead requires claims of ineffective assistance at trial to be reserved for state collateral proceedings.

While Martinez's direct appeal was pending, the attorney began a state collateral proceeding by filing a "Notice of Post-Conviction Relief." *Martinez v. Schriro*, 623 F.3d 731, 733-734 (CA9 2010); *Ariz. Rule Crim. Proc. 32.4(a)* (2011). Despite initiating this proceeding, counsel made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all. 623 F. 3d, at 734. Cf. *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996).

The state trial court hearing the collateral proceeding gave Martinez 45 days to file a *pro se* petition in support of postconviction relief and to raise any claims he believed his counsel overlooked. 623 F. 3d, at 734; see *Smith, supra*, at 459, 910 P. 2d, at 4. Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to file a *pro se* petition to preserve his rights. The state trial court dismissed the action for postconviction relief, in effect affirming counsel's determination that Martinez had no meritorious claims. 623 F. 3d, at 734. The Arizona Court of Appeals affirmed Martinez's conviction, and the Arizona Supreme Court denied review. *Id.*, at 733.

About a year and a half later, Martinez, now represented by new counsel, filed a second notice of postconviction relief in the Arizona trial court. *Id.*, at 734. Martinez claimed his trial counsel had been ineffective for failing to challenge the prosecution's evidence. He argued, for example, that his trial counsel should have objected to the expert testimony explaining the victim's recantations or should have called an expert witness in rebuttal. Martinez also faulted trial counsel for not pursuing an exculpatory explanation for the DNA on the nightgown. App. to Brief in Opposition B-6 to B-12. Martinez's petition was dismissed, in part in reliance on an Arizona Rule barring relief on a claim that could have been raised in a previous collateral proceeding. *Id.*, at B-27; see *Ariz. Rule Crim. Proc. 32.2(a)(3)*. Martinez, the theory went, should have asserted the claims of ineffective assistance of trial counsel in his first notice for postconviction relief. The Arizona Court of Appeals agreed. It denied Martinez relief because he failed to raise his claims in the first collateral proceeding. 623 F. 3d, at 734. The Arizona Supreme Court declined to review Martinez's appeal.

Martinez then sought relief in United States District Court for the District of Arizona, where he filed a petition for a writ of habeas corpus, again raising the ineffective-assistance-of-trial-counsel claims. Martinez acknowledged the state courts denied his claims by relying on a well-established state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of the claims. See, e.g., *Wainwright v. Sykes*, 433 U. S. 72, 84-85, 90-91 (1977). He could overcome this hurdle to federal review, Martinez argued, because he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions. See *id.*, at 84-85.

On the Magistrate Judge's recommendation, the District Court denied the petition, ruling that Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review. App. to Pet. for Cert. 36a. Martinez had not shown cause to excuse the procedural default, the District Court reasoned, because under *Coleman v. Thompson*, 501 U. S. 722, 753-754 (1991), an attorney's errors in a postconviction proceeding do not qualify as cause for a default. See *id.*, at 754-755.

The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals relied on general statements in *Coleman* that, absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for a procedural default. Expanding on the District Court's opinion, the Court of Appeals, citing *Coleman*, noted the general rule that there is no constitutional right to counsel in collateral proceedings. 623 F. 3d, at 736. The Court of Appeals recognized that *Coleman* reserved ruling on whether there is "an exception" to this rule in those cases "where 'state collateral review is the first place a prisoner can present a challenge to his conviction.'" 623 F. 3d, at 736 (quoting *Coleman, supra*, at 755). It concluded, nevertheless, that the controlling cases established no basis for the exception. Certiorari was granted. 563 U. S. 1032 (2011).

II

Coleman v. Thompson, supra, left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, "initial-review collateral proceedings." *Coleman* had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because "in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.*, at 755. As *Coleman* noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective-assistance claim, *id.*, at 756 (emphasis deleted; internal quotation marks omitted), and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. See *id.*, at 755; *Douglas v. California*, 372 U. S. 353, 357 (1963) (holding States must appoint counsel on a prisoner's first appeal).

This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

* * * *

Coleman, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court. See *501 U. S.*, at 755.

As *Coleman* recognized, this marks a key difference between initial-review collateral proceedings and other kinds of collateral proceedings. When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, e.g., *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875); cf. *Coleman, supra*, at 730-731. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.

The same is not true when counsel errs in other kinds of postconviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding. See, e.g., *Coleman, supra*, at 756.

Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review . . . are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. *Halbert v. Michigan*, 545 U. S. 605, 617 (2005); see *Douglas*, 372 U. S., at 357-358.

As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with

the State's procedures and obtain an adjudication on the merits of his claims. See 501 U. S., at 754; *Evitts v. Lucey*, 469 U. S. 387, 396 (1985); *Douglas, supra*, at 357-358. Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U. S., at 619. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g., *id.*, at 620-621 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U. S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., *Powell v. Alabama*, 287 U. S. 45, 68-69 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, see, e.g., *Fed. Rule Crim. Proc. 52(b)*, and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U. S. 446 (2000).

This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding. See *Massaro v. United States*, 538 U. S. 500, 505 (2003). Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim. *Ibid.* Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim. See Primus, *Structural Reform in Criminal Defense*, 92 Cornell L. Rev. 679, 689, and n. 57 (2004) (most rules give between 5 and 30 days from the time of conviction to file a request to expand the record on appeal). Thus, there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage, but this decision is not without consequences for the State's ability to assert a procedural default in later proceedings. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process,

where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims. It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion. *McCleskey v. Zant*, 499 U. S. 467, 490 (1991); see also *Coleman, supra*, at 730-731; *Sykes*, 433 U. S., at 83; *Reed v. Ross*, 468 U. S. 1, 9 (1984); *Fay v. Noia*, 372 U. S. 391, 430 (1963), overruled in part by *Sykes, supra*. These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default. See, e.g., *Strickler v. Greene*, 527 U. S. 263, 289 (1999); *Reed, supra*, at 16. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U. S. 322 (2003) (describing standards for certificates of appealability to issue).

* * * *

Arizona contends that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254, bars Martinez from asserting attorney error as cause for a procedural default. AEDPA refers to attorney error in collateral proceedings, but it does not speak to the question presented in this case. *Section 2254(i)* provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief." "Cause," however, is not synonymous with "a ground for relief." A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. In this case, for example, Martinez's "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA does not bar. Martinez relies on the ineffectiveness of his postconviction attorney to excuse his failure to comply with Arizona's procedural rules, not as an independent basis for overturning his conviction. In short, while § 2254(i) precludes Martinez from relying on the ineffectiveness of his postconviction attorney as a "ground for relief," it does not stop Martinez from using it to establish "cause." *Holland v. Florida*, 560 U. S. 630, 650-651 (2010).

III

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

In this case Martinez's attorney in the initial-review collateral proceeding filed a notice akin to an *Anders* brief, in effect conceding that Martinez lacked any meritorious claim, including his claim of ineffective assistance at trial. See *Anders v. California*, 386 U. S. 738 (1967). Martinez argued before the federal habeas court that filing the *Anders* brief constituted ineffective assistance. The Court of Appeals did not decide whether that was so. Rather, it held that because Martinez did not have a right to an attorney in the initial-review collateral proceeding, the attorney's errors in the initial-review collateral proceeding could not establish cause for the failure to comply with the State's rules. Thus, the Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.

* * * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

* * * *

[E]ven if today's holding could (against all logic) be restricted to ineffective-assistance-of-trial-counsel claims, it would have essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required. Despite the Court's suggestion to the contrary, see *ante*, at 13, the rule it adopts calls into question the common state practice of not appointing counsel in all first collateral proceedings, see *ante*, at 11-12. It does not, to be sure, call into question the *lawfulness* of that practice; only its *sanity*. For if the prisoner goes through state collateral proceedings without counsel, and fails to raise an ineffective-assistance-of-trial-counsel claim which is, because of that failure, defaulted, the default will not preclude federal habeas review of the merits of that claim. And since ineffective assistance of trial counsel is a monotonously standard claim on federal habeas (has a duly convicted defendant *ever* been effectively represented?), whoever advises the State would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases--lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas review of the adequacy of trial-court representation that occurred many years ago. Which is to say that the Court's pretended avoidance of requiring States to appoint collateral-review counsel is a sham.

Questions and Comments:

1. **A procedural doctrine, not a constitutional one:** *Martinez v. Ryan* adheres to the Court's previous decision in *Pennsylvania v. Finley*, declining to recognize a Fourteenth Amendment right to counsel in initial collateral review proceedings but concluded that a procedural default occasioned by counsel's deficient performance in such a proceeding triggers the equitable cause-and-prejudice exception to procedural default. Because it does not involve a constitutional question, there is no requirement to exhaust an argument that postconviction counsel was ineffective. Applying the cause-and-prejudice exception to procedural default is a federal question, adjudicated *de novo* in federal court. This mechanism can create incentives for states to fund competent counsel in trial and postconviction proceedings. Prisoners who received prejudicially deficient representation in state court proceedings will have their claims heard on the merits in federal court. For example, consider *Barnett v. Roper*, where postconviction counsel in state court defaulted David Barnett's *Strickland* claim by failing to plead it adequately in state proceedings.³⁷⁹ The district court initially enforced the procedural bar, relying on *Coleman v. Thompson*, but after Barnett's appeal in the Eighth Circuit.³⁸⁰ After *Martinez v. Ryan*, the district court reopened its judgment under Federal Rule of Civil Procedure 60(b), conducted an evidentiary hearing on Barnett's *Strickland* claim, and granted habeas corpus relief. *Barnett* is a good illustration of how *Martinez v. Ryan* should work to protect indigent prisoners from deficient representation in states known for chronically underfunding indigent defense.³⁸¹
2. **State's incentive revisited:** As applied in *Barnett*, *Martinez v. Ryan* gives the states the incentive to provide adequate counsel at all stages of trial and appeal. Many benefits would flow to states that do so. States that provide adequate counsel can enforce procedural defaults not caused by inept counsel. Further, cases in which the petitioner is adequately represented may win relief in state court, and those cases would never appear on a federal judge's docket. Cases in which the prisoner was well represented but did not obtain relief will arrive in federal court with the issues properly preserved and the facts well developed in State court, enhancing the fairness and efficiency of federal review.
3. **Ineffective assistance in subsequent collateral proceedings?** The Court in *Martinez* delineates between initial collateral proceedings, where ineffective assistance of counsel can excuse a procedural default, and later stages of state and federal litigation where the petitioner is bound by counsel's legal malpractice. Are there still circumstances where

³⁷⁹ 2015 U.S. Dist. LEXIS 193794 (E.D. Mo. 2015).

³⁸⁰ *Barnett v. Roper*, 541 F.3d 804 (2008), *cert. denied*, 558 U.S. 830 (2009).

³⁸¹ See Sean O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853 (2010) (discussing Missouri's historical reluctance to implement *Gideon v. Wainwright's* mandate).

attribution of attorney error to a faultless habeas petitioner would be unjust?³⁸²

4. **Claims other than trial counsel's ineffectiveness?** The majority in *Martinez* focused on claims of ineffective assistance of trial counsel that are defaulted by ineffective postconviction counsel. Justice Scalia's dissent warns that its reasoning eventually grew to include other claims, notably claims under *Brady v. Maryland* that are often discovered in a postconviction proceeding. He poses that hypothetical as if it would be a negative development. Since the prosecution's *Brady* duty is ongoing, what would be the problem with providing this means of judicial review of the prisoner's claim? Are there other claims that might appear for the first time in an initial collateral review proceeding?
5. **Error rates in death penalty cases:** The ability to reach meritorious claims of ineffective assistance of counsel and prosecutorial suppression of favorable evidence is important to the fairness and reliability of criminal judgments. A study of death penalty cases litigated to conclusion between 1973 and 1995 discovered that two-thirds of all death sentences were vacated in appellate, postconviction, and habeas corpus proceedings because of "serious error," defined as error that undermines the reliability of the outcome.³⁸³ The study found that the rate at which state postconviction courts found serious error requiring a new trial or new sentencing hearing ranged from 20% (Mississippi) to 52% of cases (Maryland).³⁸⁴ The rate was higher on direct appeal, where 41% of all death sentences nationwide were thrown out because of serious error.³⁸⁵ Of the death sentences that survived state appellate and postconviction review, 40% were overturned in federal habeas corpus proceedings due to serious error.³⁸⁶ Over the twenty-three years covered by the study, the nation-wide rate of relief due to serious error in capital cases was 68%.³⁸⁷ The authors' definition of "serious error" is borne out by the study's finding that in 82% of the cases reversed and remanded for retrial, the outcome was something other than the death penalty, including 7% of the cases in which the defendant was cleared of the capital offense.³⁸⁸ In noncapital cases it is estimated that only 15% of prisoners are granted relief in appellate, postconviction, and habeas proceedings.³⁸⁹ The two most common causes of serious error found in postconviction review of capital cases were ineffective assistance of counsel (37% of reversals) and prosecutorial suppression of exculpatory evidence (16-19%

³⁸² See *Holland v. Florida*, 560 U.S. 631 (2010) (discussing attorney abandonment as an equitable tolling event for AEDPA's one-year statute of limitations), and *Maples v. Thomas*, 565 U.S. 266 (2012) (presenting a similar set of circumstances where counsel did not file a notice of appeal in state postconviction).

³⁸³ James Liebman, et al, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1847 (2000).

³⁸⁴ *Id.* at 1848.

³⁸⁵ *Id.* at 1847.

³⁸⁶ *Id.* at 1849.

³⁸⁷ *Id.* at 1850.

³⁸⁸ *Id.* at 1852.

³⁸⁹ *Id.* at 1854, n. 49.

of reversals).³⁹⁰ Whether a court has the power to adjudicate these claims of error affects the ability of courts to produce just outcomes.

6. **Attorney error and defaulted facts:** Chapter 7, Fact Development in Postconviction Proceedings, will discuss the daunting proof problems faced by habeas petitioners. The Court's pre-AEDPA decision in *Keeney v. Tamayo-Reyes* incorporated the Court's procedural default jurisprudence into the analysis of when habeas petitioners could present evidence they had not developed in state court proceedings.³⁹¹ Dissenting from that holding, Justice O'Connor explained: "The availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court."³⁹² Justice O'Connor gave the example of *Moore v. Dempsey*, "where the state courts had rejected -- under somewhat suspicious circumstances -- the petitioner's allegation that his trial had been dominated by an angry mob: 'It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.'"³⁹³ Justice Kennedy agreed with Justice O'Connor, stating, "We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts."³⁹⁴ An important backdrop to this discussion is that prejudicially ineffective assistance of counsel most often is a failure to investigate facts. The Wyoming Supreme Court reviewed its cases adjudicating claims of ineffective assistance of counsel, and noted, "It is quickly apparent that the only successful avenue has related to investigation and obtaining witnesses."³⁹⁵ The Supreme Court's decision in *Wiggins v. Smith* points out that *Strickland's* presumption protecting trial counsel's strategic decisions has limited application where counsel's allegedly deficient performance includes failing to investigate.³⁹⁶ Because strategic judgment is informed by reasonable investigation, "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."³⁹⁷ A hearing will almost always be necessary to resolve a meritorious claim that trial counsel performed deficiently. The same will be true for a claim that postconviction counsel performed deficiently by failing to raise or investigate that claim. *Keeney's* holding combined with *Martinez* suggests that a habeas petitioner could use ineffective assistance of postconviction counsel as "cause" to permit a habeas petitioner to present evidence supporting a *Strickland* claim against trial counsel that postconviction counsel failed to discover. However, the Court in

³⁹⁰ *Id.* at 1850.

³⁹¹ 504 U.S. 1 (1992).

³⁹² *Id.* at 14 (O'Connor, J., dissenting).

³⁹³ *Keeney*, at 18 (quoting *Moore v. Dempsey*, 261 U.S. 86, 92 (1922)).

³⁹⁴ *Keeney*, at 24 (Kennedy, J., concurring).

³⁹⁵ *Calene v. State*, 846 P.2d 679, 694, n. 5. (Wyo. 1993).

³⁹⁶ 539 U.S. 510 (2003).

³⁹⁷ *Id.* at 526.

Shinn v. Ramirez, interpreted 28 U.S.C. § 2254(e) to prohibit consideration of evidence that the habeas petitioner did not develop in state proceedings, even if an ineffective postconviction lawyer causes that failure.³⁹⁸ This issue is explained in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

C. Miscarriage of Justice

Also called “the ends of justice” standard, this exception to the procedural bar doctrine flows from the equitable principle that courts should always have the power to prevent a fundamental miscarriage of justice, even if a prisoner’s constitutional claims are defaulted. What this miscarriage of justice is, though, has been the subject of debate. Many persuasive arguments have been made that convictions obtained through race discrimination, for example, should trigger the miscarriage of justice exception to procedural default, but the Court has not embraced this exception. The only consistent principle to be gleaned from the Court’s decisions in this area is that a prisoner’s actual innocence will trigger the miscarriage of justice exception, though there has been disagreement over what actual innocence is.

The ends of justice exception to issue preclusion doctrines was introduced by *Sanders v. United States*,³⁹⁹ discussed in Chapter 4, Procedural Bars: Independent, Adequate State Grounds. Decided on the same day as *Fay v. Noia*, *Sanders* held that even if the habeas petitioner’s claims are procedurally defaulted or an abuse of the writ, “the federal judge clearly has the power -- and, if the ends of justice demand, the duty -- to reach the merits.”⁴⁰⁰ The Court did not elaborate on when the ends of justice demand review of the merits of a habeas petitioner’s claims, but stated, “We are confident that this power will be soundly applied.”⁴⁰¹

That confidence waned under the Burger and Rehnquist Courts. In *Murray v. Carrier*, the Court restricted the circumstances under which a lawyer’s failure to assert a client’s constitutional rights might excuse a procedural default. However, rather than deny Carrier’s petition as procedurally barred, the Court remanded the matter to the lower courts to allow Carrier to prove that he could satisfy the ends of justice standard—with more directions on what that would require.

³⁹⁸ 596 U.S. 366 (2021).

³⁹⁹ 373 U.S. 1 (1963).

⁴⁰⁰ *Id.*, at 19.

⁴⁰¹ *Id.*

MURRAY V. CARRIER

JUSTICE O'CONNOR delivered the opinion of the Court.

* * * *

However, as we also noted in *Engle [v. Isaac]*, 456 U.S. 107, 135 (1982), “[in] 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.” We remain confident that, for the most part, “victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.” *Ibid.* But we do not pretend that this will always be true. Accordingly, we think that in 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.

* * * *

Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. See generally *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to effective assistance of counsel applies on an appeal as of right). Respondent's petition for federal habeas review of his procedurally defaulted discovery claim must therefore be dismissed for failure to establish cause for the default, *unless it is determined on remand that the victim's statements contain material that would establish respondent's actual innocence.*

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity.

* * * *

I concur in its judgment remanding the case for further proceedings on the substance of the claim, and dispensing with the procedural hearing ordered by the Court of Appeals; I disagree, however, with much of what the Court has written about "cause and prejudice," as well as with its announcement of a new standard to govern the District Court's ultimate disposition of the case.

I

The character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition. Before and during his trial on charges of rape and abduction, his counsel made timely motions for discovery of the statements made by the victim to the police. By denying those motions, the trial court significantly curtailed the defendant's ability to cross-examine the prosecution's most important witness, and may well have violated the defendant's right to review "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). That right is unquestionably protected by the Due Process Clause. *Ibid.* See also *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976). Indeed, the Court has repeatedly emphasized the fundamental importance of that federal right.

The constitutional claim advanced by respondent calls into question the accuracy of the determination of his guilt. On the record before us, however, we cannot determine whether or not he is the victim of a miscarriage of justice. Respondent argues that the trial court's analysis was severely flawed. Even if the trial judge applied the correct standard, the conclusion that there was no "exculpatory" material in the victim's statements does not foreclose the possibility that inconsistencies between the statements and the direct testimony would have enabled an effective cross-examination to demonstrate that respondent is actually innocent. On the other hand, it is possible that other evidence of guilt in the record is so overwhelming that the trial judge's decision was clearly not prejudicial to the defendant. The important point is that we cannot evaluate the possibility that respondent may be the victim of a fundamental miscarriage of justice without any knowledge about the contents of the victim's statements.

* * * *

As the statute suggests, the central mission of the Great Writ should be the substance of "justice," not the form of procedures. As Justice Frankfurter explained in his separate opinion in *Brown v. Allen*, 344 U.S. 443, 498 (1953):

"The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."

In *Hensley v. Municipal Court*, 411 U.S. 345, 349-350 (1973), the Court similarly emphasized this approach, stating:

"Our recent decisions have reasoned from the premise that habeas corpus is not 'a static, narrow, formalistic remedy,' *Jones v. Cunningham*, [371 U.S. 236,] 243 [(1963)], but one which must retain the 'ability to cut through barriers of form and procedural mazes.' *Harris v. Nelson*, 394 U.S. 286, 291 (1969). See *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). 'The very nature of the writ demands that it be administered with the

initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.' *Harris v. Nelson*, *supra*, at 291.

“Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”

Accordingly, the statutory mandate to “dispose of the matter as law and justice require” clearly requires at least some consideration of the character of the constitutional claim.⁴⁰² [Court’s fn 8]

In my opinion, the "cause and prejudice" formula that the Court explicates in such detail today is not dispositive when the fundamental fairness of a prisoner's conviction is at issue. That formula is of recent vintage, particularly in comparison to the writ for which it is invoked. It is, at most, part of a broader inquiry into the demands of justice.

* * * *

In order to be faithful to that promise, we must recognize that cause and prejudice are merely components of a broader inquiry which, in this case, cannot be performed without an examination of the victim's statements.

III

An inquiry into the requirements of justice requires a consideration, not only of the nature and strength of the constitutional claim, but also of the nature and strength of the state procedural rule that has not been observed. In its opinion today, the Court relies heavily on cases in which the defendant failed to make a contemporaneous objection to an error that occurred during a trial. Most of the reasons for finding a waiver in that setting simply do not apply to the appellate process. Of special importance is the fact that the state interest in enforcing its contemporaneous-objection rule is supported, not merely by the concern with finality that characterizes state appellate rules, but also by the concern with making the trial the "main event" in which the issue of guilt or innocence can be fairly resolved.

* * * *

IV

⁴⁰² [Court’s footnote 8] See also *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("fundamental fairness is the central concern of the writ of habeas corpus"). Although a constitutional claim that may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of constitutional claim that implicates "fundamental fairness" and that compels review regardless of possible procedural defaults. See *Rose v. Lundy*, 455 U.S. 509, 543-544 (1982) (STEVENS, J., dissenting).

Accordingly, I concur in the judgment but not in the Court's opinion.

Questions and Comments:

1. **Defining “ends of justice”:** The dissenting opinions in *Murray v. Carrier* express concern that innocence is too narrow a standard for determining when the ends of justice require a court to consider a successive petition. Justices Stevens and Blackmun pointed to *Daniels v. Allen*, a companion case decided along with *Brown v. Allen*, for invoking the ends of justice standard where “petitioners challenged their convictions and death sentences on the ground that the trial judge had erroneously denied their timely objection to the admission of allegedly coerced confessions and to the alleged discrimination against blacks in the selection of both grand and petit jurors.”⁴⁰³ Although the Court affirmed the denial of Daniels’ habeas petition, Justice Stevens argued, “Because the *Daniels* holding was repudiated in *Fay v. Noia*... Justice Black's penetrating dissent commands greater respect than Justice Reed's ambiguous opinion for the Court.”⁴⁰⁴ Justice Black’s dissent in *Brown* pointed to *Moore v. Dempsey*, where the Court found that it was error to reject Moore’s challenge to his death sentence imposed after an unfair trial by an all-white jury from which black citizens were systematically eliminated.⁴⁰⁵ “I read *Moore v. Dempsey, supra*, as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. . . . I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries.”⁴⁰⁶ Are there constitutional violations that so undermine the integrity and trustworthiness of the outcome that it risks a fundamental miscarriage of justice to withhold habeas review? Many would argue that a conviction obtained by race discrimination is such a case, but after *Murray v. Carrier*, the habeas petitioner would have to show more than clear-cut evidence of a constitutional violation to obtain habeas corpus review of a defaulted discrimination claim. The same would be true of a coerced confession claim. Should a petitioner who can establish he was convicted on a coerced confession have to make an affirmative showing of actual innocence to obtain habeas relief?
2. **When the “cause-and-prejudice” standard fails:** In *Wainwright v. Sykes*, the Court expressed the belief that its cause-and-prejudice standard “will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such

⁴⁰³ *Brown v. Allen*, 344 U.S. 443, 453 (1953).

⁴⁰⁴ *Murray*, at 507-508 (Stevens, J., dissenting).

⁴⁰⁵ 261 U.S. 86 (1922).

⁴⁰⁶ *Brown*, at 554 (Black, J., dissenting).

an adjudication will be the victim of a miscarriage of justice.”⁴⁰⁷ However, the Court declined to elaborate further on the meaning of “miscarriage of justice,” as Sykes presented no argument that would trigger a miscarriage of justice inquiry. Similarly, the *Murray* Court declined to elaborate on what constitutes a miscarriage of justice, but remanded the matter to the district court to give the petitioner an opportunity to prove actual innocence. In *Kuhlmann v. Wilson*, the Court adopted a standard proposed in a law review article written by a federal judge, holding that even in the absence of cause-and-prejudice, a prisoner who can make a “colorable showing of actual innocence” would be entitled to habeas review.⁴⁰⁸ The Second Circuit Court of Appeals had reversed the denial of habeas corpus relief to Wilson on his claim that the use of post-indictment statements he allegedly made to a jailhouse informant should have been excluded as a violation of his right to counsel under *United States v. Henry*, 447 U.S. 264 (1980), which was decided after Wilson’s claim under *Massiah v. United States*, 377 U.S. 201 (1964) had been rejected on his first habeas petition. Agreeing with Wilson that the facts of his *Massiah* claim made his claim indistinguishable from *United States v. Henry*, the Court of Appeals found that the ends of justice mandated relief. The Supreme Court granted certiorari to consider the Court of Appeals’ decision that the ends of justice required consideration of Wilson’s successive habeas petition.

KUHLMAN V. WILSON

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O’CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner’s petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

* * * *

In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the “ends of justice” require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, *supra*. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear

⁴⁰⁷ 433 U.S. 72, 91 (1977),

⁴⁰⁸ 477 U.S. 436 (1986), citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148-149 (1970).

intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though -- as argued in this case -- the evidence of guilt may have been unlawfully admitted.⁴⁰⁹ [Court's rn 17]

Applying the foregoing standard in this case, we hold that the Court of Appeals erred in concluding that the "ends of justice" would be served by consideration of respondent's successive petition. The court conceded that the evidence of respondent's guilt "was nearly overwhelming." 742 F.2d, at 742. The constitutional claim argued by respondent does not itself raise any question as to his guilt or innocence. The District Court and the Court of Appeals should have dismissed this successive petition under § 2244(b) on the ground that the prior judgment denying relief on this identical claim was final.

JUSTICE STEVENS, dissenting.

When a district court is confronted with the question whether the "ends of justice" would be served by entertaining a state prisoner's petition for habeas corpus raising a claim that has been rejected on a prior federal petition for the same relief, one of the facts that may properly be considered is whether the petitioner has advanced a "colorable claim of innocence." But I agree with Justice Brennan that this is not an essential element of every just disposition of a successive petition. More specifically, I believe that the District Court did not abuse its discretion in entertaining the petition in this case, although I would also conclude that this is one of those close cases in which the District Court could have properly decided that a second review of the same contention was not required despite the intervening decision in *United States v. Henry*, 447 U.S. 264 (1980).

On the merits, I agree with the analysis in Part II of Justice Brennan's dissent. Accordingly, I also would affirm the judgment of the Court of Appeals.

Questions and Comments:

1. **Shrinking habeas corpus?** Under the guise of defining equitable exceptions to the procedural bar doctrine, *Murray v. Carrier* and *Kuhlmann v. Wilson* represent a contraction

⁴⁰⁹ [Court's footnote 17] As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, *supra*, at 160. Rather, the prisoner must "show a fair probability that, 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, the trier of the facts would have entertained a reasonable doubt of his guilt." *Ibid.* (footnote omitted). Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

of habeas corpus jurisdiction. Justice Brennan’s dissent argues persuasively that Wilson’s first petition for writ of habeas corpus was wrongly denied because the state “intentionally created a situation in which it was foreseeable that respondent would make incriminating statements without the assistance of counsel” by planting an undercover informant in his cell who “encouraged him to talk about his crime.”⁴¹⁰ What does this suggest about his view of the ends of justice standard? Is it enough simply to present a meritorious claim? Wilson did more than that. “He also advanced a complete justification for returning to federal court a second time with this claim.”⁴¹¹ Wilson did not fail in his duty of diligence in the pursuit of his *Massiah* claim. There is no “cause-and-prejudice” issue because Wilson raised his *Massiah* claim, and the state court and the federal district court denied Wilson’s claim because they felt that the government’s conduct did not violate *Massiah*. However, *United States v. Henry* granted relief to a defendant whose facts were no different from Wilson’s. Would it have been more appropriate to view the issue as whether *United States v. Henry* should be applied retroactively? The answer may lie in the Court’s view of “successive” petitions, which it defined as a petition that “raises grounds identical to those raised and rejected on the merits on a prior petition.” *Kulmann* at 444, n. 6, citing *Sanders v. United States*.⁴¹² The Court distinguished “successive” petitions from “abuse of the writ” cases in which “a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that ‘disentitle[s] him to the relief he seeks.’”⁴¹³ This distinction is drawn by Rule 9(b) of the Rules Governing Section 2254, which provides that “second or successive petition *may* be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.” The Antiterrorism and Effective Death Penalty Act amended 28 U.S.C. § 2244(b)(1) to state simply that “A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” However, in *Stewart v. Martinez-Villareal*,⁴¹⁴ the Court relied on Rule 9(b), which was not changed by AEDPA, to interpret this provision to be triggered if the claim was presented and decided on the merits. Also see *Gonzales v. Crosby*, where the Court allowed a habeas petition to reopen an earlier denial of habeas relief under Fed. R. Civ. Pro. 60—if a petitioner’s claim was incorrectly denied on procedural bar grounds without reaching the merits.⁴¹⁵

2. **Unanswered questions:** *Kulmann* raises as many questions as it answers. What quantum of proof is necessary to trigger the actual innocence/miscarriage of justice standard? Can a

⁴¹⁰ *Kulmann*, at 576 (Brennan, J., dissenting).

⁴¹¹ *Id.* at 471.

⁴¹² 373 U.S. 1, 15-17 (1963).

⁴¹³ *Id.*

⁴¹⁴ 523 U.S. 637 (1998).

⁴¹⁵ 545 U.S. 524 (2005).

prisoner who shows actual innocence overcome all procedural barriers? Can one default the right to present innocence evidence? What does the Court mean by “new evidence”? To apply the fair miscarriage of justice standard, can a habeas petitioner be guilty of the crime, but innocent of the death penalty? The definition and application of the actual innocence standard is discussed in the next section.

1. Actual innocence of the death penalty

Once *Engle v. Isaac* and *Murray v. Carrier* restricted the definition of a fundamental miscarriage of justice to actual innocence, the question arose in habeas petitioners who, though guilty of the crime, presented compelling evidence of constitutional violations that would probably have spared them from execution. What does it mean to be actually innocent of the death penalty? In *Smith v. Murray* the Court was asked to examine defaulted constitutional claims relating to a sentence of death under the miscarriage of justice standard.⁴¹⁶ As the Court observed, actual innocence “does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.”⁴¹⁷ Without trying to define a standard for actual innocence of the death penalty, the Court rejected Smith’s claims without reaching the merits because the “alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.”⁴¹⁸

In *Sawyer v. Whitley*, a death-sentenced habeas petitioner presented new evidence supporting a defaulted claim of ineffective assistance of counsel that supported persuasive arguments for a lesser sentence. Robert Sawyer had a history of involuntary commitment for mental health treatment, and a victim of the crime had told the police that it was Sawyer’s co-defendant, not Sawyer himself, who set fire to the victim’s body, a key fact supporting the prosecutor’s successful argument for death. What measure should determine whether the ends of justice would be served by adjudicating Sawyer’s constitutional claims?

SAWYER V. WHITLEY

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim. Robert Wayne Sawyer, the petitioner in this case, filed a second federal habeas petition containing successive and abusive claims. The Court of Appeals for the Fifth Circuit refused to examine the merits of Sawyer's claims. It held that Sawyer had not shown cause for failure to raise these claims

⁴¹⁶ 477 U.S. 527 (1986).

⁴¹⁷ *Id.* at 537.

⁴¹⁸ *Id.* at 538.

in his earlier petition, and that he had not shown that he was "actually innocent" of the crime of which he was convicted or the penalty which was imposed. 945 F.2d 812 (1991). We affirm the Court of Appeals and hold that to show "actual innocence" one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

In 1979 -- 13 years ago -- petitioner and his accomplice, Charles Lane, brutally murdered Frances Arwood, who was a guest in the home petitioner shared with his girlfriend, Cynthia Shano, and Shano's two young children. As we recounted in our earlier review of this case, *Sawyer v. Smith*, 497 U.S. 227 (1990), petitioner and Lane returned to petitioner's home after a night of drinking and argued with Arwood, accusing her of drugging one of the children. Petitioner and Lane then attacked Arwood, beat her with their fists, kicked her repeatedly, submerged her in the bathtub, and poured scalding water on her before dragging her back into the living room, pouring lighter fluid on her body and igniting it. Arwood lost consciousness sometime during the attack and remained in a coma until she died of her injuries approximately two months later. Shano and her children were in the home during the attack, and Shano testified that petitioner prevented them from leaving.

At trial, the jury failed to credit petitioner's "toxic psychosis" defense, and convicted petitioner of first-degree murder. At the sentencing phase, petitioner testified that he was intoxicated at the time of the murder and remembered only bits and pieces of the events. Petitioner's sister, Glenda White, testified about petitioner's deprived childhood, about his affection and care for her children, and that as a teenager petitioner had been confined to a mental hospital for "no reason," where he had undergone shock therapy. The jury found three statutory aggravating factors and no statutory mitigating factors and sentenced petitioner to death.⁴¹⁹

* * * *

The present petition before this Court arises out of Sawyer's second petition for federal habeas relief. After granting a stay and holding an evidentiary hearing, the District Court denied one of Sawyer's claims on the merits and held that the others were barred as either abusive or successive. 772 F. Supp. 297 (ED La. 1991). The Court of Appeals granted a certificate of probable cause on the issue whether petitioner had shown that he is actually "innocent of the death penalty" such that a court should reach the merits of the claims contained in this successive petition. 945 F.2d at 814. The Court of Appeals held that petitioner had failed to show that he was actually innocent of the death penalty because the evidence he argued had been unconstitutionally kept from the jury failed to show that Sawyer was ineligible for the death penalty under Louisiana law.

⁴¹⁹ [Court's footnote 2] The jury found the following statutory aggravating factors: "(1) that [Sawyer] was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that [Sawyer] had previously been convicted of an unrelated murder." *Id.*, at 100. The Louisiana Supreme Court held that the last aggravating circumstance was not supported by the evidence. *Id.*, at 101.

For the third time we granted Sawyer's petition for certiorari, 502 U.S. 965 (1991), and we now affirm.

* * * *

The present case requires us to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake. In the context of a noncapital case, the concept of "actual innocence" is easy to grasp.

It is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death. The phrase "innocent of death" is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a noncapital defendant. In defining this analog, we bear in mind that the exception for "actual innocence" is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. In the everyday context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the "actual innocence" exception if such a claim is made.

* * * *

Considering Louisiana law as an example, then, there are three possible ways in which "actual innocence" might be defined. The strictest definition would be to limit any showing to the elements of the crime which the State has made a capital offense. The showing would have to negate an essential element of that offense. The Solicitor General, filing as *amicus curiae* in support of respondent, urges the Court to adopt this standard. We reject this submission as too narrow, because it is contrary to the statement in *Smith* that the concept of "actual innocence" could be applied to mean "innocent" of the death penalty. 477 U.S. at 537. This statement suggested a more expansive meaning to the term of "actual innocence" in a capital case than simply innocence of the capital offense itself.

The most lenient of the three possibilities would be to allow the showing of "actual innocence" to extend not only to the elements of the crime, but also to the existence of aggravating factors, and to mitigating evidence that bore not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment. This, in effect, is what petitioner urges upon us. He contends that actual innocence of the death penalty exists where "there is a 'fair probability' that the admission of false evidence, or the preclusion of true mitigating evidence, [caused by a constitutional error] resulted in a

sentence of death.”⁴²⁰ Although petitioner describes his standard as narrower than that adopted by the Eighth and Ninth Circuits,⁴²¹ in reality it is only more closely related to the facts of his case in which he alleges that constitutional error kept true mitigating evidence from the jury. The crucial consideration, according to petitioner, is whether due to constitutional error the sentencer was presented with “a *factually inaccurate sentencing profile*” of the petitioner. Brief for Petitioner 15, n.21, quoting *Johnson v. Singletary*, 938 F.2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J., dissenting).

The Eighth Circuit has adopted a similar test: “In the penalty-phase context, this exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.” *Stokes v. Armontrout*, 893 F.2d 152, 156 (1989), quoting *Smith v. Armontrout*, 888 F.2d 530, 545 (1989).

Insofar as petitioner's standard would include not merely the elements of the crime itself, but the existence of aggravating circumstances, it broadens the extent of the inquiry but not the type of inquiry. Both the elements of the crime and statutory aggravating circumstances in Louisiana are used to narrow the class of defendants eligible for the death penalty. And proof or disproof of aggravating circumstances, like proof of the elements of the crime, is confined by the statutory definitions to a relatively obvious class of relevant evidence. Sensible meaning is given to the term “innocent of the death penalty” by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.⁴²²

But we reject petitioner's submission that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that “actual innocence” amounts to little more than what is already required to show “prejudice,” a necessary showing for habeas relief for many constitutional errors. See, e. g., *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). If federal habeas review of capital sentences is to be at all rational, petitioner must

⁴²⁰ [Court’s footnote 10] Petitioner's standard derives from language in *Smith v. Murray*, 477 U.S. 527 (1986). Petitioner maintains that *Smith* holds that if one can show that the error precludes the development of true mitigating evidence, actual innocence has been shown. By emphasizing that in *Smith* the fundamental miscarriage of justice exception had not been met because, *inter alia*, the constitutional error did not lead the jury to consider any false evidence, we did not hold its converse, that an error which leads to the consideration of “false” mitigating evidence amounts to a miscarriage of justice.

⁴²¹ [Court’s footnote 11] In *Deutscher v. Whitley*, 946 F.2d 1443 (1991), the Ninth Circuit phrased its test as follows: “To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination. This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for constitutional error, the sentence of death would not have been imposed.” *Id.*, at 1446 (citations omitted).

⁴²² [Court’s footnote 12] Louisiana narrows the class of those eligible for the death penalty by limiting the type of offense for which it may be imposed, and by requiring a finding of at least one aggravating circumstance. See 505 U.S. at 342. Statutory provisions for restricting eligibility may, of course, vary from State to State.

show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.⁴²³

But, more importantly, petitioner's standard would so broaden the inquiry as to make it anything but a "narrow" exception to the principle of finality that we have previously described it to be. A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative, and admissible evidence negating the element of intent. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider.

The Court of Appeals in this case took the middle ground among these three possibilities for defining "actual innocence" of the death penalty, and adopted this test:

"We must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *945 F.2d at 820* (footnotes omitted).

The Court of Appeals standard therefore hones in on the objective factors or conditions that must be shown to exist before a defendant is eligible to have the death penalty imposed. The Eleventh Circuit has adopted a similar "eligibility" test for determining actual innocence. *Johnson v. Singletary*, 938 F.2d 1166 (1991), cert. pending, No. 91-6576.⁴²⁴ We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the "actual innocence" requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error.

⁴²³ [Court's footnote 13] If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive, or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases. *McCleskey v. Zant*, 499 U.S. 467, 494-495 (1991); *Carrier*, 477 U.S. at 493.

⁴²⁴ [Court's footnote 15] The Eleventh Circuit articulated the following test:

"Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty." *Johnson v. Singletary*, 938 F.2d at 1183 (emphasis in original).

In the present petition, Sawyer advances two claims, arising from two distinct groups of evidentiary facts that were not considered by the jury that convicted and sentenced Sawyer. The first group of evidence relates to petitioner's role in the offense and consists of affidavits attacking the credibility of Cynthia Shano and an affidavit claiming that one of Shano's sons told a police officer that Sawyer was not responsible for pouring lighter fluid on Arwood and lighting it, and that in fact Sawyer tried to prevent Charles Lane from lighting Arwood on fire. Sawyer claims that the police failed to produce this exculpatory evidence in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The second group consists of medical records from Sawyer's stays as a teenager in two different mental health institutions. Sawyer alleges ineffective assistance of counsel in trial counsel's failure to introduce these records in the sentencing phase of his trial.

The Court of Appeals held that petitioner's failure to assert his *Brady* claim in his first petition constituted an abuse of the writ, and that he had not shown cause for failing to raise the claim earlier under *McCleskey*. 945 F.2d at 824. The ineffective-assistance claim was held by the Court of Appeals to be a successive claim because it was rejected on the merits in Sawyer's first petition, and petitioner failed to show cause for not bringing all the evidence in support of this claim earlier. *Id.*, at 823. Petitioner does not contest these findings of the Court of Appeals. Therefore, we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

Under Louisiana law, petitioner is eligible for the death penalty because he was convicted of first-degree murder -- that is, an intentional killing while in the process of committing an aggravated arson -- and because at the sentencing phase the jury found two valid aggravating circumstances: that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious, and heinous. The psychological evidence petitioner alleges was kept from the jury due to the ineffective assistance of counsel does not relate to petitioner's guilt or innocence of the crime.⁴²⁵ Neither does it relate to either of the aggravating factors found by the jury that made petitioner eligible for the death penalty. Even if this evidence had been before the jury, it cannot be said that a reasonable juror would not have found both of the aggravating factors that make petitioner eligible for the death penalty.⁴²⁶ Therefore, as to this evidence, petitioner has not shown that there would be a fundamental miscarriage of justice for the Court to fail to reexamine the merits of this successive claim.

We are convinced that the evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show that the petitioner is actually innocent of the death penalty to which he has been sentenced. Much of the evidence goes to the credibility of Shano, suggesting, *e. g.*, that

⁴²⁵ [Court's footnote 16] Petitioner does not allege that his mental condition was such that he could not form criminal intent under Louisiana law.

⁴²⁶ [Court's footnote 17] In the same category are the affidavits from petitioner's family members attesting to the deprivation and abuse suffered by petitioner as a child.

contrary to her testimony at trial she knew Charles Lane prior to the day of the murder; that she was drinking the day before the murder; and that she testified under a grant of immunity from the prosecutor. This sort of latter day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions.

The final bit of evidence petitioner alleges was unconstitutionally kept from the jury due to a *Brady* violation was a statement made by Shano's then 4-year-old son, Wayne, to a police officer the day after the murder. Petitioner has submitted an affidavit from one Diane Thibodeaux stating that she was present when Wayne told a police detective who asked who had lit Arwood on fire that "Daddy [Sawyer] tried to help the lady" and that the "other man" had pushed Sawyer back into a chair. The affidavit also states that Wayne showed the officer where to find a cigarette lighter and a can of lighter fluid in the trash. *Ibid*. Because this evidence goes to the jury's finding of aggravated arson, it goes both to petitioner's guilt or innocence of the crime of first-degree murder and the aggravating circumstance of a murder committed in the course of an aggravated arson. However, we conclude that this affidavit, in view of all the other evidence in the record, does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury. The murder was especially cruel, atrocious, and heinous based on the undisputed evidence of torture before the jury quite apart from the arson (*e. g.*, beating, scalding with boiling water). As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit, it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.

Even considering the affidavit of Wayne Shano, it cannot be said that no reasonable juror would have found that petitioner committed the aggravated arson, given Cynthia Shano's testimony as to petitioner's statements to Lane on the day of the murder and petitioner's fingerprints on the can of lighter fluid.

We therefore hold that petitioner has failed to show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under Louisiana law. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BLACKMUN, concurring in the judgment.

* * * *

My ability in *Maxwell*, *Furman*, and the many other capital cases I have reviewed during my tenure on the federal bench to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the Federal Judiciary's power to reach and correct claims of constitutional error on federal habeas review,

would ensure that death sentences are fairly imposed. Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty.

Only last Term I had occasion to lament the Court's continuing "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and its transformation of "the duty to protect federal rights into a self-fashioned abdication." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (dissenting opinion). This Term has witnessed the continued narrowing of the avenues of relief available to federal habeas petitioners seeking redress of their constitutional claims. See, e. g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (overruling in part *Townsend v. Sain*, 372 U.S. 293 (1963)). It has witnessed, as well, the execution of two victims of the "new habeas," Warren McCleskey and Roger Keith Coleman.

* * * *

As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg v. Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. See 428 U.S. 153, 189 (1976) (joint opinion); *Lockett v. Ohio*, 438 U.S. 586, 601 (1978). At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, concurring in the judgment.

* * * *

While the conviction of an innocent person may be the archetypal case of a manifest miscarriage of justice, it is not the only case. There is no reason why "actual innocence" must be both an animating *and the limiting* principle of the work of federal courts in furthering the "ends of justice." As Judge Friendly emphasized, there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151-154 (1970). Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence.

Nowhere is this more true than in capital sentencing proceedings. Because the death penalty is qualitatively and morally different from any other penalty, "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures." *Smith v. Murray*, 477 U.S. 527, 545-546 (1986) (Stevens, J., dissenting). Accordingly, the ends of justice dictate that "when a condemned

prisoner raises a substantial, colorable *Eighth Amendment* violation, there is a special obligation . . . to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair." *Id.*, at 546.

Thus the Court's first and most basic error today is that it asks the wrong question. Charged with averting manifest miscarriages of justice, the Court instead narrowly recasts its duty as redressing cases of "actual innocence." This error aside, under a proper interpretation of the *Carrier* analysis, the Court's definition of "innocence of death" is plainly wrong because it disregards well-settled law -- both the law of habeas corpus and the law of capital punishment.

* * * *

Similarly, I do not share the Court's concern that a standard broader than the eligibility standard creates "a far more difficult task" for federal courts. *Ante*, 505 U.S. at 346. As noted above, both the "probably resulted" standard and the "clearly-erroneous" standard have long been applied by federal courts in a variety of contexts. Moreover, to the extent that the "clearly-erroneous" standard is more difficult to apply than the Court's "eligibility" test, I believe that that cost is far outweighed by the importance of making just decisions in the few cases that fit within this narrow exception. To my mind, any added administrative burden is surely justified by the overriding interest in minimizing the risk of error in implementing the sovereign's decision to take the life of one of its citizens. As we observed in *Gardner v. Florida*, 430 U.S. 349, 360 (1977), "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."

Questions and Comments:

1. **Delay and capital punishment drives jurisprudence:** No justice dissented from the proposition that Robert Wayne Sawyer had not presented a case that qualified as a miscarriage of justice sufficient to justify review of the merits of his second habeas petition. Justices sharply disagreed, however, on the standard that should apply to future cases. Much of the tension between the majority and the concurring opinions flows from philosophical differences in the penalty of death. What seems to be the primary concern of the majority? The rift on the Court regarding federal review of state death penalty cases is on display in the Court's stay-of-execution jurisprudence of the time. In *Delo v. Stokes*,⁴²⁷ a narrowly divided Court granted Missouri's motion to lift a stay of execution issued by a district court less than twenty-four hours earlier so it could consider Winford Stokes' fourth petition for writ of habeas corpus, finding that the district court abused its discretion in granting the stay. "Delay or default by courts in the federal system must not be allowed to

⁴²⁷ 495 U.S. 320, 322 (1990).

deprive parties, including States, of the lawful process to which they are entitled.”⁴²⁸ Dissenting justices claimed that “Given the dire consequences of error, the Court’s rush to judgment is unseemly and indefensible.”⁴²⁹ Do you see the same tensions between the majority and the dissent in *Sawyer v. Whitley*? As passing the Antiterrorism and Effective Death Penalty Act shows, federal review of death sentences is perhaps the leading motivation for federal courts to expand or shrink the reach of the writ of habeas corpus. The administration of capital punishment is fraught with issues of delay and unfairness, and those tensions continue to play out in habeas corpus cases.

2. **AEDPA heightens *Sawyer*’s hurdle:** The Antiterrorism and Effective Death Penalty Act has incorporated a version of *Sawyer v. Whitley*’s standard in its provision barring subsequent habeas corpus petitions. Congress enacted a wholly new version of the abuse of the standard in 28 U.S.C. § 2244:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 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*

⁴²⁸ *Id.* at 323 (Kennedy, J., concurring).

⁴²⁹ *Id.* at 326-27 (Brennan, J., dissenting).

*establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense*⁴³⁰

This language applies the *Sawyer v. Whitley* standard to all claims relating to guilt or innocence and accommodates no claim relating to sentence. The only successful post-AEDPA cases allowing habeas relief are those that fall within 28 U.S.C. § 2244(b)(2)(A), which allows successive claims based on a new, retroactive rule of constitutional law, such as:

- *Atkins v. Virginia*—exempting intellectually disabled people from execution,⁴³¹
 - *Roper v. Simmons*—exempting juvenile offenders from execution,⁴³²
 - *Graham v. Florida*—exempting juvenile offenders in non-homicide cases from life without parole,⁴³³ and
 - *Miller v. Alabama*—exempting juvenile offenders in homicide cases from automatic imposition of sentences of life imprisonment without parole.⁴³⁴
3. **Burying mistakes:** The research of Professor Liebman, et al., reported in *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, vindicates the justices who disagree with *Sawyer v. Whitley*'s preclusive standard for successor claims by establishing the frequency of prejudicial error in the imposition of the death penalty.⁴³⁵ AEDPA accomplishes in black letter law what *Sawyer v. Whitley* accomplished in practice: the most common constitutional violations in the imposition of the death penalty, such as ineffective assistance of counsel and prosecutorial misconduct, must be raised in a first petition for writ of habeas corpus, or not at all. *Sawyer v. Whitley* and § 2244 do not address initial habeas corpus petitions; the defense of procedural default in an initial petition continues to be governed by *Wainright v. Sykes*.⁴³⁶

⁴³⁰ 28 U.S.C. § 2244 (emphasis added).

⁴³¹ 536 U.S. 304 (2002).

⁴³² 543 U.S. 551 (2005).

⁴³³ 560 U.S. 48 (2010).

⁴³⁴ 567 U.S. 460 (2012); See *Montgomery v. Louisiana*, 577 U.S. 190 (2015) (applying *Miller* retroactively).

⁴³⁵ 78 Tex. L. Rev. 1839, 1847 (2000).

⁴³⁶ See *Williams v. Taylor*, 529 U.S. 420 (2000).

2. Miscarriage of justice and actual innocence

Soon after *Sawyer*, the Eighth Circuit applied it to a noncapital habeas case challenging an Arkansas rape conviction, in *McCoy v. Lockhart*.⁴³⁷ Robert McCoy alleged that he was denied his right to the effective assistance of counsel because his lawyer did not present evidence that bolstered his trial testimony that he knew his accuser and that she consented to sexual relations. Ignoring *Sawyer*'s long explanation for why courts should use a higher standard for determining actual innocence of the death penalty, the Court of Appeals rewrote *Sawyer*'s standard so a habeas petitioner who cannot meet the cause-and-prejudice standard to reach a defaulted claim "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner [guilty] under the applicable state law."⁴³⁸ *McCoy* was remanded to determine whether his evidence met this new standard.

The "clear-and-convincing evidence" standard of *McCoy* was applied a year later in *Schlup v. Delo*, a prison homicide case in which the habeas petitioner presented multiple eyewitnesses naming someone else as the real killer, and more evidence and testimony, including a videotaped alibi, casting substantial doubt on the evidence implicating Schlup. The district court rejected Schlup's petition, reasoning that if two eyewitnesses had not recanted, Schlup could not meet the *McCoy* standard. A divided Eighth Circuit Court of Appeals affirmed, following *McCoy*. Judge Heaney dissented, stating, "this court tells Lloyd Schlup in regard to his conviction: You may indeed be innocent, but you are not innocent enough early enough."⁴³⁹ The night before Schlup's execution, Missouri Governor Mel Carnahan stayed his execution, and the Supreme Court granted certiorari to determine the standard for applying the miscarriage of justice exception to procedural default.

SCHLUP V. DELO

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Lloyd E. Schlup, Jr., a Missouri prisoner currently under a sentence of death, filed a second federal habeas corpus petition alleging that constitutional error deprived the jury of critical evidence that would have established his innocence. The District Court, without conducting an evidentiary hearing, declined to reach the merits of the petition, holding that petitioner could not satisfy the threshold showing of "actual innocence" required by *Sawyer v. Whitley*, 505 U.S. 333 (1992). Under *Sawyer*, the petitioner must show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" guilty. *Id.*, at 336. The Court of Appeals affirmed. We granted certiorari to consider whether the *Sawyer* standard

⁴³⁷ 969 F.2d 649 (8th Cir. 1992).

⁴³⁸ *Id.* at 651, citing *Sawyer* at 336.

⁴³⁹ *Schlup v. Delo*, 11 F.3d 738, 754 (Heaney, J., dissenting).

provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent.

I

On February 3, 1984, on Walk 1 of the high security area of the Missouri State Penitentiary, a black inmate named Arthur Dade was stabbed to death. Three white inmates from Walk 2, including petitioner, were charged in connection with Dade's murder.

At petitioner's trial in December 1985, the State's evidence consisted principally of the testimony of two corrections officers who had witnessed the killing. On the day of the murder, Sergeant Roger Flowers was on duty on Walk 1 and Walk 2, the two walks on the lower floor of the prison's high security area. Flowers testified that he first released the inmates on Walk 2 for their noon meal and relocked their cells. After unlocking the cells to release the inmates on Walk 1, Flowers noticed an inmate named Rodnie Stewart moving against the flow of traffic carrying a container of steaming liquid. Flowers watched as Stewart threw the liquid in Dade's face. According to Flowers, Schlup then jumped on Dade's back, and Robert O'Neal joined in the attack. Flowers shouted for help, entered the walk, and grabbed Stewart as the two other assailants fled.

Officer John Maylee witnessed the attack from Walk 7, which is three levels and some 40-50 feet above Walks 1 and 2. Maylee first noticed Schlup, Stewart, and O'Neal as they were running from Walk 2 to Walk 1 against the flow of traffic. According to Maylee's testimony, Stewart threw a container of liquid at Dade's face, and then Schlup jumped on Dade's back. O'Neal then stabbed Dade several times in the chest, ran down the walk, and threw the weapon out a window. Maylee did not see what happened to Schlup or Stewart after the stabbing.

The State produced no physical evidence connecting Schlup to the killing, and no witness other than Flowers and Maylee testified to Schlup's involvement in the murder.⁴⁴⁰

Schlup's defense was that the State had the wrong man.⁴⁴¹ He relied heavily on a videotape from a camera in the prisoners' dining room. The tape showed that Schlup was the first inmate to walk into the dining room for the noon meal, and that he went through the line and got his food. Approximately 65 seconds after Schlup's entrance, several guards ran out of the dining room in apparent response to a distress call. Twenty-six seconds later, O'Neal ran into the dining room, dripping blood. Shortly thereafter, Schlup and O'Neal were taken into custody.

⁴⁴⁰ [Court's footnote 2] In contrast, the evidence of the involvement of Stewart and O'Neal in Dade's murder was substantial. Stewart, for example, was apprehended by Flowers during the struggle itself. And when O'Neal was taken into custody, his clothes were covered with blood and he was bleeding from lacerations on his right hand.

⁴⁴¹ [Court's footnote 3] Schlup did not testify at the guilt phase of the trial. At the sentencing hearing, Schlup did testify and maintained his innocence of the offense. He continued to maintain his innocence even after the jury had sentenced him to death.

O'Neal was followed into the dining room by inmate Randy Jordan, who is identified in some affidavits attesting to petitioner's innocence as the third participant in the crime. However, Jordan's name was not mentioned at Schlup's trial.

Schlup contended that the videotape, when considered in conjunction with testimony that he had walked at a normal pace from his cell to the dining room,⁴⁴² demonstrated that he could not have participated in the assault. Because the videotape showed conclusively that Schlup was in the dining room 65 seconds before the guards responded to the distress call, a critical element of Schlup's defense was determining when the distress call went out. Had the distress call sounded shortly after the murder, Schlup would not have had time to get from the prison floor to the dining room, and thus he could not have participated in the murder. Conversely, had there been a delay of several minutes between the murder and the distress call, Schlup might have had sufficient time to participate in the murder and still get to the dining room over a minute before the distress call went out.⁴⁴³

The prosecutor adduced evidence tending to establish that such a delay had in fact occurred. First, Flowers testified that none of the officers on the prison floor had radios, thus implying that neither he nor any of the other officers on the floor was able to radio for help when the stabbing occurred. Second, Flowers testified that after he shouted for help, it took him "a couple [of] minutes" to subdue Stewart. Flowers then brought Stewart downstairs, encountered Captain James Eberle, and told Eberle that there had been a "disturbance." Eberle testified that he went upstairs to the prison floor, and then radioed for assistance. Eberle estimated that the elapsed time from when he first saw Flowers until he radioed for help was "approximately a minute." The prosecution also offered testimony from a prison investigator who testified that he was able to run from the scene of the crime to the dining room in 33 seconds and to walk the distance at a normal pace in a minute and 37 seconds.

Neither the State nor Schlup was able to present evidence establishing the exact time of Schlup's release from his cell on Walk 2, the exact time of the assault on Walk 1, or the exact time

⁴⁴² [Court's footnote 5] Schlup's cell was at the end of Walk 2, closest to the dining room.

⁴⁴³ [Court's footnote 6] A necessary element of Schlup's defense was that Flowers and Maylee were mistaken in their identification of Schlup as one of the participants in the murder. Schlup suggested that Flowers had taken a visitor to Schlup's cell just 30 minutes before the murder. Schlup argued that Flowers had therefore had Schlup "on the brain," Trial Tr. 493-494, thus explaining why, in the confusion surrounding the murder, Flowers might have mistakenly believed that he had seen Schlup.

Schlup argued that Maylee's identification was suspect because Maylee was three floors away from the murder and did not have an unobstructed view of the murder scene. Schlup further suggested that Maylee's identification of Schlup had been influenced by a post incident conversation between Maylee and another officer who had talked to Flowers.

Schlup also argued that there were inconsistencies between the description of the murder provided by Flowers and that provided by Maylee. For example, Maylee testified that he saw Schlup, Stewart, and O'Neal running together against the flow of traffic, and that the three men had stopped when they encountered Dade. See *id.*, at 332. Flowers noticed only Stewart running against the flow of traffic, and he testified that O'Neal and Schlup were at the other end of the walk on the far side of Dade. See *id.*, at 249.

of the radio distress call. Further, there was no evidence suggesting that Schlup had hurried to the dining room.⁴⁴⁴

After deliberating overnight, the jury returned a verdict of guilty. Following the penalty phase, at which the victim of one of Schlup's prior offenses testified extensively about the sordid details of that offense, the jury sentenced Schlup to death. The Missouri Supreme Court affirmed Schlup's conviction and death sentence, *State v. Schlup*, 724 S.W.2d 236 (Mo. 1987), and this Court denied certiorari, *Schlup v. Missouri*, 482 U.S. 920, 96 L. Ed. 2d 685, 107 S. Ct. 3198 (1987).⁴⁴⁵

II

On January 5, 1989, after exhausting his state collateral remedies, Schlup filed a *pro se* petition for a federal writ of habeas corpus, asserting the claim, among others, that his trial counsel was ineffective for failing to interview and to call witnesses who could establish Schlup's innocence.⁴⁴⁶ The District Court concluded that Schlup's ineffectiveness claim was procedurally barred, and it denied relief on that claim without conducting an evidentiary hearing.⁴⁴⁷ The Court of Appeals affirmed, though it did not rely on the alleged procedural bar. *Schlup v. Armontrout*, 941 F.2d 631 (CA8 1991). Instead, based on its own examination of the record, the Court found that trial counsel's performance had not been constitutionally ineffective, both because counsel had reviewed statements that Schlup's potential witnesses had given to prison investigators, and because the testimony of those witnesses "would be repetitive of the testimony to be presented at trial." *Id.*, at 639.⁴⁴⁸ But cf. 11 F. 3d 738, 746, n. 3 (CA8 1993) (Heaney, J., dissenting) (challenging

⁴⁴⁴ [Court's footnote 10] In fact, the evidence presented was to the contrary. Two inmates, Bernard Bailey and Arthur St. Peter, testified that they were behind Schlup in line on the way to the dining room and that they had all walked at a normal pace. Lieutenant Robert Faherty, the corrections officer on duty in the corridor leading from the prison floor to the dining room, testified that Schlup was the first inmate into the corridor on the day of the murder. Faherty also testified that he saw Schlup pause and yell something out one of the windows in the corridor, and that he told Schlup to move on. Faherty testified that nothing else unusual had occurred while Schlup was in the corridor.

On the other hand, both Maylee's testimony and the videotape establish that O'Neal ran from Walk 1 to the dining room.

⁴⁴⁵ [Court's footnote 12] The other alleged participants in the crime were convicted in earlier, separate trials. O'Neal, who did the stabbing, was sentenced to death, see *State v. O'Neal*, 718 S.W.2d 498 (Mo. 1986); Stewart, who was apprehended by Flowers at the scene, was sentenced to 50 years' imprisonment without eligibility for probation or parole, see *State v. Stewart*, 714 S.W.2d 724 (Mo. App. 1986).

⁴⁴⁶ [Court's footnote 14] Schlup identified three nonparticipant witnesses who he claimed had witnessed the murder: Van Robinson, Lamont Griffin Bey, and Ricky McCoy. Schlup also faulted trial counsel for failing to interview Randy Jordan, whom Schlup identified as the third participant in the murder.

⁴⁴⁷ [Court's footnote 15] Schlup had presented the ineffectiveness claim in his state postconviction motion, but had failed to raise it on appeal. See *Schlup v. Armontrout*, No. 89-0020C(3), 1989 U.S. Dist. LEXIS 18285, *11-*13 (ED Mo., May 31, 1989). Schlup's first federal habeas petition also raised several other claims, all of which were denied either as procedurally barred or on the merits.

⁴⁴⁸ [Court's footnote 16] The Court of Appeals also addressed Schlup's other claims. Over Judge Heaney's dissent, the court rejected Schlup's claim that his counsel had been ineffective for failing to adduce available mitigating evidence at the penalty hearing. *Schlup v. Armontrout*, 941 F.2d at 639. The court also rejected Schlup's separate claim challenging the denial of his request for an evidentiary hearing in the District Court. Schlup had requested

the conclusion that such testimony would have been “repetitive”). The Court of Appeals denied a petition for rehearing and suggestion for rehearing en banc, *Schlup v. Armontrout*, 945 F.2d 1062 (1991), and we denied a petition for certiorari, 503 U.S. 909 (1992).

On March 11, 1992, represented by new counsel, Schlup filed a second federal habeas corpus petition. That petition raised a number of claims, including that (1) Schlup was actually innocent of Dade's murder, and that his execution would therefore violate the *Eighth* and *Fourteenth Amendments*, cf. *Herrera v. Collins*, 506 U.S. 390 (1993); (2) trial counsel was ineffective for failing to interview alibi witnesses; and (3) the State had failed to disclose critical exculpatory evidence. The petition was supported by numerous affidavits from inmates attesting to Schlup's innocence.

The State filed a response arguing that various procedural bars precluded the District Court from reaching the merits of Schlup's claims and that the claims were in any event meritless. Attached to the State's response were transcripts of inmate interviews conducted by prison investigators just five days after the murder. One of the transcripts contained an interview with John Green, an inmate who at the time was the clerk for the housing unit. In his interview, Green stated that he had been in his office at the end of the walks when the murder occurred. Green stated that Flowers had told him to call for help, and that Green had notified base of the disturbance shortly after it began.⁴⁴⁹

If the total time required for Green to respond to Flowers' instruction and for the base to send out a distress call in response to Green's call amounted to a mere 15-17 seconds, O'Neal running at top speed would have had 8-10 seconds to wash his hands and still would have been able to arrive in the dining room some 26 seconds after the distress call.

Schlup immediately filed a traverse arguing that Green's affidavit provided conclusive proof of Schlup's innocence. Schlup contended that Green's statement demonstrated that a call for help had gone out shortly after the incident. Because the videotape showed that Schlup was in the dining room some 65 seconds before the guards received the distress call, Schlup argued that he could not have been involved in Dade's murder. Schlup emphasized that Green's statement was not likely to have been fabricated, because at the time of Green's interview, neither he nor anyone else would have realized the significance of Green's call to base. Schlup tried to buttress his claim of innocence with affidavits from inmates who stated that they had witnessed the event and that

such a hearing to develop evidence so that he could in turn challenge the failure of the state court to grant his request for a continuance of his state postconviction proceedings. Schlup had requested that continuance to obtain additional evidence to support his claim of innocence. The Court of Appeals held that Schlup's challenge to the state court's failure to grant a continuance was not cognizable in a federal habeas corpus action. *Id.*, at 642.

⁴⁴⁹ [Court's footnote 17] “BROOKS: John, whenever you saw Dade fall what did you do then?”

“GREEN: I stepped out of the office and I heard Sgt. Flowers calling for officers cause they had had a fight. Couldn't get nobody so he told me to call base to notify them of the fight and that's what I did.

“DEARIXON: That's all I have, John. Thank you very much.” Response to Order To Show Cause Why a Writ of Habeas Corpus Should Not Be Granted, Exhibit T (Transcripts of Inmate Interviews), p. 31.

Schlup had not been present.⁴⁵⁰ Two of those affidavits suggested that Randy Jordan -- who occupied the cell between O'Neal and Stewart in Walk 2, and who, as noted above, see n. 4, *supra*, is shown on the videotape arriving at lunch with O'Neal -- was the third assailant.

On August 23, 1993, without holding a hearing, the District Court dismissed Schlup's second habeas petition and vacated the stay of execution that was then in effect. The District Court concluded that Schlup's various filings did not provide adequate cause for failing to raise his new claims more promptly. Moreover, the court concluded that Schlup had failed to meet the *Sawyer v. Whitley*, 505 U.S. 333 (1992), standard for showing that a refusal to entertain those claims would result in a fundamental miscarriage of justice. In its discussion of the evidence, the court made no separate comment on the significance of Green's statement.⁴⁵¹

On September 7, 1993, petitioner filed a motion to set aside the order of dismissal, again calling the court's attention to Green's statement. Two days later, Schlup filed a supplemental motion stating that his counsel had located John Green⁴⁵² and had obtained an affidavit from him. That affidavit confirmed Green's post incident statement that he had called base shortly after the assault. Green's affidavit also identified Jordan rather than Schlup as the third assailant.⁴⁵³ The District Court denied the motion and the supplemental motion without opinion.

⁴⁵⁰ [Court's footnote 18] In the District Court, Schlup attempted to supplement the record with several detailed affidavits from inmates attesting to his innocence. For example, Lamont Griffin Bey, a black inmate, submitted an affidavit in which he stated, "The first thing I saw of the fight was Rodney [sic] Stewart throw liquid in Arthur Dade's face, and O'Neal stab him. . . . I knew Lloyd Schlup at that time, but we were not friends. Lloyd Schlup was not present at the scene of the fight." Affidavit of Lamont Griffin Bey, pp. 2-3 (Apr. 7, 1993). Griffin Bey also stated, "When this happened, there was a lot of racial tension in the prison. . . . I would not stick my neck out to help a white person under these circumstances normally, but I am willing to testify because I know Lloyd Schlup is innocent." *Id.*, at 4.

Similarly, inmate Donnell White swore an affidavit in which he stated: "Three white guys were coming the opposite way. One of them had a tumbler of something that he threw in [Dade's] face. One or two of the other ones started sticking [Dade] with an ice-pick-type knife." Affidavit of Donnell White, at 1 (Apr. 21, 1993). White further stated, "I have seen Lloyd Schlup, and I know who he is. He is definitely not one of the guys I saw jump Arthur Dade I know that one of the three men involved has never been prosecuted, and I know that Lloyd Schlup is innocent. I barely know Lloyd Schlup, and I have no reason to lie for him. I told the investigators that I didn't see anything because I didn't want to get involved." *Id.*, at 3.

Though the District Court ultimately denied Schlup's motion to supplement the record, the inmate affidavits are part of the record on appeal.

⁴⁵¹ [Court's footnote 19] The District Court focused primarily on the "suspect" nature of affidavits that are produced after a long delay, cf. *Herrera v. Collins*, 506 U.S. 390, 423-424 (1993) (O'Connor, J., concurring), and that come from inmates. The court concluded that the affidavits presented by Schlup, when considered against the positive identifications made by Flowers and Maylee, failed to constitute a sufficiently persuasive showing of actual innocence. App. 79.

⁴⁵² [Court's footnote 20] Green had been released from prison on January 29, 1986. Green Affidavit, at 4 (Sept. 7, 1993).

⁴⁵³ [Court's footnote 21] Green's affidavit stated:

Petitioner then sought from the Court of Appeals a stay of execution pending the resolution of his appeal. Relying on Justice Powell's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), Schlup argued that the District Court should have entertained his second habeas corpus petition, because he had supplemented his constitutional claim "with a colorable claim of factual innocence." *Id.*, at 454.

On October 15, 1993, the Court of Appeals denied the stay application. In an opinion that was subsequently vacated, the majority held that petitioner's claim of innocence was governed by the standard announced in *Sawyer v. Whitley*, 505 U.S. 333 (1992), and it concluded that under that standard, the evidence of Schlup's guilt that had been adduced at trial foreclosed consideration of petitioner's current constitutional claims.

Judge Heaney dissented. Relying on Green's affidavit, the videotape, and the affidavits of four other eyewitnesses, Judge Heaney concluded that the petitioner had met both the *Kuhlmann* standard and a proper reading of the *Sawyer* standard. Cf. *infra*, at 331. He believed that the District Court should have conducted an evidentiary hearing in which the affiants would have been subjected to examination by the State so "their credibility could be accurately determined."

In the meantime, petitioner's counsel obtained an affidavit from Robert Faherty, the former lieutenant at the prison whom Schlup had passed on the way to lunch on the day of the murder and who had reprimanded Schlup for shouting out the window. See n. 10, *supra*. Faherty's affidavit stated that Schlup had been in Faherty's presence for at least two and a half minutes; that Schlup

"I looked down one walk, and I saw Randy Jordan holding Arthur Dade. Jordan was standing behind Dade, and had Dade's arms pinned to his sides from behind. I saw Robert O'Neal stab Dade several times in the chest while Jordan was holding him.

"Dade broke loose and ran straight toward me. I saw him collide with Rodnie Stewart and fall to the ground near the paint storage area. Sergeant Flowers hollered for help. I think there was so much noise that he didn't think the other guards in the Housing Unit heard him, so he told me to call base. He was on his way to break up the fight when he told me to call base. I immediately went into the office, picked up the phone, and called base.

"A sergeant at the base picked up the phone. I told him there was a fight in Housing Unit 5A. He said something like, 'OK,' and I hung up the phone." *Id.*, at 2-3.

Green stated that his call to base came "within seconds of Dade hitting the ground. It could not have been more than a half minute or a minute after he was stabbed by Jordan and O'Neal. It happened very fast." *Id.*, at 4.

Green also explained why he had earlier denied witnessing the murder: "I told [investigators] I didn't [see the murder] because I was concerned about my safety. I know that Jordan and O'Neal were in the Aryan Brotherhood, and if I said I saw them do it, they could easily have me killed." *Id.*, at 3-4

Green continued: "If I had been contacted before Schlup's trial, I would have told his attorney that he was not there when Dade was stabbed, and I would have testified that I called base within seconds after Dade hit the ground. I might have been reluctant to snitch on Jordan and O'Neal. I'm not afraid now because I haven't been in prison for more than 7 1/2 years, and I have been working steadily ever since. I have no intention of going back to prison." *Id.*, at 6.

was walking at a leisurely pace; and that Schlup “was not perspiring or breathing hard, and he was not nervous.” Affidavit of Robert Faherty PP4, 6 (Oct. 26, 1993).⁴⁵⁴

On November 15, 1993, the Court of Appeals vacated its earlier opinion and substituted a more comprehensive analysis of the law to support its decision to deny Schlup's request for a stay. 11 F.3d 738. The majority adhered to its earlier conclusion that *Sawyer* stated the appropriate standard for evaluating Schlup's claim of actual innocence. 11 F.3d at 740. The opinion also contained an extended discussion of Schlup's new evidence. The court noted in particular that Green's new affidavit was inconsistent in part with both his prison interview and his testimony at the Stewart trial. *Id.*, at 742. The court viewed Faherty's affidavit as simply “an effort to embellish and expand upon his testimony” and concluded “that a habeas court should not permit retrial on such a basis. *Id.*, at 743.

Judge Heaney again dissented, concluding that Schlup had “presented truly persuasive evidence that he is actually innocent” and that the District Court should therefore have addressed the merits of Schlup's constitutional claims. *Id.*, at 744. Judge Heaney also argued that Schlup's ineffectiveness claim was substantial. He noted that Schlup's trial counsel failed to conduct individual interviews with Griffin Bey, McCoy, or any of the other inmates who told investigators that they had seen the killing. Moreover, counsel failed to interview Green about his statement that he had called base. In fact, counsel apparently failed to conduct individual interviews with any of the potential witnesses to the crime.

Judge Heaney adhered to his conclusion that Schlup's counsel was ineffective, even though counsel allegedly had reviewed 100 interviews conducted by prison investigators.⁴⁵⁵ Judge Heaney argued that counsel's review of the interview transcripts -- rather than demonstrating counsel's effectiveness -- made counsel's failure to conduct his own interviews with Green and the few inmates who admitted seeing the attack even more troubling. See *id.*, at 747, n. 5. Judge Heaney concluded that Schlup's case should be remanded to the District Court to conduct an evidentiary hearing and, if appropriate, to address the merits of Schlup's constitutional claims.

On November 17, 1993, the Court of Appeals denied a suggestion for rehearing en banc. Dissenting from that denial, three judges joined an opinion describing the question whether the majority should have applied the standard announced in *Sawyer v. Whitley, supra*, rather than the

⁴⁵⁴ [Court's footnote 25] Faherty had testified at Schlup's trial, but he had not been asked about the significant details of his encounter with Schlup that are recited in his affidavit. Faherty Affidavit P9 (Oct. 26, 1993). Faherty left the Department of Corrections in 1989. He stated in his affidavit that he had been prompted to come forward after hearing about Schlup's case through an article in the local newspaper. *Id.*, P11.

⁴⁵⁵ [Court's footnote 26] The transcripts of the individual interviews conducted by the prison investigators were relatively brief: The entire written transcript of the investigators' interview with Green, for example, takes up less than one page. The vast majority of the interviews consisted of simple statements that the interviewee had not seen Dade's killing.

Kuhlmann standard as "a question of great importance in habeas corpus jurisprudence." *11 F.3d at 755*. We granted certiorari to consider that question. 511 U.S. 1003 (1994).⁴⁵⁶

III

As a preliminary matter, it is important to explain the difference between Schlup's claim of actual innocence and the claim of actual innocence asserted in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely, that the execution of an innocent person would violate the *Eighth Amendment*. Under petitioner's theory in *Herrera*, even if the proceedings that had resulted in his conviction and sentence were entirely fair and error free, his innocence would render his execution a "constitutionally intolerable event." *Id.*, at 419 (O'Connor, J., concurring).

Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington*, 466 U.S. 668 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland*, 373 U.S. 83 (1963), denied him the full panoply of protections afforded to criminal defendants by the Constitution. Schlup, however, faces procedural obstacles that he must overcome before a federal court may address the merits of those constitutional claims. Because Schlup has been unable to establish "cause and prejudice" sufficient to excuse his failure to present his evidence in support of his first federal petition, see *McCleskey v. Zant*, 499 U.S. 467, 493-494 (1991), Schlup may obtain review of his constitutional claims only if he falls within the "narrow class of cases . . . implicating a fundamental miscarriage of justice," *id.*, at 494. Schlup's claim of innocence is offered only to bring him within this "narrow class of cases."

Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404; see also *11 F.3d at 740*.³¹

More importantly, a court's assumptions about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup's case than in *Herrera*'s. In *Herrera*, petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free. In such a case, when a petitioner has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants," 506 U.S. at 419 (O'Connor, J., concurring), it is appropriate to apply an "extraordinarily high" standard of review, *id.*, at 426 (O'Connor, J., concurring).

⁴⁵⁶ [Court's footnote 17] Though the Court of Appeals denied Schlup's motion for a stay of execution, the Governor of Missouri granted a stay one day before Schlup's execution date. The Governor then ordered a Board of Inquiry to conduct clemency proceedings. Those proceedings are apparently continuing.

Schlup, in contrast, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial. Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Consequently, Schlup's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial.

Our rather full statement of the facts illustrates the foregoing distinction between a substantive *Herrera* claim and Schlup's procedural claim. Three items of evidence are particularly relevant: the affidavit of black inmates attesting to the innocence of a white defendant in a racially motivated killing; the affidavit of Green describing his prompt call for assistance; and the affidavit of Lieutenant Faherty describing Schlup's unhurried walk to the dining room. If there were no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.

IV

* * * *

The general rule announced in *Kuhlmann*, *Carrier*, and *Smith*, and confirmed in this Court's more recent decisions, rests in part on the fact that habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare. Judge Friendly's observation a quarter of a century ago that "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime" remains largely true today.⁴⁵⁷ Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and

⁴⁵⁷ [Court's footnote 37] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970).

conservation of judicial resources, and the overriding individual interest in doing justice in the "extraordinary case," *Carrier*, 477 U.S. at 496.

* * * *

V

In evaluating Schlup's claim of innocence, the Court of Appeals applied Eighth Circuit precedent holding that *Sawyer*, rather than *Carrier*, supplied the proper legal standard. The court then purported to apply the *Sawyer* standard. Schlup argues that *Sawyer* has no application to a petitioner who claims that he is actually innocent of the crime, and that the Court of Appeals misapplied *Sawyer* in any event. Respondent contends that the Court of Appeals was correct in both its selection and its application of the *Sawyer* standard. Though the Court of Appeals seems to have misapplied *Sawyer*, we do not rest our decision on that ground because we conclude that in a case such as this, the *Sawyer* standard does not apply.

As we have stated, the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case. We conclude that *Carrier*, rather than *Sawyer*, properly strikes that balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime.

Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. See *supra*, at 321-322. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected."⁴⁵⁸ The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.

Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372

⁴⁵⁸ [Court's footnote 40] Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 377 (1993); see also *id.*, at 377, n. 370 (collecting cases).

(1970) (Harlan, J., concurring). See also T. Starkie, *Evidence* 756 (1824) (“The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned”). See generally Newman, *Beyond "Reasonable Doubt,"* 68 N. Y. U. L. Rev. 979, 980-981 (1993).

The overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe. As this Court has noted, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring); see also *Addington v. Texas*, 441 U.S. 418, 423 (1979). The standard of proof thus reflects "the relative importance attached to the ultimate decision." *Ibid.* Though the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence. The paramount importance of avoiding the injustice of executing one who is actually innocent thus requires application of the *Carrier* standard.⁴⁵⁹

We recognize, as the State has reminded us, that in *Sawyer* the Court applied its new standard not only to the penalty phase of the case but also to Sawyer's responsibility for arson, one of the elements of the offense of first-degree murder. This fact does not require application of the *Sawyer* standard to a case such as Schlup's. Though formulated as an element of the offense of first-degree murder, the arson functioned essentially as a sentence enhancer. That claim, therefore, is readily distinguishable from a claim, like the one raised by Schlup, that the petitioner is actually innocent. Fealty to the doctrine of *stare decisis* does not, therefore, preclude application of the *Carrier* standard to the facts of this case.⁴⁶⁰

Accordingly, we hold that the *Carrier* "probably resulted" standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner who

⁴⁵⁹ [Court's footnote 42] By our references to *Winship*, of course, we do not suggest that Schlup comes before a habeas court in the same situation as one who has merely been accused of a crime. Having been convicted by a jury of a capital offense, Schlup no longer has the benefit of the presumption of innocence. Cf. *Herrera v. Collins*, 506 U.S. at 399 (O'Connor, J., concurring). To the contrary, Schlup comes before the habeas court with a strong -- and in the vast majority of the cases conclusive -- presumption of guilt. Our reference to *Winship* is intended merely to demonstrate that it is quite consistent with our jurisprudence to give content through a burden of proof to the understanding that fundamental injustice would result from the erroneous conviction and execution of an innocent person.

⁴⁶⁰ [Court's footnote 44] Nor do we believe that confining Sawyer's more rigorous standard to claims involving eligibility for the sentence of death is anomalous. Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing. See, e. g., *Williams v. New York*, 337 U.S. 241 (1949).

has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

VI

The *Carrier* standard requires the habeas petitioner to show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” 477 U.S. at 496. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice. At the same time, the showing of “more likely than not” imposes a lower burden of proof than the “clear and convincing” standard required under *Sawyer*. The *Carrier* standard thus ensures that petitioner's case is truly “extraordinary,” *McCleskey*, 499 U.S. at 494, while still providing petitioner a meaningful avenue by which to avoid a manifest injustice.

Carrier requires a petitioner to show that he is “actually innocent.” As used in *Carrier*, actual innocence is closely related to the definition set forth by this Court in *Sawyer*. To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

Several observations about this standard are in order. The *Carrier* standard is intended to focus the inquiry on actual innocence. 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, with respect to this aspect of the *Carrier* standard, 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.”

The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of “innocence.” The *Carrier* standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970). Indeed, even in *Sawyer*, with its emphasis on eligibility for the death penalty, the Court did not stray from the understanding that the eligibility determination must be made with reference to reasonable doubt. Thus, whether a court is assessing eligibility for the death penalty under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under *Carrier*, the analysis must incorporate the

understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence.⁴⁶¹

As we have explained, *supra*, at 313-317, Schlup's claim of innocence is fundamentally different from the claim advanced in *Herrera*. The standard that we apply today, therefore, will not foreclose the application of factual innocence to the analysis of such claims.

* * * *

We note finally that the *Carrier* standard requires a petitioner to show that it is more likely than not that "no reasonable juror" would have convicted him. The word "reasonable" in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.

Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), that governs review of claims of insufficient evidence. The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. First, under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments. Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*, the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under *Carrier*, the use of the word "would" focuses the inquiry on the likely behavior of the trier of fact.

Indeed, our adoption of the phrase "more likely than not" reflects this distinction. Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry, it makes sense to have a probabilistic standard such as "more likely than not."⁴⁶² Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under *Carrier*.

⁴⁶¹ [Court's footnote 47] Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life. Indeed, Schlup's situation provides a good illustration. At the time of the crime at issue in this case, Schlup was incarcerated for an earlier offense, the sordid details of which he acknowledged in his testimony at the punishment phase of his trial. Such earlier criminal activity has no bearing on whether Schlup is actually innocent of Dade's murder.

⁴⁶² [Court's footnote 49] The "clear and convincing" standard adopted in *Sawyer* reflects this same understanding of the relevant inquiry.

We believe that the Eighth Circuit's erroneous application of the *Sawyer* standard below illustrates this difference. In determining that Schlup had failed to satisfy the *Sawyer* standard, the majority noted that “two prison officials, who were eyewitnesses to the crime, positively identified Mr. Schlup as one of the three perpetrators of the murder. This evidence was clearly admissible and stands unrefuted except to the extent that Mr. Schlup now questions its credibility.” 11 F.3d at 741.

The majority then continued:

“Even if we disregard the source of the new evidence, the eleventh-hour nature of the information, and a presentation coming almost six years after the trial; it is simply not possible to say that the appellant has shown by clear and convincing evidence that but for a constitutional error no reasonable jury would have found him guilty.” *Ibid.*

* * * *

In this case, the application of the *Carrier* standard arises in the context of a request for an evidentiary hearing. In applying the *Carrier* standard to such a request, the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. Obviously, the court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment. Cf. *Agosto v. INS*, 436 U.S. 748, 756 (1978) (“[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”). Instead, the Court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.

Because both the Court of Appeals and the District Court evaluated the record under an improper standard, further proceedings are necessary. The fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable, convinces us that the most expeditious procedure is to order that the decision of the Court of Appeals be vacated and that the case be remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O’CONNOR, concurring.

I write to explain, in light of the dissenting opinions, what I understand the Court to decide and what it does not.

The Court holds that, in order to have an abusive or successive habeas claim heard on the merits, a petitioner who cannot demonstrate cause and prejudice “must show that it is more likely

than not that no reasonable juror would have convicted him” in light of newly discovered evidence of innocence. *Ante*, at 327. This standard is higher than that required for prejudice, which requires only “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt,” *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Instead, a petitioner does not pass through the gateway erected by *Murray v. Carrier*, 477 U.S. 478 (1986), if the district court believes it more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt. And the Court's standard, which focuses the inquiry on the likely behavior of jurors, is substantively different from the rationality standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jackson*, which emphasizes the authority of the factfinder to make conclusions from the evidence, establishes a standard of review for the sufficiency of record evidence -- a standard that would be ill suited as a burden of proof, see *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 624-626 (1993). The Court today does not sow confusion in the law. Rather, it properly balances the dictates of justice with the need to ensure that the actual innocence exception remains only a “‘safety valve’ for the ‘extraordinary case,’” *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring).

* * * *

With these observations, I join the Court's opinion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court decides that the threshold standard for a showing of "actual innocence" in a successive or abusive habeas petition is that set forth in *Murray v. Carrier*, 477 U.S. 478 (1986), rather than that set forth in *Sawyer v. Whitley*, 505 U.S. 333 (1992). For reasons which I later set out, I believe the *Sawyer* standard should be applied to claims of guilt or innocence as well as to challenges to a petitioner's sentence. But, more importantly, I believe the Court's exegesis of the *Carrier* standard both waters down the standard suggested in that case, and will inevitably create confusion in the lower courts.

* * * *

But if we are to adopt the *Carrier* standard, it should not be the confusing exegesis of that standard contained in the Court's opinion. It should be based on a modified version of *Jackson v. Virginia*, with a clearly defined area in which the district court may exercise its discretion to hold an evidentiary hearing.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

* * * *

Rather than advancing a different reading of the statute, the Court gives in essence only one response to all of this: that the law of federal habeas corpus is a product of "the interplay between statutory language and judicially managed equitable considerations." *Ante*, at 319, n. 35.

This sort of vague talk might mean one of two things, the first inadequate, the second unconstitutional. It might mean that the habeas corpus statute is riddled with gaps and ambiguities that we have traditionally filled or clarified by a process of statutory interpretation that shades easily into a sort of federal common law. See, e. g., *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). That is true enough. There assuredly are, however, many legal questions on which the habeas corpus statute is neither silent nor ambiguous; and unless the question in this case is one on which the statute *is* silent or ambiguous (in which event the Court should explain why that is so), the response is irrelevant. On the other hand, the Court's response might mean something altogether different and more alarming: that even where the habeas statute does speak clearly to the question at hand, it is but one "consideration," *ante*, at 319, n. 35, relevant to resolution of that question. Given that federal courts have no inherent power to issue the writ, *Ex parte Bollman*, 8 U.S. 75, 4 Cranch 75, 94-95, 2 L. Ed. 554 (1807), that response would be unconstitutional. See *U.S. Const., Art. VI, cl. 2*.

There is thus no route of escape from the Court's duty to confront the statute today. I would say, as the statute does, that habeas courts need not entertain successive or abusive petitions. The courts whose decisions we review declined to entertain the petition, and I find no abuse of discretion in the record. (I agree with the Chief Justice that they were correct to use *Sawyer v. Whitley*, *supra*, as the legal standard for determining claims of actual innocence. See *ante*, at 334.) Therefore, "we should sustain [their] action without saying more." *Salinger*, 265 U.S. at 232.

For these reasons, I respectfully dissent.

Questions and Comments:

1. **Executing the innocent—*Schlup* and *Herrera*:** *Schlup* provides a definitive answering to Judge Friendly's rhetorical question: "Is innocence relevant?" The short answer is "yes," but in practice, the answer is much more complex. When *Schlup*'s new counsel presented new evidence of innocence as a gateway to his procedurally defaulted claims under *Murray v. Carrier*, Texas death row prisoner Leonel Herrera tried to present evidence he was innocent as a substantive ground for habeas corpus relief. Both *Schlup* and *Herrera* were facing execution and seeking stays of execution from lower federal courts in February 1992. Both *Schlup* and *Herrera* alleged that their trial attorneys were ineffective and that the state had withheld exculpatory evidence in violation of *Brady v. Maryland*, but the federal district court denied *Herrera*'s claim on the merits, leaving no choice but to argue that his innocence, by itself, would make his execution cruel and unusual punishment prohibited by the Eighth Amendment. *Schlup* also presented that argument, but the Supreme Court denied *Schlup*'s 1992 petition for writ of certiorari and granted *Herrera*'s, which argued "that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he

was convicted.” *Herrera v. Collins*.⁴⁶³ Only three justices would have ruled outright that innocence evidence by itself cannot state a constitutional claim for relief from a conviction. Chief Justice Rehnquist, joined by Justices Thomas and Scalia, said, “Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”⁴⁶⁴ Six justices assumed the possibility of this claim. Justice O’Connor agreed with Herrera that “the execution of a legally and factually innocent person would be a constitutionally intolerable event.”⁴⁶⁵ At the same time, eight justices also agreed with Justice O’Connor that “Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.”⁴⁶⁶ Justice Blackmun, joined by Justices Stevens and Souter, believed that Herrera should first have the right to a hearing on his evidence before the Court addressed the issue.⁴⁶⁷ The Court has never taken a case to articulate a standard for proving a freestanding claim of innocence, but all mention of this claim is couched in the most superlative language, such as “extraordinarily high,”⁴⁶⁸ or “unquestionably” innocent.⁴⁶⁹ The Court’s decisions in *Schlup* and *Herrera* split innocence arguments into two paths: The fair procedural gateway of *Schlup v. Delo*, which enables habeas courts to reach the merits of defaulted constitutional claims, and the far more challenging freestanding claim of innocence which would justify habeas corpus relief even if the petitioner had a fair trial. Justice O’Connor hinted at a third path: that habeas relief could be justified “for a truly persuasive demonstration of actual innocence. . . if no state avenue were open to process the claim.”⁴⁷⁰ See the discussion of *Herrera v. Collins* in Chapter 9, Innocence and Habeas Corpus.

2. **Application of the innocence gateway:** *Schlup* itself demonstrates how the innocence gateway is to be applied. After remand from the Supreme Court, the U.S. District Court first conducted a hearing to determine whether, “considering all of the evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’”⁴⁷¹ The district court found that *Schlup*’s evidence satisfied the *Schlup* standard. First, the court found “the testimony of the eyewitnesses to Dade’s murder

⁴⁶³ 506 U.S. 390, 398 (1993).

⁴⁶⁴ *Id.* at 401.

⁴⁶⁵ *Id.* at 418.

⁴⁶⁶ *Id.* at 419 (O’Connor, J., concurring).

⁴⁶⁷ *Id.* at 430-31 (Blackmun, J., dissenting).

⁴⁶⁸ *Herrera, supra*, at 417.

⁴⁶⁹ *Schlup, supra*, at 317.

⁴⁷⁰ *Herrera, supra*, at 427 (O’Connor, J., concurring); *See, e.g.*, *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991), granting habeas corpus relief because the State of Minnesota deprived George Lewis of due process by refusing to provide a forum to hear his newly discovered innocence evidence. This discussion will focus on procedural Gateway innocence claims.

⁴⁷¹ *Schlup v. Delo*, 912 F. Supp. 448, 450 (E.D. Mo. 1995) (quoting *Schlup v. Delo*, 513 U.S. at 327).

credible and believable.”⁴⁷² Although some witnesses had told authorities they had not seen the stabbing, they “satisfactorily explained that denial” because the evidence clarified that violating the “code of silence” that existed at the Missouri State Penitentiary “can place an inmate in danger.”⁴⁷³ The court also concluded that “the eyewitnesses’ unanimous testimony that Petitioner was not present at the scene of Dade’s murder supports Petitioner’s claim of actual innocence.” The Court also addressed the evidence of Schlup’s alibi, finding that the credible testimony of Robert Faherty and John Green “cast[] serious doubt on the ability of Petitioner to have participated in the stabbing death of Arthur Dade and to have arrived in the dining room approximately sixty-five seconds before the distress call was sounded.”⁴⁷⁴ The Court let Schlup present evidence of a polygraphist who found that John Green was truthful when he said that Schlup was not involved in the murder, that Schlup was not present during the murder, and that Green called base immediately during the incident. However, the court concluded that although the polygraphist bolstered Green’s testimony, Green was a credible witness on his own.⁴⁷⁵ The detailed examination of the facts in the Supreme Court’s and the district court’s opinions provides a good insight into the habeas petitioner’s heavy burden to prove actual innocence, and the level of investigation required to meet that standard. It is also important to observe that the district judge’s finding that Schlup was actually innocent did not end the habeas litigation; she ordered parties to submit supplemental evidence and briefing on the merits of Schlup’s claims,⁴⁷⁶ and thereafter held an evidentiary hearing and granted Schlup’s claim of ineffective assistance of counsel under *Strickland v. Washington*.⁴⁷⁷

3. ***Schlup* reaffirmed and explained:** The Court reaffirmed *Schlup*’s actual innocence standard two decades later in *House v. Bell*.⁴⁷⁸ In an opinion by Justice Kennedy, who had dissented in *Schlup*, the Court ruled that Tennessee death row prisoner Paul Gregory House had produced enough evidence to show his actual innocence, and remanded the case for a determination of the merits of House’s constitutional claims. The Court stated that *Schlup*’s “reasonable probability” standard was enough to “ensure[] that petitioner’s case is truly ‘extraordinary,’ while still providing petitioner a meaningful avenue by which to avoid a manifest injustice.”⁴⁷⁹ The Court repeated that a successful *Schlup* showing requires:

⁴⁷² *Id.* at 453.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 455.

⁴⁷⁶ *Schlup v. Delo*, 912 F. Supp. at 455.

⁴⁷⁷ 466 U.S. 668 (1984); *Schlup v. Bowersox*, 1996 U.S. Dist. LEXIS 8887, No. 4:92CV443 JCH (E.D. Mo. filed May 2, 1996); For more information about some of the investigative work that went into Schlup’s defense, see Sean D. O’Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 UMKC L. REV. 1021 (2009).

⁴⁷⁸ 547 U.S. 518 (2006).

⁴⁷⁹ *Id.* at 537.

- “[N]ew reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial,”⁴⁸⁰
- “[T]he habeas court must consider ‘all the evidence,’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial.’”⁴⁸¹
- “Based on this total record, the court must make ‘a probabilistic determination about what reasonable, properly instructed jurors would do.’”⁴⁸²
- “A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt--or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.”⁴⁸³
- “If new evidence so requires, this may include consideration of ‘the credibility of the witnesses presented at trial.’”⁴⁸⁴
- “[T]he *Schlup* inquiry, we repeat, requires a holistic judgment about ‘all the evidence,’⁴⁸⁵ and its likely effect on reasonable jurors applying the reasonable-doubt standard.”⁴⁸⁶

Equally important, the Court explained what *Schlup* does not require. “As the *Schlup* decision explains, the gateway actual-innocence standard is ‘by no means equivalent to the standard of *Jackson v. Virginia*’⁴⁸⁷ which governs claims of insufficient evidence.”⁴⁸⁸ The Court further noted that the AEDPA provision limiting successive habeas corpus petitions, 28 U.S.C. § 2244(b)(2)(B)(ii), and the provision limiting evidentiary hearings on claims the petitioner did not develop in state court, do not address “the type of petition at issue here--a first federal habeas petition seeking consideration of defaulted claims based on a

⁴⁸⁰ *Id.* at 537.

⁴⁸¹ *Id.* at 538, quoting Friendly, *supra*, at 160.

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 539.

⁴⁸⁵ 513 U.S. at 328 (quoting Friendly, *supra*, at 160).

⁴⁸⁶ *Id.* at 537-39.

⁴⁸⁷ 443 U.S. 307 (1979).

⁴⁸⁸ *Id.* at 538 (quoting *Schlup* at 330).

showing of actual innocence.”⁴⁸⁹ But the Court observed, “[D]ismissal of a first federal habeas petition is a particularly serious matter.”⁴⁹⁰ After a thorough, in-depth discussion of the evidence, the Court ruled, “Accordingly, and although the issue is close, we conclude that this is the rare case where--had the jury heard all the conflicting testimony--it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.”⁴⁹¹ *Schlup* and *House* together are instructive of the level of investigation and scrutiny that an actual innocence gateway claim demands.

4. **Actual innocence overcomes time bars:** *Schlup* and *House* both involved questions of procedural default, and they clarify that innocence is the ultimate equity that habeas petitioners can have on their side. In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Court granted certiorari to determine whether the one-year statute of limitation imposed by AEDPA, 28 U.S.C.S. § 2244(d)(1), could be overcome by showing actual innocence. The Court held that “actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations.” 569 U.S. at 386. The Court also rejected the state’s argument that the lack of diligence reflected by Perkins’ six-year delay in presenting his innocence evidence disentitled him to invoke the miscarriage of justice exception. Instead, when a prisoner asserting actual innocence has not been careful in asserting his innocence evidence, courts “should count unjustifiable delay on a habeas petitioner’s part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.”⁴⁹² The issue of delay should be considered in assessing the credibility of the innocence evidence, but delay will not bar consideration of it. Further, the Court clarified, “The miscarriage of justice exception, our decisions bear out, survived AEDPA’s passage.” *Id.* at 393, citing *Calderon v. Thompson*, 523 U.S. 538 (1998). In addition to overcoming AEDPA’s procedural bars, a sufficient showing of actual innocence will overcome procedural barriers in petitions under 28 U.S.C. § 2255, even where the petition has pled guilty. *See Bousley v. United States*, 523 U.S. 614 (1998).
5. **The aberrational Eighth Circuit *Schlup* standard:** Contrary to the directives in *Schlup* and *House* to consider the entire record in determining a claim of actual innocence, the Eighth Circuit Court of Appeals has imposed a unique limitation on innocence evidence: it will not consider evidence that could have been presented earlier by due diligence.⁴⁹³ The court concluded that “evidence is new only if it was not available at trial and could not

⁴⁸⁹ *Id.* at 539.

⁴⁹⁰ *Id.* (quoting *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)).

⁴⁹¹ *House, supra*, at 554.

⁴⁹² *Id.* at 387.

⁴⁹³ *Amrine v. Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (en banc).

have been discovered earlier through the exercise of due diligence.”⁴⁹⁴ Evidence that could have been discovered by careful trial counsel will not be considered in support of a gateway claim of actual innocence under *Amrine*, which produces the admittedly anomalous result that the innocence gateway cannot be used in the Eighth Circuit to reach a claim of ineffective assistance of trial counsel for failure to investigate innocence evidence.⁴⁹⁵ The due diligence limitation on the *Schlup* innocence gateway has been rejected by other circuits to consider the issue.⁴⁹⁶ The Third Circuit applies the due diligence limitation to *Schlup* evidence, but exempts ineffective assistance of counsel claims because that result would contravene *Schlup* itself, where the Court remanded the matter for a hearing to determine whether Schlup could prove actual innocence as a procedural path to his defaulted claim of ineffective assistance of counsel. If *Amrine v. Bowersox* were correct, *Schlup* itself would have a different outcome. *McQuiggin v. Perkins* also rejected the Eighth Circuit’s limitation on *Schlup* evidence. It is also noteworthy that the Missouri Supreme Court granted habeas corpus relief to Joseph Amrine on a freestanding claim of innocence based on the same evidence that the Eighth Circuit prohibits federal courts from considering.⁴⁹⁷ Similarly, Ricky Kidd returned to state court and obtained habeas corpus relief, using the *Schlup* gateway to reach his *Brady v. Maryland* claim.⁴⁹⁸

6. **Actual innocence gateway used in state courts:** State courts have followed the Supreme Court’s reasoning in *Schlup* in allowing postconviction review of defaulted claims for prisoners who can make a colorable showing of actual innocence. State courts have broader jurisdiction than federal habeas courts to police their own judgments; they are not burdened by considerations of comity and federalism that have complicated and limited habeas corpus review. After granting habeas corpus relief to Joseph Amrine, Missouri Supreme Court Chief Justice Laura Denvir Stith explained:

On February 24, 2003, the case of State ex rel. Amrine v. Roper was argued to the Supreme Court of Missouri. The key issue was whether Joseph Amrine was entitled to have his claim of actual innocence heard by the Missouri courts

⁴⁹⁴ *Id.* at 1230 (citing *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996), and *Smith v. Armontrout*, 888 F.2d 530, 542 (8th Cir. 1989), both cases in which habeas petitioners argued innocence as a freestanding claim, not as a procedural gateway).

⁴⁹⁵ *Kidd v. Norman*, 651 F.3d 947, 952 (2011) (“our panel is not at liberty to ignore Amrine because we have already applied Amrine in situations like Kidd’s.”).

⁴⁹⁶ *See Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010).

⁴⁹⁷ *Amrine v. Roper*, 102 S.W. 3d 541, 543 (Mo. 2003) (en banc) (“Because the continued imprisonment and eventual execution of an innocent person is a manifest injustice, a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.”).

⁴⁹⁸ *Kidd v. Korneman*, No. 18DK-CC00017 (DeKalb County Mo., filed August 14, 2019) (finding that the Court in *Schlup* fashioned a “standard unburdened by technicalities that might impair this Court’s ability to arrive at a truthful resolution of Kidd’s innocence claim.”).

by way of a writ of habeas corpus, even though he had already seemingly exhausted his rights to direct and postconviction relief. The State asserted in its brief, and in oral argument, that Mr. Amrine had no right to additional review, whatever the nature of his current claims and whatever the strength of the evidence supporting them. I, therefore, asked the Assistant Attorney General arguing the case, "Are you suggesting, ... even if we find that Mr. Amrine is actually innocent, he should be executed?" The Assistant Attorney General answered: "That's correct, your honor."

While some later commentators were shocked by the answer given by the Assistant Attorney General, I was not. That was the only answer he could give in light of the legal position taken by the State of Missouri in opposing Mr. Amrine's petition for writ of habeas corpus. If a state high court has no authority to review a claim of actual innocence, then it follows that it is powerless to prevent the prisoner's execution.⁴⁹⁹

Chief Justice Stith observed, "Even in the absence of an underlying federal constitutional violation in a criminal defendant's trial, state courts and legislatures are free to develop procedures by which a criminal defendant, such as Mr. Amrine, can bring claims of actual innocence."⁵⁰⁰

7. **Limitations on "Actual Innocence" as a ground for relief:** The relevance of innocence to habeas corpus and postconviction review of criminal judgment is complicated. As the evidence in *Schlup* and *House* shows, it will be the rare case in which a prisoner will have access to the investigative resources and legal skill to establish the level of innocence required to establish a procedural gateway to the review of defaulted claims. The system that has evolved in the United States focuses primarily not on the outcome, but on the process, in the belief that if a trial is conducted under the Constitution, it will produce reliable results. When the Court sidestepped the troubling question presented by Leonel Herrera, Justice O'Connor explained, "If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all."⁵⁰¹ However, it is not frivolous to think that courts will fail to correct an unjust conviction of a person who is actually innocent. For example, innocence

⁴⁹⁹ Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Corpus Relief*, 38 Valparaiso U. L. REV. 421, 421-422 (2004).

⁵⁰⁰ *Id.* at 448.

⁵⁰¹ *Herrera v. Collins*, 506 U.S. at 427 (O'Connor, J., concurring).

proven by newly developed DNA technology will fall outside of Justice O'Connor's constitutional construct of habeas corpus review because it could not be the fault of a defense attorney or prosecutor that this evidence was not presented to the jury at the time of trial. Chapter 11, Reduction-in-Sentencing, aka Compassionate Release, discusses recent legislative responses to limited circumstances where courts have disabled themselves from correcting injustice.

CHAPTER 5: ABUSE OF THE WRIT

The previous chapter explored the doctrine of procedural bar, which presents an obstacle to claims that the prisoner failed to present in compliance with clearly announced, consistently applied state procedural rules. The abuse of the writ doctrine limits a prisoner's ability to file subsequent petitions for *habeas corpus* after an initial petition has been denied. A prisoner might file successive petitions for several reasons: new evidence supporting a previously denied claim (successive-claim petitions), new evidence supporting a novel claim (successor petitions), a change in the law that renders prior rulings incorrect, or a new set of circumstances could arise rendering a previously valid judgement and sentence unlawful. While repetitious *habeas corpus* filings may raise fewer concerns about comity and federalism, they frustrate finality—especially in death penalty cases where executions are delayed to relitigate previously denied claims or litigate new claims. The abuse of the writ doctrine adds yet another layer of complexity, as such claims and evidence must still satisfy exhaustion and procedural bar doctrines. This chapter examines the origins and evolution of the abuse of the writ doctrine, culminating in the stricter standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

I. The Evolution of the Court-Made Doctrine of Abuse of the Writ

The abuse of the writ doctrine is unique to American law. It did not exist in the common law governing habeas corpus, nor did *res judicata* or collateral estoppel principles apply. An order denying a petition for writ of habeas corpus was not appealable, but the petitioner was free to file subsequent petitions in a court having jurisdiction. No formal doctrine addressed successive or repetitive filings. The law was unclear as to what effect, if any, a habeas court should give to a prior order declining to discharge a prisoner on a similar petition. In *Salinger v. Loisel*,⁵⁰² the Supreme Court addressed whether *res judicata* or some other principle allowed federal courts to deny habeas corpus relief solely because a previous petition had been denied.

In *Salinger*, the petitioner was arrested in New York under a federal indictment in South Dakota for mail fraud.⁵⁰³ He petitioned for habeas corpus relief in New York challenging South Dakota's jurisdiction. After this petition was denied, Salinger posted bail, but instead of going to South Dakota, he surrendered himself in New Orleans, and filed a new habeas petition, alleging he was not in South Dakota when the alleged crime occurred. That petition was also denied, but Salinger was again admitted to bail. The United States Marshall took Salinger into custody, and Salinger filed a third petition for writ of habeas corpus, this time alleging that his detention violated the supersedeas bond he had posted.⁵⁰⁴ The Supreme Court consolidated the cases and rejected the government's argument that *res judicata* barred the successive petitions. The Court stated, "At common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to

⁵⁰² 265 U.S. 224 (1924).

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 228.

discharge the prisoner.”⁵⁰⁵ The Court noted that when the common law rule evolved, decisions to deny a writ of habeas corpus were not subject to appeal, so that “courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number.”⁵⁰⁶ However, the Court also noted that Congress’ creation of appellate review for *habeas corpus* denials lessened the justification for this practice.⁵⁰⁷ The Court held that while *res judicata* did not apply, a court could give weight to prior denials of *habeas corpus* relief, depending on “the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.”⁵⁰⁸ The Court viewed this approach as consistent with the statutory duty “to dispose of the party as law and justice may require.”⁵⁰⁹ Applying this principle, the Court analyzed the unique claims in Salinger’s second and third petitions, rejecting one claim as repetitive, and granting partial relief on Salinger’s newest claim.⁵¹⁰

The same term, in *Wong Doo v. United States*,⁵¹¹ the Court upheld the dismissal of a second petition as an abuse of the writ. Wong Doo’s first petition was denied after he failed to present evidence supporting one of his claims.⁵¹² In his second petition, he attempted to revive the same claim with evidence not previously presented, but “[n]o reason for not presenting the proof at the outset is offered.”⁵¹³ The Court concluded that withholding evidence in the first proceeding amounted to an abusive use of the writ.⁵¹⁴ *Wong Doo* emphasized a petitioner’s obligation to act diligently and in good faith.

The Court further refined the doctrine in *Price v. Johnston*.⁵¹⁵ Price filed a fourth petition for *habeas corpus*, alleging for the first time that his robbery conviction was secured through the government’s use of perjured testimony.⁵¹⁶ The Court determined that this claim had not been raised in prior petitions and was therefore not barred by the abuse of the writ doctrine because it was not clear to the Court whether the claim was known to the petitioner at the time of his prior

⁵⁰⁵ *Id.* at 230.

⁵⁰⁶ *Id.*, 230-231.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 231-232.

⁵⁰⁹ *Id.* at 231, quoting sec. 761.

⁵¹⁰ *Id.* at 238.

⁵¹¹ 265 U.S. 239 (1924).

⁵¹² *Wong Sun v. United States*, 293 F. 273, (6th Cir. Ohio) (1922).

⁵¹³ 265 U.S. 239, 240-41.

⁵¹⁴ *Id.* at 241.

⁵¹⁵ 334 U.S. 266 (1947).

⁵¹⁶ *Id.* at 272.

filings, or whether he had an excuse for not raising it.⁵¹⁷ The Court emphasized that *habeas corpus* should remain flexible enough to address illegal restraints effectively.⁵¹⁸ However, the case was remanded for further proceedings, with instructions for the government to respond fully and for the district court to explicitly address whether the petition was abusive.⁵¹⁹

The controversy over successive *habeas corpus* petitions resurfaced in *Sanders v. United States*, where the Court further clarified the standards for determining when subsequent petitions constitute an abuse of the writ.

SANDERS V. UNITED STATES⁵²⁰

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We consider here the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U. S. C. § 2255. [fn. 1 omitted] Under that statute, a federal prisoner who claims that his sentence was imposed in violation of the Constitution or laws of the United States may seek relief from the sentence by filing a motion in the sentencing court stating the facts supporting his claim. "[A] prompt hearing" on the motion is required "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" The section further provides that "the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

The petitioner is serving a 15-year sentence for robbery of a federally insured bank in violation of 18 U. S. C. § 2113 (a). He filed two motions under § 2255. The first alleged no facts but only bare conclusions in support of his claim. The second, filed eight months after the first, alleged facts which, if true, might entitle him to relief. Both motions were denied, without hearing, by the District Court for the Northern District of California. On appeal from the denial of the second motion, the Court of Appeals for the Ninth Circuit affirmed. 297 F.2d 735. We granted leave to proceed *in forma pauperis* and certiorari. 370 U.S. 936.

* * * *

On January 4, 1960, petitioner, appearing *pro se*, filed his first motion. He alleged no facts but merely the conclusions that (1) the "Indictment" was invalid, (2) "Appellant was denied adequate assistance of Counsel as guaranteed by the *Sixth Amendment*," and (3) the sentencing

⁵¹⁷ *Id.* at 286, 289.

⁵¹⁸ *Id.* at 294.

⁵¹⁹ *Id.* Justice Jackson dissented, arguing that requiring the government to relitigate claims based on vague or speculative allegations undermines finality and fairness. He warned that the system's integrity could be eroded by prisoners' ingenuity and persistence. *Price*, 334 U.S. 266, 295-301 (1947) (Jackson, J., dissenting).

⁵²⁰ 373 U.S. 1 (1963).

court had "allowed the Appellant to be intimidated and coerced into intering [*sic*] a plea without Counsel, and any knowledge of the charges lodged against the Appellant." He filed with the motion an application for a writ of *habeas corpus ad testificandum* requiring the prison authorities to produce him before the court to testify in support of his motion. On February 3 the District Court denied both the motion and the application. In a memorandum accompanying the denial, the court explained that the motion, "although replete with conclusions, sets forth no facts upon which such conclusions can be founded. For this reason alone, this motion may be denied without a hearing." Nevertheless, the court stated further that the motion "sets forth nothing but unsupported charges, which are completely refuted by the files and records of this case. Since the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, no hearing on the motion is necessary." No appeal was taken by the petitioner from this denial.

On September 8 petitioner, again appearing *pro se*, filed his second motion. This time he alleged that at the time of his trial and sentence he was mentally incompetent as a result of narcotics administered to him while he was held in the Sacramento County Jail pending trial. He stated in a supporting affidavit that he had been confined in the jail from on or about January 16, 1959, to February 18, 1959; that during this period and during the period of his "trial" he had been intermittently under the influence of narcotics; and that the narcotics had been administered to him by the medical authorities in attendance at the jail because of his being a known addict. The District Court denied the motion without hearing, stating: "As there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion, the Court will refuse, in the exercise of its statutory discretion, to entertain the present petition." (Footnote omitted.) The court also stated that "petitioner's complaints are without merit in fact." On appeal from the order denying this motion, the Court of Appeals for the Ninth Circuit affirmed. *297 F.2d 735 (1961)*. The Court of Appeals said in a *per curiam* opinion: "Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion." *297 F.2d, at 736-737*.

We reverse. We hold that the sentencing court should have granted a hearing on the second motion.

I.

The statute in terms requires that a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case "conclusively show" that the claim is without merit. This is the first case in which we have been called upon to determine what significance, in deciding whether to grant a hearing, the sentencing court should attach to any record of proceedings on prior motions for relief which may be among the files and records of the case, in light of the provision that: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." * * * *

At common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*. [citations omitted]

* * * *

It has been suggested, see *Salinger v. Loisel, supra, at 230-231*, that this principle derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment," *Fay v. Noia*, [372 U.S. 391, 402 (1962)], access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.

* * * *

Plainly, were the prisoner invoking § 2255 faced with the bar of *res judicata*, he would not enjoy the "same rights" as the habeas corpus applicant, or "a remedy exactly commensurate with" habeas. Indeed, if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered, as the Court in [*United States v. Hayman*, 342 U.S. 205 (1952)] implicitly recognized.

III.

Application of the foregoing principles to the instant case presents no difficulties. Petitioner's first motion under § 2255 was denied because it stated only bald legal conclusions with no supporting factual allegations. The court had the power to deny the motion on this ground, see *Wilkins v. United States*, 103 U. S. App. D. C. 322, 258 F.2d 416 (C. A. D. C. Cir. 1958), although the better course might have been to direct petitioner to amend his motion, see *Stephens v. United States*, 246 F.2d 607 (C. A. 10th Cir. 1957) (*per curiam*). But the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient. . . . However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights. . . . For the facts on which petitioner's claim in his second application is predicated are outside the record. This is so even though the judge who passed on the two motions was the same judge who presided at the hearing at which petitioner made the waivers, and the later hearing at which he was sentenced. Whether or not petitioner was under the influence of narcotics would not necessarily have been apparent to the trial judge. Petitioner appeared before him without counsel and but briefly. That the judge may have thought that he acted with intelligence and understanding in responding to the judge's inquiries cannot "conclusively show," as the statute requires, that there is no merit in his present claim. Cf. *Machibroda v. United States, supra, at 495*. If anything, his request before sentence that the judge send him to a hospital "for addiction cure" cuts the other way. Moreover, we are advised in the Government's brief that the probation officer's report made to the judge before

sentence (the report is not part of the record in this Court) disclosed that petitioner received medical treatment for withdrawal symptoms while he was in jail prior to sentencing.

On remand, a hearing will be required. This is not to say, however, that it will automatically become necessary to produce petitioner at the hearing to enable him to testify. Not every colorable allegation entitles a federal prisoner to a trip to the sentencing court. Congress, recognizing the administrative burden involved in the transportation of prisoners to and from a hearing in the sentencing court, provided in § 2255 that the application may be entertained and determined "without requiring the production of the prisoner at the hearing." This does not mean that a prisoner can be prevented from testifying in support of a substantial claim where his testimony would be material. However, we think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing. In this connection, the sentencing court might find it useful to appoint counsel to represent the applicant.

* * * *

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

This case, together with *Townsend v. Sain*, 372 U.S. 293, and *Fay v. Noia*, 372 U.S. 391, form a trilogy of "guideline" decisions in which the Court has undertaken to restate the responsibilities of the federal courts in federal post-conviction proceedings. *Sain* and *Noia* relate to federal habeas corpus proceedings arising out of state criminal convictions. The present case involves successive § 2255 applications (and similar habeas corpus proceedings under § 2244, which the Court finds sets the pattern for § 2255) arising out of federal convictions.

The over-all effect of this trilogy of pronouncements is to relegate to a back seat, as it affects state and federal criminal cases finding their way into federal post-conviction proceedings, the principle that there must be some end to litigation.

Questions and Comments:

1. **One good bite at the apple on each claim?** What principles connect the decisions in *Salinger*, *Wong Doo*, *Price*, and *Sanders*? What are the responsibilities of a federal judge when reviewing a habeas corpus petition following one or more denials? *Salinger* allows the court to consider a prior judgment denying habeas corpus relief, and to regard it as controlling, depending on the "fullness of consideration" given in the prior proceedings. Does the judge's duty change if the prisoner presents a new claim, versus a previously denied one?

2. ***Sanders* favors rulings on the merits of constitutional claims:** What if a claim presented in a prior petition was avoided for procedural reasons, such as a state procedural bar or failure to exhaust state remedies? How do procedural versus merits-based denials affect this duty? Are there circumstances under which a judge should revisit a claim previously decided on its merits, such as newly discovered evidence or a new Supreme Court decision clarifying the law? When should a habeas petitioner be barred from filing another petition after a denial? How would you articulate that standard?
3. **End point to litigation?** *Sanders v. United States*⁵²¹ was decided alongside *Fay v. Noia*,⁵²² which introduced the “deliberate by-pass” standard, and *Townsend v. Sain*,⁵²³ which set evidentiary hearing standards. Justice Harlan, dissenting in *Sanders*, expressed concerns about endless litigation.⁵²⁴ Does *Sanders* establish a definitive endpoint for litigation? How burdensome are the resulting proceedings, and do they always necessitate an evidentiary hearing?
4. **Abuse of the Writ standard codified:** The abuse of the writ doctrine, grounded in *Sanders*, governed habeas corpus law for nearly two decades and was codified in Habeas Rule 9, amended in 1976:

(a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.⁵²⁵

⁵²¹ 373 U.S. 1 (1963).

⁵²² 372 U.S. 391 (1963).

⁵²³ 372 U.S. 293 (1962).

⁵²⁴ *Sanders v. United States*, 373 U.S. 1, 23 (1963) (Harlan, J., dissenting).

⁵²⁵ Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, effective February 1, 1977. This version of Rule 9 Governing Cases under 28 U.S.C. Sec. 2254 was repealed in 2004 and replaced with the following language: “Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).” 90 Stat. 1335; April 26, 2004, eff. Dec. 1, 2004.

Is this formulation consistent with *Sanders*? How does it address Justice Harlan’s concerns about finality? Does it place additional obligations on the petitioner? How does this rule reconcile the goals of finality and fairness?

II. The Court Leans Toward Finality

Sanders v. United States and *Fay v. Noia* were decided during the Civil Rights Movement, as the Warren Court extended much of the Bill of Rights to protect individuals against State actors by incorporating rights into the Fourteenth Amendment Due Process Clause, consistent with the stated intent of its framers. Habeas corpus doctrines followed suit, favoring the merits of constitutional claims over procedural finality. Under *Sanders v. United States*, federal courts always had the discretion to entertain habeas petitions when necessary to serve “the ends of justice.”

As the Court expanded constitutional protections for state prisoners, the volume of habeas corpus petitions increased. For instance, *Gideon v. Wainwright* extended the Sixth Amendment’s right to counsel to all felony defendants, enabling prisoners to challenge denials of counsel or ineffective representation. Similarly, the incorporation of additional rights into the Fourteenth Amendment gave state prisoners a growing arsenal of claims, particularly when such rights were applied retroactively. The tension between finality of criminal convictions and the constitutional rights of criminal defendants reached a peak with *Furman v. Georgia*,⁵²⁶ which invalidated all death sentences nationwide by finding that unregulated discretion in capital sentencing violated the Eighth Amendment. States revised their death penalty statutes, but constitutional challenges to capital sentencing persisted. Unlike non-capital prisoners who served their sentences while litigating, death-row inmates often had their executions stayed during habeas proceedings, highlighting the conflict between fairness and finality.

This tension was stark in *Delo v. Stokes*.⁵²⁷ In that case, Winford Stokes, a condemned prisoner, filed a fourth habeas petition, claiming innocence and alleging an Equal Protection violation due to inconsistent application of jury instruction requirements.⁵²⁸ A district court stayed his execution to consider the petition’s merits, but the Supreme Court, in a 5–4 decision, deemed the petition an “abuse of the writ” since the Equal Protection claim could have been raised earlier.⁵²⁹ Justice Kennedy, concurring, emphasized that delays should not deprive states of lawful process. Dissenting, Justice Brennan, joined by Justices Marshall, Stevens, and Blackmun, argued that the lower courts’ discretionary decisions to stay Stokes’ execution to allow orderly consideration of his claims warranted deference, particularly when a person’s life was at stake.⁵³⁰

⁵²⁶ 403 U.S. 952 (1971).

⁵²⁷ 495 U.S. 320 (1990) (per curium).

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Delo v. Stokes*, 495 U.S. at 327 (Brennan, J., Marshall, J., Stevens, J., and Blackmun, J., dissenting).

Stokes was executed without resolution of his claims. What could explain the difference between this outcome and the Court's decision in *Price v. Johnson*?

The majority in *Delo v. Stokes* leveraged its numerical advantage to impose stricter limits on habeas relief, as also discussed in Chapter 4, Procedural Bars: Independent, Adequate State Grounds regarding procedural bars. In *McCleskey v. Kemp*,⁵³¹ the Court revisited the abuse-of-the-writ doctrine, aligning it with procedural bar standards. Warren McCleskey, sentenced to death in Georgia, had previously failed to prove that racial bias in Georgia's death penalty system violated the Eighth or Fourteenth Amendments absent specific evidence of discrimination by his jury.⁵³² Later, McCleskey's attorneys uncovered new evidence showing the prosecution planted a jail informant to elicit incriminating statements, violating *Massiah v. United States*.⁵³³ Although a district court granted relief under *Fay*'s deliberate-bypass standard, the Eleventh Circuit reversed, and the Supreme Court granted certiorari to consider the case.

MCCLESKEY V. ZANT⁵³⁴

JUSTICE KENNEDY delivered the opinion of the Court.

The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus. Petitioner Warren McCleskey in a second federal habeas petition presented a claim under *Massiah v. United States*, 377 U.S. 201 (1964), that he failed to include in his first federal petition. The Court of Appeals for the Eleventh Circuit held that assertion of the *Massiah* claim in this manner abused the writ. Though our analysis differs from that of the Court of Appeals, we agree that the petitioner here abused the writ, and we affirm the judgment.

I

McCleskey and three other men, all armed, robbed a Georgia furniture store in 1978. One of the robbers shot and killed an off duty policeman who entered the store in the midst of the crime. McCleskey confessed to the police that he participated in the robbery. When on trial for both the robbery and the murder, however, McCleskey renounced his confession after taking the stand with an alibi denying all involvement. To rebut McCleskey's testimony, the prosecution called Offie Evans, who had occupied a jail cell next to McCleskey's. Evans testified that McCleskey admitted shooting the officer during the robbery and boasted that he would have shot his way out of the store even in the face of a dozen policemen.

Although no one witnessed the shooting, further direct and circumstantial evidence supported McCleskey's guilt of the murder. An eyewitness testified that someone ran from the

⁵³¹ 481 U.S. 279 (1987).

⁵³² *Id.*

⁵³³ 377 U.S. 201 (1964).

⁸⁰ 499 U.S. 467 (1991). [Appendix references omitted]

store carrying a pearl-handled pistol soon after the robbery. Other witnesses testified that McCleskey earlier had stolen a pearl-handled pistol of the same caliber as the bullet that killed the officer. Ben Wright, one of McCleskey's accomplices, confirmed that during the crime McCleskey carried a white-handled handgun matching the caliber of the fatal bullet. Wright also testified that McCleskey admitted shooting the officer. Finally, the prosecutor introduced McCleskey's confession of participation in the robbery.

In December 1978, the jury convicted McCleskey of murder and sentenced him to death. Since his conviction, McCleskey has pursued direct and collateral remedies for more than a decade. We describe this procedural history in detail, both for a proper understanding of the case and as an illustration of the context in which allegations of abuse of the writ arise.

On direct appeal to the Supreme Court of Georgia, McCleskey raised six grounds of error. A summary of McCleskey's claims on direct appeal, as well as those he asserted in each of his four collateral proceedings, is set forth in the Appendix to this opinion, *infra*, at 503. The portion of the appeal relevant for our purposes involves McCleskey's attack on Evans' rebuttal testimony. McCleskey contended that the trial court "erred in allowing evidence of [McCleskey's] oral statement admitting the murder made to [Evans] in the next cell, because the prosecutor had deliberately withheld such statement" in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *McCleskey v. State*, 245 Ga. 108, 112, 263 S.E. 2d 146, 149 (1980). A unanimous Georgia Supreme Court acknowledged that the prosecutor did not furnish Evans' statement to the defense but ruled that because the undisclosed evidence was not exculpatory, McCleskey suffered no material prejudice and was not denied a fair trial under *Brady*. 245 Ga., at 112-113, 263 S. E. 2d, at 149. The court noted, moreover, that the evidence McCleskey wanted to inspect was "introduced to the jury in its entirety" through Evans' testimony, and that McCleskey's argument that "the evidence was needed in order to prepare a proper defense or impeach other witnesses had no merit because the evidence requested was statements made by [McCleskey] himself." *Ibid*. The court rejected McCleskey's other contentions and affirmed his conviction and sentence. *Ibid*. We denied certiorari. *McCleskey v. Georgia*, 449 U.S. 891 (1980).

McCleskey then initiated postconviction proceedings. In January 1981, he filed a petition for state habeas corpus relief. The amended petition raised 23 challenges to his murder conviction and death sentence. Three of the claims concerned Evans' testimony. First, McCleskey contended that the State violated his due process rights under *Giglio v. United States*, 405 U.S. 150 (1972), by its failure to disclose an agreement to drop pending escape charges against Evans in return for his cooperation and testimony. Second, McCleskey reasserted his *Brady* claim that the State violated his due process rights by the deliberate withholding of the statement he made to Evans while in jail. App. 21. Third, McCleskey alleged that admission of Evans' testimony violated the *Sixth Amendment* right to counsel as construed in *Massiah v. United States*, *supra*. On this theory, "the introduction into evidence of [his] statements to [Evans], elicited in a situation created to induce [McCleskey] to make incriminating statements without the assistance of counsel, violated [McCleskey's] right to counsel under the *Sixth Amendment to the Constitution of the United States*."

At the state habeas corpus hearing, Evans testified that one of the detectives investigating the murder agreed to speak a word on his behalf to the federal authorities about certain federal charges pending against him. The state habeas court ruled that the *ex parte* recommendation did not implicate *Giglio*, and it denied relief on all other claims. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause, and we denied his second petition for a writ of certiorari. *McCleskey v. Zant*, 454 U.S. 1093 (1981).

In December 1981, McCleskey filed his first federal habeas corpus petition in the United States District Court for the Northern District of Georgia, asserting 18 grounds for relief. The petition failed to allege the *Massiah* claim, but it did reassert the *Giglio* and *Brady* claims. Following extensive hearings in August and October 1983, the District Court held that the detective's statement to Evans was a promise of favorable treatment, and that failure to disclose the promise violated *Giglio*. *McCleskey v. Zant*, 580 F. Supp. 338, 380-384 (ND Ga. 1984). The District Court further held that Evans' trial testimony may have affected the jury's verdict on the charge of malice murder. On these premises it granted relief. *Id.*, at 384.

The Court of Appeals reversed the District Court's grant of the writ. *McCleskey v. Kemp*, 753 F.2d 877 (CA11 1985). The court held that the State had not made a promise to Evans of the kind contemplated by *Giglio*, and that in any event the *Giglio* error would be harmless. *753 F.2d*, at 884-885. The court affirmed the District Court on all other grounds. We granted certiorari limited to the question whether Georgia's capital sentencing procedures were constitutional, and denied relief. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

McCleskey continued his postconviction attacks by filing a second state habeas corpus action in 1987 which, as amended, contained five claims for relief. See Appendix, *infra*, at 505. One of the claims again centered on Evans' testimony, alleging that the State had an agreement with Evans that it had failed to disclose. The state trial court held a hearing and dismissed the petition. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause.

In July 1987, McCleskey filed a second federal habeas action, the one we now review. In the District Court, McCleskey asserted seven claims, including a *Massiah* challenge to the introduction of Evans' testimony. McCleskey had presented a *Massiah* claim, it will be recalled, in his first state habeas action when he alleged that the conversation recounted by Evans at trial had been "elicited in a situation created to induce" him to make an incriminating statement without the assistance of counsel. The first federal petition did not present a *Massiah* claim. The proffered basis for the *Massiah* claim in the second federal petition was a 21-page signed statement that Evans made to the Atlanta Police Department on August 1, 1978, two weeks before the trial began. The department furnished the document to McCleskey one month before he filed his second federal petition.

The statement related pretrial jailhouse conversations that Evans had with McCleskey and that Evans overheard between McCleskey and Bernard Dupree. By the statement's own terms, McCleskey participated in all the reported jail-cell conversations. Consistent with Evans'

testimony at trial, the statement reports McCleskey admitting and boasting about the murder. It also recounts that Evans posed as Ben Wright's uncle and told McCleskey he had talked with Wright about the robbery and the murder.

* * * *

The District Court held extensive hearings in July and August 1987 focusing on the arrangement the jailers had made for Evans' cell assignment in 1978. Several witnesses denied that Evans had been placed next to McCleskey by design or instructed to overhear conversations or obtain statements from McCleskey. McCleskey's key witness was Ulysses Worthy, a jailer at the Fulton County Jail during the summer of 1978. McCleskey's lawyers contacted Worthy after a detective testified that the 1978 Evans statement was taken in Worthy's office. The District Court characterized Worthy's testimony as "often confused and self-contradictory." *McCleskey v. Kemp*, No. C87-1517A (ND Ga., Dec. 23, 1987), App. 81. Worthy testified that someone at some time requested permission to move Evans near McCleskey's cell. He contradicted himself, however, concerning when, why, and by whom Evans was moved, and about whether he overheard investigators urging Evans to engage McCleskey in conversation. *Id.*, at 76-81.

On December 23, 1987, the District Court granted McCleskey relief based upon a violation of *Massiah*. *Id.*, at 63-97. The court stated that the Evans statement "contains strong indication of an *ab initio* relationship between Evans and the authorities." *Id.*, at 84. In addition, the court credited Worthy's testimony suggesting that the police had used Evans to obtain incriminating information from McCleskey. Based on the Evans statement and portions of Worthy's testimony, the District Court found that the jail authorities had placed Evans in the cell adjoining McCleskey's "for the purpose of gathering incriminating information"; that "Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public"; that Evans talked with McCleskey and eavesdropped on McCleskey's conversations with others; and that Evans reported what he had heard to the authorities. *Id.*, at 83. These findings, in the District Court's view, established a *Massiah* violation.

* * * *

The Eleventh Circuit reversed, holding that the District Court abused its discretion by failing to dismiss McCleskey's *Massiah* claim as an abuse of the writ. 890 F. 2d 342 (CA11 1989). McCleskey petitioned this Court for a writ of certiorari, alleging numerous errors in the Eleventh Circuit's abuse-of-the-writ analysis. In our order granting the petition, we requested the parties to address the following additional question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" 496 U.S.904 (1990).

II

[Section II of the Court's opinion discussing the progression of judicial decisions on abuse of the writ through *Sanders v. United States* is omitted].

III

Our discussion demonstrates that the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. Because of historical changes and the complexity of the subject, the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ." *Fay v. Noia*, 372 U.S., at 411-412. Today we attempt to define the doctrine of abuse of the writ with more precision.

Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief. *Sanders* cited a passage in *Townsend v. Sain*, 372 U.S., at 317, which applied the principle of inexcusable neglect, and noted that this principle also governs in the abuse-of-the-writ context, *Sanders v. United States*, 373 U.S., at 18.

As *Sanders'* reference to *Townsend* demonstrates, as many Courts of Appeals recognize, see e. g., *McCleskey v. Zant*, 890 F. 2d, at 346-347; *Hall v. Lockhart*, 863 F. 2d 609, 610 (CA8 1988); *Jones v. Estelle*, 722 F. 2d 159, 163 (CA5 1983); *Miller v. Bordenkircher*, 764 F. 2d 245, 250-252 (CA4 1985), and as *McCleskey* concedes, a petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice. See, e. g., *Delo v. Stokes*, 495 U.S., at 321-322; *Antone v. Dugger*, *supra*, at 205-206. See also 28 U. S. C. § 2244(b) (recognizing that a petitioner can abuse the writ in a fashion that does not constitute deliberate abandonment).

* * * *

We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. *Wainwright v. Sykes*, *supra*. We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.

In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray v. Carrier*, 477 U.S., at 488. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid*. In addition, constitutionally "ineffective assistance of counsel . . . is cause." *Ibid*. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a

procedural default. *Id.*, at 486-488. Once the petitioner has established cause, he must show "actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982).

Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. 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. *Murray v. Carrier*, *supra*, at 485.

* * * *

Considerations of certainty and stability in our discharge of the judicial function support adoption of the cause and prejudice standard in the abuse-of-the-writ context. Well defined in the case law, the standard will be familiar to federal courts. Its application clarifies the imprecise contours of the term "inexcusable neglect." The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry. See *Price v. Johnston*, 334 U.S., at 287 (abuse of the writ is "preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself"). Finally, the standard provides "a sound and workable means of channeling the discretion of federal habeas courts." *Murray v. Carrier*, 477 U.S., at 497. "It is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." *Brown v. Allen*, 344 U.S., at 501-502 (opinion of Frankfurter, J.).

The cause and prejudice standard should curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process. "Federal courts should not continue to tolerate -- even in capital cases -- this type of abuse of the writ of habeas corpus." *Woodard v. Hutchins*, 464 U.S., at 380. The writ of habeas corpus is one of the centerpieces of our liberties. "But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown v. Allen*, *supra*, at 512 (opinion of Frankfurter, J.). Adoption of the cause and prejudice standard acknowledges the historic purpose and function of the writ in our constitutional system, and, by preventing its abuse, assures its continued efficacy.

We now apply these principles to the case before us.

IV

McCleskey based the *Massiah* claim in his second federal petition on the 21-page Evans document alone. Worthy's identity did not come to light until the hearing. The District Court found, based on the document's revelation of the tactics used by Evans in engaging McCleskey in conversation (such as his pretending to be Ben Wright's uncle and his claim that he was supposed to participate in the robbery), that the document established an *ab initio* relationship between Evans

and the authorities. It relied on the finding and on Worthy's later testimony to conclude that the State committed a *Massiah* violation.

This ruling on the merits cannot come before us or any federal court if it is premised on a claim that constitutes an abuse of the writ. We must consider, therefore, the preliminary question whether McCleskey had cause for failing to raise the *Massiah* claim in his first federal petition. The District Court found that neither the 21-page document nor Worthy were known or discoverable before filing the first federal petition. Relying on these findings, McCleskey argues that his failure to raise the *Massiah* claim in the first petition should be excused. For reasons set forth below, we disagree.

That McCleskey did not possess or could not reasonably have obtained certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "Cause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S., at 492 (emphasis added). For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. See *id.*, at 488 (cause if "interference by officials . . . made compliance impracticable"); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (cause if unavailable evidence "was the reason" for default). Abuse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process, see 28 U. S. C. § 2254 Rule 6 (Discovery); Rule 7 (Expansion of Record); Rule 8 (Evidentiary Hearing). The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

In applying these principles, we turn first to the 21-page signed statement. It is essential at the outset to distinguish between two issues: (1) Whether petitioner knew about or could have discovered the 21-page document; and (2) whether he knew about or could have discovered the evidence the document recounted, namely the jail-cell conversations. The District Court's error lies in its conflation of the two inquiries, an error petitioner would have us perpetuate here.

The 21-page document unavailable to McCleskey at the time of the first petition does not establish that McCleskey had cause for failing to raise the *Massiah* claim at the outset. * Based on testimony and questioning at trial, McCleskey knew that he had confessed the murder during jail-cell conversations with Evans, knew that Evans claimed to be a relative of Ben Wright during the conversations, and knew that Evans told the police about the conversations. Knowledge of these facts alone would put McCleskey on notice to pursue the *Massiah* claim in his first federal habeas petition as he had done in the first state habeas petition.

* * * *

The District Court's determination that jailer Worthy's identity and testimony could not have been known prior to the first federal petition does not alter our conclusion. * * * * By failing to raise the *Massiah* claim in 1981, McCleskey foreclosed the procedures best suited for disclosure of the facts needed for a reliable determination.

* * * *

As McCleskey lacks cause for failing to raise the *Massiah* claim in the first federal petition, we need not consider whether he would be prejudiced by his inability to raise the alleged *Massiah* violation at this late date. See *Murray v. Carrier*, 477 U.S., at 494 (rejecting proposition that showing of prejudice permits relief in the absence of cause).

We do address whether the Court should nonetheless exercise its equitable discretion to correct a miscarriage of justice. That narrow exception is of no avail to McCleskey. The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. The very statement McCleskey now seeks to embrace confirms his guilt. As the District Court observed:

"After having read [the Evans statement], the court has concluded that nobody short of William Faulkner could have contrived that statement, and as a consequence finds the testimony of Offie Evans absolutely to be true, and the court states on the record that it entertains absolutely no doubt as to the guilt of Mr. McCleskey." 4 Tr. 4.

We agree with this conclusion. McCleskey cannot demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person. *Murray v. Carrier*, *supra*, at 496.

The history of the proceedings in this case, and the burden upon the State in defending against allegations made for the first time in federal court some nine years after the trial, reveal the necessity for the abuse-of-the-writ doctrine. The cause and prejudice standard we adopt today leaves ample room for consideration of constitutional errors in a first federal habeas petition and in a later petition under appropriate circumstances. Petitioner has not satisfied this standard for excusing the omission of the *Massiah* claim from his first petition. The judgment of the Court of Appeals is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

Today's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding longstanding legal principles, the Court radically redefines the content of the "abuse of the writ" doctrine, substituting the strict-liability "cause and prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977), for the good-faith "deliberate abandonment" standard of *Sanders v. United States*, 373 U.S. 1 (1963). This doctrinal innovation, which repudiates a line of judicial decisions codified by Congress in the

governing statute and procedural rules, was by no means foreseeable when the petitioner in this case filed his first federal habeas application. Indeed, the new rule announced and applied today was not even *requested* by respondent at any point in this litigation. Finally, rather than remand this case for reconsideration in light of its new standard, the majority performs an independent reconstruction of the record, disregarding the factual findings of the District Court and applying its new rule in a manner that encourages state officials to *conceal* evidence that would likely prompt a petitioner to raise a particular claim on habeas. Because I cannot acquiesce in this unjustifiable assault on the Great Writ, I dissent.

[Part I & II of Justice Marshall's dissent explaining his view of the historical development of the abuse of the writ doctrine omitted. In short, Justice Marshall argued that because Congress codified the holding in *Sanders v. United States*, the Court lacked the power to impose a harsher standard on habeas petitioners. Justice Marshall further argued that "the majority's abrupt change in law subverts the policies underlying § 2244(b) and unfairly prejudices the petitioner in this case" because he initiated and litigated his petition under *Sanders* less restrictive standard, and therefore he did not have a fair opportunity to address the Court's new standard. Finally, he challenged the majority's assumption that a habeas petitioner needed added incentive to raise all claims in his first petition. "A habeas petitioner's own interest in liberty furnishes a powerful incentive to assert in his first petition all claims that the petitioner (or his counsel) believes have a reasonable prospect for success. See Note, 83 Harv. L. Rev. 1038, 1153-1154 (1970); see also *Rose v. Lundy*, 455 U.S., at 520 ('The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims'). *Sanders'* bar on the later assertion of claims omitted in bad faith adequately fortifies this natural incentive." Justice Marshall called the adoption of the cause-and-prejudice test "unwise" and "manifestly unfair."]

III

[In Part III of his dissenting opinion, Justice Marshall took issue with the majority opinion's application of the cause-and-prejudice test and disagreed with assumptions of fact underpinning the majority's analysis, repeating his criticism that McCleskey will be executed without an opportunity to flesh out his cause-and-prejudice argument in the district court.]

Undaunted by the difficulty of applying its new rule without the benefit of any lower court's preliminary consideration, the majority forges ahead to perform its own independent review of the record. The majority concludes that McCleskey had no cause to withhold his *Massiah* claim because all of the evidence supporting that claim was available before he filed his first habeas petition. The majority purports to accept the District Court's finding that Offie Evans' 21-page statement was, at that point, being held beyond McCleskey's reach. See *ante*, at 498.⁵³⁵ But the

⁸¹ [Court's footnote 2] Nonetheless, "for the sake of completeness," the majority feels constrained to express its opinion that "this finding is not free from substantial doubt." *Ante*, at 498, n. Pointing to certain vague clues arising at different points during the state proceedings at trial and on direct and collateral review, the majority asserts that "the record . . . furnishes strong evidence that McCleskey knew or should have known of the Evans document before the first federal petition." *Ante*, at 499, n. It is the majority's account, however, that is incomplete. Omitted is any

State's failure to produce this document, the majority explains, furnished no excuse for McCleskey's failure to assert his *Massiah* claim "because McCleskey participated in the conversations reported by Evans," and therefore "knew everything in the document that the District Court relied upon to establish the *ab initio* connection between Evans and the police." *Ante*, at 500. The majority also points out that no external force impeded McCleskey's discovery of the testimony of jailer Worthy. See *ibid*.

To appreciate the hollowness -- and the dangerousness -- of this reasoning, it is necessary to recall the District Court's central finding: that the State *did* covertly plant Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. Once this finding is credited, it follows that the State affirmatively misled McCleskey and his counsel throughout their unsuccessful pursuit of the *Massiah* claim in state collateral proceedings and their investigation of that claim in preparing for McCleskey's first federal habeas proceeding. McCleskey's counsel deposed or interviewed the assistant district attorney, various jailers, and other government officials responsible for Evans' confinement, all of whom denied any knowledge of an agreement between Evans and the State.

Against this background of deceit, the State's withholding of Evans' 21-page statement assumes critical importance. The majority overstates McCleskey's and his counsel's awareness of the statement's contents. For example, the statement relates that state officials were present when Evans made a phone call at McCleskey's request to McCleskey's girlfriend, Plaintiff's Exh. 8, p. 14, a fact that McCleskey and his counsel had no reason to know and that strongly supports the District Court's finding of an *ab initio* relationship between Evans and the State. But in any event, the importance of the statement lay much less in what the statement said than in its simple *existence*. Without the statement, McCleskey's counsel had nothing more than his client's testimony to back up counsel's own suspicion of a possible *Massiah* violation; given the state officials' adamant denials of any arrangement with Evans, and given the state habeas court's rejection of the *Massiah* claim, counsel quite reasonably concluded that raising this claim in McCleskey's first habeas petition would be futile. All this changed once counsel finally obtained the statement, for at that point, there was credible, independent corroboration of counsel's suspicion. This additional evidence not only gave counsel the reasonable expectation of success that had previously been lacking, but also gave him a basis for conducting further investigation into the underlying claim. Indeed, it was by piecing together the circumstances under which the statement had been transcribed that McCleskey's counsel was able to find Worthy, a state official

mention of the State's evasions of counsel's repeated attempts to compel disclosure of any statement in the State's possession. In particular, the majority neglects to mention the withholding of the statement from a box of documents produced during discovery in McCleskey's state collateral-review action; these documents were represented to counsel as comprising "a complete copy of the prosecutor's file resulting from the criminal prosecution of Warren McCleskey in Fulton County." (emphasis added). McCleskey ultimately obtained the statement by filing a request under a state "open records" statute that was not construed to apply to police-investigative files until six years after McCleskey's first federal habeas proceeding. See generally *Napper v. Georgia Television Co.*, 257 Ga. 156, 356 S. E. 2d 640 (1987). This fact, too, is missing from the majority's account.

who was finally willing to admit that Evans had been planted in the cell adjoining McCleskey's.⁵³⁶ [Justice Marshall's note 12]

The majority's analysis of this case is dangerous precisely because it treats as irrelevant the effect that the State's disinformation strategy had on counsel's assessment of the reasonableness of pursuing the *Massiah* claim. For the majority, all that matters is that no external obstacle barred McCleskey from finding Worthy. But obviously, counsel's decision even to look for evidence in support of a particular claim has to be informed by what counsel reasonably perceives to be the prospect that the claim may have merit; in this case, by withholding the 21-page statement and by affirmatively misleading counsel as to the State's involvement with Evans, state officials created a climate in which McCleskey's first habeas counsel was perfectly justified in focusing his attentions elsewhere. The sum and substance of the majority's analysis is that McCleskey had no "cause" for failing to assert the *Massiah* claim because he did not try hard enough to pierce the State's veil of deception. Because the majority excludes from its conception of cause any recognition of how state officials can distort a petitioner's reasonable perception of whether pursuit of a particular claim is worthwhile, the majority's conception of "cause" creates an incentive for state officials to engage in this very type of misconduct.

* * * *

Thus, as I read the record, McCleskey should be entitled to the consideration of his petition for habeas corpus even under the cause-and-prejudice test. The case is certainly close enough to warrant a remand so that the issues can be fully and fairly briefed.

IV

Ironically, the majority seeks to defend its doctrinal innovation on the ground that it will promote respect for the "rule of law." *Ante*, at 492. Obviously, respect for the rule of law must start with those who are responsible for *pronouncing* the law. The majority's invocation of "'the orderly administration of justice,'" *ante*, at 496, rings hollow when the majority itself tosses aside established precedents without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit. Whatever "abuse of the writ" today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function.

I dissent.

⁵³⁶ [Court's footnote 3] The majority gratuitously characterizes Worthy's testimony as being contradictory on the facts essential to McCleskey's *Massiah* claim. See *ante*, at 475. According to the District Court -- which is obviously in a better position to know than is the majority -- "Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey." App. 78; accord *id.*, at 81 ("The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken").

Questions and Comments:

1. **The Court opts for finality over Fairness:** *McCleskey* brought the "abuse of the writ" doctrine within the framework created in *Wainwright v. Sykes* to analyze claims not adjudicated by state courts due to procedural grounds. The Court replaced the deliberate bypass rule of *Salinger* and *Fay* with an inquiry into whether the prisoner was diligent in pursuing constitutional claims. Which cases in this unit give greater weight to fairness, and which prioritize finality? What are the advantages and risks of each approach? Which standard better balances the Court's competing duties?
2. **Statutory authority for *Sykes*, *Carrier* and *McCleskey*?** Habeas corpus jurisprudence blends statutory, constitutional, and court-made law. Even after Congress amended the habeas statute to codify protections for prisoners' constitutional claims, the Court imposed procedural restrictions to address perceived overuse of the writ. *Wainwright v. Sykes*, *Murray v. Carrier*, and *McCleskey v. Zant* elevated the standards for overcoming procedural errors and omissions, replacing *Sanders*' "ends of justice" standard with stricter tests like "miscarriage of justice" and "actual innocence" in *Schlup v. Delo*. How did the Court's decisions in *Keeney v. Tamayo-Reyes* and *McCleskey* reshape the obligations of habeas petitioners, especially regarding the requirement of due diligence in state court?
3. **How should a prisoner's diligence be measured?** By the time of *McCleskey*, the Court no longer considered a prisoner's circumstances in procedural default decisions. If *McCleskey* had been unrepresented by counsel, as many postconviction litigants are, how could he have uncovered the jail records showing that Offie Evans was planted in his cell? What if he lacked funds for an investigator or attorney? Would it be reasonable to expect someone in his position to know how to use discovery tools or public records statutes?
4. **When is a petition "second or successive?"** In *Lonchar v. Thomas*,⁵³⁷ Larry Lonchar, under a death sentence, initially chose not to challenge his conviction in a habeas petition. When the appeal concluded, Lonchar was scheduled to be executed, and his sister and brother filed a series of habeas petitions in state and federal court attempting to stay his execution and challenge his death sentence, but all were denied. Seven years later, Lonchar filed a federal habeas petition raising twenty-two claims, and the state moved to dismiss it under the abuse of the writ doctrine. The Court ultimately ruled that dismissal of a first habeas petition is a serious matter because it entirely denies the petitioner the protections of the Great Writ, risking human liberty. Was Lonchar's petition abusive? What distinguishes his case from others involving procedural restrictions on habeas petitions?
5. **Duty of diligence in state postconviction proceedings:** How does *McCleskey* affect the responsibilities of state postconviction attorneys? Before *McCleskey*, attorneys often pled all conceivable issues to avoid procedural default. How might this tactic have impacted

⁵³⁷ 517 U.S. 314 (1996).

McCleskey's case? What if the postconviction lawyer had not pled a *Massiah* claim before obtaining evidence to support it? If counsel had filed a motion to compel evidence for a *Massiah* claim, but the Court denied it or the prosecution falsely claimed no evidence existed, would McCleskey still have met the diligence standard? How can future postconviction attorneys use *McCleskey* to improve state postconviction processes?

III. Habeas “Reform”: Death Penalty Politics and AEDPA

The tensions between the majority and dissent in *McCleskey* mirrored broader debates in American politics. As discussed in Chapter 1, Introduction to Habeas Corpus⁵³⁸ a typical criminal case could progress through nine stages of litigation, each often taking a year or more. States struggled to meet the demands imposed by Supreme Court decisions incorporating provisions of the Bill of Rights into the Fourteenth Amendment Due Process Clause. This was particularly true with respect to *Gideon v. Wainwright*, which expanded the right to competent legal counsel, and *Furman v. Georgia*, which expanded the focus of the Eighth Amendment Cruel and Unusual Punishment Clause to include questions of procedural fairness and reliability as well as modern standards of decency in the imposition of the death penalty. For example, *Lockett v. Ohio*⁵³⁹ mandates that capital sentencers “not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” This in turn set new standards for lawyer performance and decision-making in death penalty cases.⁵⁴⁰ Supreme Court decisions incorporating these rights raised fairness concerns for proceedings conducted before these rulings were established. Delays of ten years or more between sentencing and execution were common. Worse, many prisoners were executed without any court addressing the merits of their strongest arguments for a new trial or sentencing.

Adding to these issues was a critical shortage of qualified defense counsel, particularly in death penalty cases. The frustration over long delays and the high rate of relief in death penalty cases was palpable. Over two-thirds of death sentences reviewed in appellate, postconviction, and habeas proceedings were vacated due to prejudicial constitutional errors.⁵⁴¹ Moreover, in more than 80% of cases where death-sentenced prisoners were granted new trials or sentencing hearings,

⁵³⁸ *Infra*, at 1.

⁵³⁹ 438 U.S. 586, 604 (1978).

⁵⁴⁰ In multiple cases, the Supreme Court vacated death sentences because trial counsel violated their Sixth Amendment duty of effective representation by failing to thoroughly investigate and present mitigating evidence in the sentencing phase of a death penalty case. See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374; (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010). In each of these cases, capital habeas petitioners were granted new sentencing trials because trial counsel had failed to uncover and present compelling mitigating evidence at their capital sentencing trials that had occurred decades before the Supreme Court's decision.

⁵⁴¹ James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOKLYN L. REV. 411 (2002).

the resulting disposition was something other than a death sentence.⁵⁴² There was widespread agreement that the capital punishment process was slow, complex, and often unfair, yet there was resistance to any meaningful reform. Members of the American Law Institute explained:

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services. Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process.⁵⁴³

The problems in the administration of capital punishment were so ubiquitous and unsolvable that the American Law Institute withdrew the death penalty provisions from the Model Penal Code, issuing a statement pointing to the “intractable” problems in the capital punishment process and the refusal to undertake any meaningful attempts at reform.⁵⁴⁴ Justice Blackmun, who voted in *Furman v. Georgia* to uphold the death penalty, eventually concluded that the death penalty could not be constitutionally administered because “the Court has ‘erected unprecedented and unwarranted barriers’ to the federal judiciary’s review of the constitutional claims of capital defendants.”⁵⁴⁵

⁵⁴² *Id.*

⁵⁴³ Carol S. Stieker and Jordan M. Stieker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 367, 410 (2010), referencing Samuel R. Gross and Barbara O’Brien, *Frequency and Predictors of Wrongful Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. Empir. Legal Studies 927 (2008). The title of the Stieker’s article is taken from Justice Blackmun’s powerful statement, “From this day forward, I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

⁵⁴⁴ AM. LAW INST., REPORT OF THE COUNSEL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009).

⁵⁴⁵ *Callins v. Collins*, *supra*, p. 1158.

This chapter completes the development of procedural default and abuse of the writ jurisprudence through the Rehnquist Court's judicial measures to restrict federal habeas corpus review of State convictions.⁵⁴⁶ Justice Blackmun's pessimism that the Court would ever achieve fairness and reliability in the administration of capital punishment grew from the Court's restriction of the power of federal courts to correct unjust convictions, as outlined in the cases discussed in this chapter. The best argument against the Antiterrorism and Effective Death Penalty Act (AEDPA) was that the Rehnquist Court had already accomplished habeas corpus reform without the need for Congressional action. Cornell Professor John Blume noted, "by the time Congress finally passed habeas 'reform' legislation, something it in all likelihood, could not have achieved without the help of Timothy McVeigh, the Supreme Court had dramatically reshaped the writ of habeas corpus."⁵⁴⁷

Just as the Rehnquist Court's restrictions of habeas corpus review drove Justice Blackmun to reject the constitutionality of the death penalty, even more extreme restrictions Congress enacted in AEDPA drove the American Law Institute to its decision to omit capital punishment from its Model Penal Code:

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Antiterrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.⁵⁴⁸

The authors discuss AEDPA's restrictions on federal habeas corpus relief in a separate chapter for multiple reasons. First, by all accounts, AEDPA is a poorly drafted piece of legislation, and introduces concepts and restrictions that are foreign to traditional habeas corpus jurisprudence.⁵⁴⁹ It may be somewhat less confusing to discuss those provisions separately. Second, there remain rare circumstances under which a prisoner seeking federal habeas can still receive traditional, plenary habeas corpus review, notwithstanding AEDPA's substantial

⁵⁴⁶ The evolution of the Court's jurisprudence on evidentiary hearing is discussed in Chapter 7, Fact Development in Postconviction Proceedings. AEDPA imposes substantial new limits on the admission and consideration of evidence, and limits the habeas remedy in other significant ways, as discussed in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

⁵⁴⁷ John H. Blume, *AEDPA: The Hype and the 'Bite,'* 91 CORNELL L. REV. 259, 270 (2006), citing Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How To Fix It*, 33 CONN. L. REV. 919, 923 (2001).

⁵⁴⁸ Stieker & Stieker, *No More Tinkering*, *supra* n. 38, p. 411.

⁵⁴⁹ Professor Larry Yackle observed, "AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar. Larry Yackle, *Federal Courts: Habeas Corpus* 57 (2003).

limitations on the habeas remedy. Further, while principles governing abuse of the writ, evidentiary hearings, and standards for issuing the habeas remedy are expressly modified in AEDPA, others, such as procedural bar, are completely omitted, and largely unaffected by AEDPA. Finally, the cases and principles discussed in Chapters 1-7 are relevant to the interpretation AEDPA's sometimes confusing and vague language.

CHAPTER 6: RETROACTIVITY

The procedural challenges discussed in earlier chapters often arise when an incarcerated individual discovers the facts supporting constitutional claims too late to raise them in state court. New claims can also emerge when the Supreme Court issues a decision that creates or clarifies a constitutional right—thereby giving prisoners convicted in violation of that right new grounds for appeal. Notable examples include *Gideon v. Wainwright*⁵⁵⁰ (requiring states to appoint counsel for indigent defendants), *Duren v. Missouri*⁵⁵¹ (finding the exclusion of women from juries unconstitutional under the Equal Protection Clause), and more recently, *Ramos v. Louisiana*⁵⁵² (holding non-unanimous jury convictions violate the Sixth Amendment). Each of these rulings generated hundreds if not thousands of potential constitutional claims—often from prisoners whose appeals had already been denied or who had never raised the claims, as it would have been futile at the time. Federal courts thus face the dual challenge of enforcing constitutional principles while respecting state court adjudications.

When should a change or clarification of the law apply to cases that have already become final? Whether a court ruling applies retroactively or only prospectively impacts the number of individuals who may benefit from the decision. Consider the Supreme Court tax ruling in which Justice Scalia noted that the concept of retroactivity in judicial decisions is inconsistent with the principle of “the Judicial Power” as established in Article III, § 1, Clause 1 of the U.S. Constitution.⁴ “Since the Constitution does not change from year to year; . . . the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue in *Scheiner* (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to ‘apply’ that decision needs no further attention.”⁵⁵³ In a habeas corpus context, however, Justice Scalia concurred with the view that “[t]he ‘costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.”⁵⁵⁴

This question has significant practical implications. After *Gideon*, nearly all prisoners who had pled guilty or been tried without counsel were entitled to new trials. Similarly, *Duren* opened the door for Missouri prisoners convicted by juries excluding women to challenge their verdicts. On the other hand, very few Louisiana prisoners were able to challenge convictions imposed by

⁵⁵⁰ 372 U.S. 335 (1963).

⁵⁵¹ 439 U.S. 357 (1979).

⁵⁵² 590 U.S. 83 (2020).

⁵⁵³ *American Trucking Associations, Inc., v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in result), citing *American Trucking Association v. Scheiner*, 483 U.S. 266 (1987).

⁵⁵⁴ *Teague v. Lane*, 489 U.S. 288, 310 (1989).

non-unanimous juries in violation of *Ramos v. Louisiana*.⁵⁵⁵ The Supreme Court's approach to retroactivity has evolved over time, and understanding its varying doctrines is essential, as not all states have adopted the Court's more restrictive retroactivity rules.

The cases in this section contemplate the issue of retroactivity in various time frames. As the term implies, the issue of retroactivity refers to whether the rule of a new opinion from the Supreme Court will be applied to cases that have already been decided, or events that have already happened. Identifying the various time frames can be as complicated as conjugating Latin verb tenses. For example, when the Supreme Court decided *Mapp v. Ohio*⁵⁵⁶ protecting certain Fourth Amendment rights against state action, it might have chosen to apply it retroactively (or retrospectively) to all cases, regardless of when the search occurred, or to searches conducted after *Mapp* was decided, or to trials that occurred after *Mapp*. The decision might also be applied *prospectively* only, i.e., to court rulings or to convictions handed down after the date that *Mapp* was decided. One could make a logical argument for any of these, beginning with Justice Scalia's observation noted above that the Court did not change the Constitution, so the search was either lawful or it was not. The argument could also be made that since the Fourth Amendment governs police conduct, it would not be fair to the police to apply *Mapp* to any search that had already occurred. Unquestionably the new standard will apply to *some* cases, but which? The answer depends on the same balancing act discussed throughout this book: how does the decision on retroactivity serve the balance between finality and fairness, and which of those is more important?

I. *Linkletter v. Walker*'s "Clear Break with Precedent" Standard

The Supreme Court addressed retroactivity in *Linkletter v. Walker*.⁵⁵⁷ A jury convicted Linkletter of burglary in Louisiana in 1959 based on evidence obtained through a warrantless search. At the time, the governing Supreme Court case, *Wolf v. Colorado*, held that the Fourteenth Amendment did not require states to apply the Fourth Amendment's exclusionary rule. However, in 1961, the Supreme Court overruled *Wolf* in *Mapp v. Ohio* and extended the exclusionary rule to the states. Linkletter, whose conviction was finalized before *Mapp*, filed a habeas corpus petition arguing that his conviction violated the Fourth Amendment as interpreted in *Mapp*. The Court granted certiorari to address whether *Mapp* applied retrospectively. Subsequent Court decisions use the term "retroactive" when discussing this issue. They refer to the same issues: will the Court's current decision be applied to decisions already made in cases that are pending or already final?

The Court acknowledged that, under common law principles, judges declare existing law; they do not create new law. Citing Blackstone, the Court noted that judges interpret and expound existing principles, and do not pronounce new rules. The reality is more complex when interpreting

⁵⁵⁵ See *Edwards v. Vannoy*, 593 U.S. 255 (2021).

⁵⁵⁶ 367 U.S. 643 (1961).

⁵⁵⁷ 381 U.S. 618 (1965).

the Constitution: when courts overrule precedent, they effectively make new law, invalidating prior decisions deemed incorrect. It is interesting, though, that the issue in *Linkletter* was not purely a question of interpreting the Fourth Amendment; rather, the Court was deciding whether to apply the Court-made exclusionary rule of *Weeks v. United States*⁵⁵⁸ to the states through the Fourteenth Amendment Due Process Clause.

The *Linkletter* Court reviewed the history of retroactive and prospective application of judicial decisions and concluded: “[T]he Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, ‘We think the federal constitution has no voice upon the subject.’”⁵⁵⁹ The Court then articulated principles that it would follow to determine whether a decision should apply retroactively.

LINKLETTER V. WALKER

MR. JUSTICE CLARK delivered the opinion of the Court.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), we held that the exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment. In so doing we overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), to the extent that it failed to apply the exclusionary rule to the States. This case presents the question of whether this requirement operates retrospectively upon cases finally decided in the period prior to *Mapp*. The Court of Appeals for the Fifth Circuit held that it did not, 323 F.2d 11, and we granted certiorari in order to settle what has become a most troublesome question in the administration of justice. *377 U.S. 930*. We agree with the Court of Appeals.

* * * *

Initially we must consider the term "retrospective" for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the court. However, we are not here concerned with pure prospectivity since we applied the rule announced in *Mapp* to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered. Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final⁵⁶⁰ before rendition of our opinion.

I.

⁵⁵⁸ 232 U.S. 383 (1914).

⁵⁵⁹ 232 U.S. 383 (1914).

⁵⁶⁰ By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*.

* * * *

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than "disparaging" the Amendment we but apply the wisdom of Justice Holmes that "the life of the law has not been logic: it has been experience." Holmes, *The Common Law* 5 (Howe ed. 1963).⁵⁶¹

II.

Since *Weeks v. United States*, 232 U.S. 383 (1914), this Court has adhered to the rule that evidence seized by federal officers in violation of the Fourth Amendment is not admissible at trial in a federal court. In 1949 in *Wolf v. Colorado*, *supra*,² the Court decided that while the right to privacy -- "the core of the Fourth Amendment" -- was such a basic right as to be implicit in "the concept of ordered liberty" and thus enforceable against the States through the Fourteenth Amendment, "the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution." At 27-28.

* * * *

III.

We believe that the existence of the *Wolf* doctrine prior to *Mapp* is "an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist. v. Baxter State Bank*, *supra*, at 374. The thousands of cases that were finally decided on *Wolf* cannot be obliterated. The "particular conduct, private and official," must be considered. Here "prior determinations deemed to have finality and acted upon accordingly" have "become vested." And finally, "public policy in the light of the nature both of the . . . [*Wolf* doctrine] and of its previous application" must be given its proper weight. *Ibid*. In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*.

It is clear that the *Wolf* Court, once it had found the Fourth Amendment's unreasonable Search and Seizure Clause applicable to the States through the Due Process Clause of the Fourteenth Amendment, turned its attention to whether the exclusionary rule was included within

⁵⁶¹ See *Mapp v. Ohio*, 367 U.S. 643, 661-662 (1961) (concurring opinion of BLACK, J.).

the command of the Fourth Amendment. This was decided in the negative. It is clear that based upon the factual considerations heretofore discussed the *Wolf* Court then concluded that it was not necessary to the enforcement of the Fourth Amendment for the exclusionary rule to be extended to the States as a requirement of due process. *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. See, e. g., *Rea v. United States*, *supra*. We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.

It is true that both the accused and the States relied upon *Wolf*. Indeed, *Wolf* and *Irvine* each pointed the way for the victims of illegal searches to seek reparation for the violation of their privacy. Some pursued the same. See *Monroe v. Pape*, 365 U.S. 167 (1961). In addition, in *Irvine*, a flag in a concurring opinion warned that *Wolf* was in stormy weather. On the other hand, the States relied on *Wolf* and followed its command. Final judgments of conviction were entered prior to *Mapp*. Again and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas, [fn 18 omitted] notably that of coerced confessions, and that the *Mapp* exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, *Fay v. Noia*, 372 U.S. 391 (1963), and *Reck v. Pate*, 367 U.S. 433 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See *Brown v. Mississippi*, 297 U.S. 278 (1936). There was no question of retrospective operation involved in either case. Moreover, coerced confessions are excluded from evidence because of "a complex of values," *Blackburn v. Alabama*, 361 U.S. 199 (1960), including

"the likelihood that the confession is untrue"; "the preservation of the individual's freedom of will"; and "the abhorrence of society to the use of involuntary confessions." At 207. Cited with approval in *Jackson v. Denno*, 378 U.S. 368, 385-386 (1964). But there is no likelihood of unreliability or coercion present in a search-and-seizure case. Rather than being abhorrent at the time of seizure in this case, the use in state trials of illegally seized evidence had been specifically authorized by this Court in *Wolf*. [fn 19 omitted] Furthermore, in *Noia*, the confession was admittedly coerced and the sole issue involved the availability of federal habeas corpus in a state conviction, where state post-conviction remedies had been exhausted but the accused had failed to appeal from his original conviction. Nothing of that kind is involved here and this holding has no bearing whatever on *Noia* or *Reck*, for that matter. Finally, in each of the three areas in which we have applied our rule retrospectively⁵⁶² the principle that we applied went to the fairness of the trial -- the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome.

Nor can we accept the contention of petitioner that the *Mapp* rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in *Mapp* has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date. In the light of the cases of this Court this is the better cutoff time. See *United States v. Schooner Peggy*, *supra*.

All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the *Mapp* rule requires retrospective application.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court of Appeals held, and this Court now concedes, that the petitioner Linkletter is presently in prison serving a nine-year sentence at hard labor for burglary under a 1959 Louisiana State Court conviction obtained by use of evidence unreasonably seized in violation of the Fourth and Fourteenth Amendments. On June 19, 1961, we decided *Mapp v. Ohio*, 367 U.S. 643, in which the Court specifically held that "all evidence obtained by searches and seizures in violation

⁵⁶² In *Griffin v. Illinois*, [351 U.S. 12 (1956)], the appeal which was denied because of lack of funds was "an integral part of the [State's] trial system for finally adjudicating the guilt or innocence of a defendant." At 18. Precluding an appeal because of inability to pay was analogized to denying the poor a fair trial. In *Gideon v. Wainwright*, [372 U.S. 335 (1963)], we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared rights adequately. Because of this the judgment lacked reliability. In *Jackson v. Denno*, [378 U.S. 368 (1964)], the holding went to the basis of fair hearing and trial because the procedural apparatus never assured the defendant a fair determination of voluntariness. In addition, MR. JUSTICE WHITE expressed grave doubts regarding the ability of the jury to disregard a confession found to be involuntary if the question of guilt was uncertain.

of the Constitution is, by that same authority, inadmissible in a state court." 367 U.S., at 655. Stating that this Court had previously held in *Wolf v. Colorado*, 338 U.S. 25, that the Fourth Amendment was applicable to the States through the Due Process Clause of the Fourteenth Amendment, this Court in *Mapp* went on to add:

"In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." 367 U.S., at 656.

Despite the Court's resounding promises throughout the *Mapp* opinion that convictions based on such "unconstitutional evidence" would "find no sanction in the judgments of the courts," Linkletter, convicted in the state court by use of "unconstitutional evidence," is today denied relief by the judgment of this Court because his conviction became "final" before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961.

Miss Mapp's Ohio offense was committed May 23, 1957; Linkletter's Louisiana offense occurred more than a year later -- August 16, 1958. Linkletter was tried in Louisiana, convicted, the State Supreme Court affirmed, and a rehearing was denied March 21, 1960, all within about one year and seven months after his offense was committed. The Ohio Supreme Court affirmed Miss Mapp's conviction March 23, 1960, approximately two years and 10 months after her offense. Thus, had the Ohio courts proceeded with the same expedition as those in Louisiana, or had the Louisiana courts proceeded as slowly as the Ohio courts, Linkletter's conviction would not have been "finally" decided within the Court's definition of "finally" until within about 10 days of the time Miss Mapp's case was decided in this Court -- which would have given Linkletter ample time to petition this Court for virtually automatic relief on direct review after the *Mapp* case was decided. The Court offers no defense based on any known principle of justice for discriminating among defendants who were similarly convicted by use of evidence unconstitutionally seized. It certainly cannot do so as between Linkletter and Miss Mapp. The crime with which she was charged took place more than a year before his, yet the decision today seems to rest on the fanciful concept that the Fourth Amendment protected her 1957 offense against conviction by use of unconstitutional evidence but denied its protection to Linkletter for his 1958 offense. In making this ruling the Court assumes for itself the virtue of acting in harmony with a comment of Justice Holmes that "the life of the law has not been logic: it has been experience."⁵⁶³ Justice Holmes was not there talking about the Constitution; he was talking about the evolving judge-made law of England and of some of our States whose judges are allowed to follow in the common law tradition. It should be remembered in this connection that no member of this Court has ever more seriously

⁵⁶³ Holmes, *The Common Law* 5 (Howe ed. 1963).

criticized it than did Justice Holmes for reading its own predilections into the "vague contours" of the Due Process Clause. [fn 2 omitted] But quite apart from that, there is no experience of the past that justifies a new Court-made rule to perpetrate a grossly invidious and unfair discrimination against Linkletter simply because he happened to be prosecuted in a State that was evidently well up with its criminal court docket. If this discrimination can be excused at all it is not because of experience but because of logic -- sterile and formal at that -- not, according to Justice Holmes, the most dependable guide in lawmaking.

When we get beyond the way the new rule works as between people situated like Linkletter and Miss Mapp, the new contrivance stands no better. I say "new" because the Court admits, as it must, that "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." *Ante*, p. 628. And the Court also refers to a number of cases in which that practice has been followed. For example, in *Griffin v. Illinois*, 351 U.S. 12, where we announced that a pauper could not be denied the right to appeal because of his indigency, a suggestion was made in a concurring opinion that the Court should apply its new rule to future cases only. *Id.*, at 25-26. However, in 1958 this Court did apply the Griffin rule to a conviction obtained in 1935, over the dissents of two Justices who said that the Griffin case decided in 1956 should not determine the constitutionality of the petitioner's 1935 conviction. *Eskridge v. Washington*, 357 U.S. 214.

* * * *

The plain facts here are that the Court's opinion cuts off many defendants who are now in jail from any hope of relief from unconstitutional convictions. The opinion today also beats a timid retreat from the wholesome and refreshing principles announced in *Noia*. No State should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials. Careful analysis of the Court's opinion shows that it rests on the premise that a State's assumed interest in sustaining convictions obtained under the old, repudiated rule outweighs the interests both of that State and of the individuals convicted in having wrongful convictions set aside. It certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time. No words can obscure the simple fact that the promises of *Mapp* and *Noia* are to a great extent broken by the decision here. I would reverse.

Questions and Comments:

1. **“Future cases”**: The question of retroactivity involves multiple stages of a case's timeline. Justice Black argued that refusing to apply *Mapp* to *Linkletter* was unfair because the search in *Linkletter* occurred after the search in *Mapp*, creating inequity between similarly situated petitioners. The majority, however, emphasized the litigation status of each case

to justify the line drawn. When the Supreme Court decides an issue, it typically applies the new rule to the parties before the Court and to all future cases. But what defines a "future case"?

- Does it include cases pending but not yet decided?
- Cases where charges have been filed but trials have not yet occurred?
- Cases where the trial has occurred but the appeal is ongoing?
- Cases where appeals are final but certiorari could still be granted?
- Cases with finalized convictions after all appeals have been denied?

What factors should the Court consider in deciding how to apply a new precedent retroactively?

2. **Retrospective applications:** The Court distinguished *Linkletter* from other cases in which retroactive application was granted, such as:

- *Fay v. Noia* (involuntary confession),⁵⁶⁴ and *Griffin v. Illinois* (right to waiver of filing fees for indigent prisoners).⁵⁶⁵
- *Gideon v. Wainwright* (right to counsel in felony prosecutions),⁵⁶⁶ and *Jackson v. Denno* (right to hearing on voluntariness of confession).⁵⁶⁷

These cases announced new rules, but were nevertheless used to vacate final convictions. What common thread connects these cases and differentiates them from *Linkletter*? Under *Linkletter*, the Court would apply a new rule based on its consideration of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Solem v. Stumes*.⁵⁶⁸

3. **Controlled by existing law? Does the reliability of the petitioner's conviction have a bearing on application of the *Linkletter* standard? Consider the involuntary confession cases:**

- In *Brown v. Mississippi*,⁵⁶⁹ the Court prohibited the use of confessions obtained

⁵⁶⁴ 372 U.S. 391 (1963).

⁵⁶⁵ 351 U.S. 12 (1956).

⁵⁶⁶ 372 U.S. 335 (1963).

⁵⁶⁷ 378 U.S. 368 (1964).

⁵⁶⁸ 465 U.S. 638, 643 (1984) (quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)).

⁵⁶⁹ 297 U.S. 278 (1936).

through physical violence, but subsequent cases like *Ashcraft v. Tennessee*,⁵⁷⁰ and *Watts v. Indiana*,⁵⁷¹ followed *Brown* in spite of arguably different facts. Is the rule of *Brown* prohibiting police from beating confessions out of people sufficiently specific to also prohibit other forms of coercion?

How do these cases illustrate the scope of the rule established in *Brown*? Is the prohibition on physical violence specific enough to encompass nonviolent coercion? Did *Watts* and *Ashcraft* create new obligations for the states, or were they logical extensions of *Brown*?

4. **Reliance on prior decisions and burdens on state courts:** The Court noted that its decision in *Wolf v. Colorado* served as “an operative fact and may have consequences which cannot justly be ignored.” Why was *Wolf* treated as significant despite being overruled by *Mapp v. Ohio*? Did reliance on *Wolf* influence the Court's retroactivity analysis in *Mapp*? Imagine that the Court had decided the case differently, so that every prisoner convicted on evidence obtained in a search could now claim that such evidence should have been suppressed. How many cases would have to be reopened? What would be the cost to the states of having to reopen all of them to litigate the legality of the search? The Court deemed the cost was worth the candle in cases like *Gideon v. Wainwright*, which established a bedrock principle that counsel is essential to a fair trial, and *Brown v. Mississippi*, condemning the use of torture to obtain confessions. How is the seizure of physical evidence with probable cause or a warrant different from these principles? The majority in *Linkletter* emphasized comity and finality, and considered economic and social costs to the states. The dissent emphasized justice and the constitutional rights of the individual. Both make valid points. How will the Court strike a balance in future cases involving an issue of retroactivity?
5. **Clear break with precedent:** *Linkletter*'s very first sentence observed that *Mapp v. Ohio* overruled *Wolf v. Colorado* in its decision extending the exclusionary rule to the states through the Fourteenth Amendment's Due Process Clause. Justice Black's dissent provides important meaning to the majority opinion, pointing out that this issue must be addressed only when the Court announces a rule that is “new.” The fact that *Mapp* overruled *Wolf* required the Court to acknowledge that there were many state judgments handed down in violation of the Fourteenth Amendment in reliance on *Wolf*. Because the retroactivity issue arises only when there is a clear break with precedent, there would be no need to determine whether cases such as *Ashcraft v. Tennessee* and *Watts v. Indiana* are controlled by the Court's decision in *Brown v. Mississippi* finding that it violates the Fourteenth Amendment to extract an involuntary statement from a suspect. What is the practical effect of the Court's retroactivity analysis? Can states disregard a Supreme Court decision if it is even arguably distinguishable from precedent, or must it apply precedent to all similar cases? What is the duty of state courts under *Linkletter*?
6. **Is fairness relevant?** What was the primary concern of the dissenting justices in *Linkletter*? Is it ever appropriate to allow an unconstitutional conviction to stand due to the

⁵⁷⁰ 322 U.S. 143 (1944).

⁵⁷¹ 338 U.S. 49 (1949).

challenges posed by retroactive application of a new rule? Can a rule ever truly be “new” if it is based on interpreting a document—the Constitution—that has existed for over two centuries?

II. *Teague v. Lane*’s “Dictated by Precedent” Standard

The retroactivity issue came to a head in the mid-1980’s with the Supreme Court’s decision in *Batson v. Kentucky*,⁵⁷² which changed the burden of proof that a defendant would have to meet to prevent a prosecutor’s racially discriminatory use of peremptory challenges. A previous decision, *Swain v. Alabama*,⁵⁷³ acknowledged that “a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”⁵⁷⁴ However, that decision also saddled criminal defendants with a crippling burden to prove that “the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.”⁵⁷⁵

Batson v. Kentucky retained *Swain*’s holding condemning race discrimination but overruled its holding with respect to the burden of proof. The Court adopted a standard providing that “a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”⁵⁷⁶ If the court is satisfied that the defense has made a prima facie showing of discrimination, “the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”⁵⁷⁷ The first case in which the Court examined whether *Batson* would be applied retroactively was *Allen v. Hardy*,⁵⁷⁸ involving a habeas petitioner who was convicted in a 1978 trial in which the prosecutor used a disproportionate number of peremptory strikes to exclude Black jurors. Using the *Linkletter* standard, the Court concluded that “the factors concerning reliance on the old rule and the effect of retroactive application on the administration of justice

⁵⁷² 476 US 79 (1986).

⁵⁷³ 380 US 202 (1965).

⁵⁷⁴ *Id.* at 203-204, citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

⁵⁷⁵ *Id.* at 837.

⁵⁷⁶ *Batson*, at 96.

⁵⁷⁷ *Id.* at 97.

⁵⁷⁸ 478 U.S. 255 (1986) (per curiam).

weigh heavily in favor of nonretroactive effect.”⁵⁷⁹ By “retroactive effect,” the Court specified that it would not be applied to judgments that were final when the opinion in *Batson* was announced.⁵⁸⁰

The dissent in *Allen v. Hardy* criticized the Court for deciding the issue summarily on Allen’s certiorari petition, without briefing and oral argument. Justice Marshall argued that the Court should have granted certiorari because the need for further briefing was compelling, and “the majority’s readiness to act on its own uninformed assumptions, disturbing.”⁵⁸¹

Two terms later, the Court granted certiorari in *Teague v. Lane* to reconsider the issue of retroactivity in the case of a habeas petitioner who argued that the prosecutor’s use of peremptory challenges to eliminate potential Black jurors and empanel an all-white jury violated both his Fourteenth Amendment right to equal protection of the law and his Sixth Amendment right to a jury made up of a fair cross-section of the community. The Illinois courts denied his claim, and he petitioned for federal habeas relief. The United States District Court, though sympathetic to Teague’s claim, denied relief. While Teague’s case was pending on appeal from the denial of his habeas petition, the Supreme Court decided *Batson v. Kentucky*. The Court of Appeals was divided over whether Teague had a viable Sixth Amendment fair-cross-section claim based on *Batson*’s analysis, but denied relief. The Court granted certiorari to address the retroactivity issues implicit in Teague’s claim.

TEAGUE V. LANE

JUSTICE O’CONNOR announced the judgment of the Court.

In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule. See, e. g., *Brown v. Louisiana*, 447 U.S. 323 (1980) (addressing retroactivity of *Burch v. Louisiana*, 441 U.S. 130 (1979)); *Robinson v. Neil*, 409 U.S. 505 (1973) (addressing retroactivity of *Waller v. Florida*, 397 U.S. 387 (1970)); *Stovall v. Denno*, 388 U.S. 293 (1967) (addressing retroactivity of *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967)); *Tehan v. Shott*, 382 U.S. 406 (1966) (addressing retroactivity of *Griffin v. California*, 380 U.S. 609 (1965)). In several cases, however, the Court has addressed the retroactivity question in the very case announcing the new rule. See *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972); *Witherspoon v. Illinois*, 391 U.S. 510, 523, n. 22 (1968). These two lines of cases do not have a unifying theme,

⁵⁷⁹ *Id.* at 260.

⁵⁸⁰ *Id.* at 258. The Court explained that “final” means that “the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in” *Batson v. Kentucky*.” *Id.* at n. 1.

⁵⁸¹ *Id.* at 264 (Marshall, J., dissenting).

and we think it is time to clarify how the question of retroactivity should be resolved for cases on collateral review.

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In our view, the question "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision." Mishkin, *Foreword: the High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 64 (1965). Cf. *Bowen v. United States*, 422 U.S. 916, 920 (1975) (when "issues of both retroactivity and application of constitutional doctrine are raised," the retroactivity issue should be decided first). Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue. This retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification.

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. See, e. g., *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. See generally *Truesdale v. Aiken*, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting). Given the strong language in *Taylor* and our statement in *Akins v. Texas*, 325 U.S. 398, 403 (1945), that "[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury," application of the fair cross section requirement to the petit jury would be a new rule. [fn 1 omitted].

Not all new rules have been uniformly treated for retroactivity purposes. Nearly a quarter of a century ago, in *Linkletter*, the Court attempted to set some standards by which to determine the retroactivity of new rules. The question in *Linkletter*, was whether *Mapp v. Ohio*, which made the exclusionary rule applicable to the States, should be applied retroactively to cases on collateral review. The Court determined that the retroactivity of *Mapp* should be determined by examining the purpose of the exclusionary rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the exclusionary rule. Using that standard, the Court held that *Mapp* would only apply to trials commencing after that case was decided. 381 U.S., at 636-640.

The *Linkletter* retroactivity standard has not led to consistent results. Instead, it has been used to limit application of certain new rules to cases on direct review, other new rules only to the

defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced. See *Desist v. United States*, 394 U.S. 244, 256-257 (1969) (Harlan, J., dissenting) (citing examples). Not surprisingly, commentators have "had a veritable field day" with the *Linkletter* standard, with much of the discussion being "more than mildly negative." Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1558, and n. 3 (1975) (citing sources).

* * * *

Dissatisfied with the *Linkletter* standard, Justice Harlan advocated a different approach to retroactivity. He argued that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review. See *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion concurring in judgments in part and dissenting in part); *Desist*, 394 U.S., at 256 (dissenting opinion).

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), we rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S., at 322. We gave two reasons for our decision. First, because we can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." *Id.*, at 323. We quoted approvingly from Justice Harlan's separate opinion in *Mackey*, *supra*, at 679:

"If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." 479 U.S., at 323.

Second, because "selective application of new rules violates the principle of treating similarly situated defendants the same," we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final. *Id.*, at 323-324 (citing *Desist*, *supra*, at 258-259 (Harlan, J., dissenting)). Although new rules that constituted clear breaks with the past generally were not given retroactive effect under the *Linkletter* standard, we held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S., at 328.

* * * *

B

Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. He argued that retroactivity for cases on collateral review could "be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Mackey*, 401 U.S., at 682 (opinion concurring in judgments in part and dissenting in part). With regard to the nature of habeas corpus, Justice Harlan wrote:

"Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed." *Id.* at 682-683.

Given the "broad scope of constitutional issues cognizable on habeas," Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Id.*, at 689. As he had explained in *Desist*, "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." 394 U.S., at 262-263. See also *Stumes*, 465 U.S., at 653 (Powell, J., concurring in judgment) ("Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark'") (citation omitted).

Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Mackey*, 401 U.S., at 692. Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.*, at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

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We agree with Justice Harlan's description of the function of habeas corpus. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause for the default and actual prejudice resulting therefrom. See *Wainwright v. Sykes*, 433 U.S., at 87-91. We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, see *Engle v. Isaac*, 456 U.S., at 129, or on the State's interest in the enforcement of its procedural rule, see *Murray v. Carrier*, 477 U.S. 478, 493-496 (1986).

* * * *

We find these criticisms to be persuasive, and we now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

V

Petitioner's conviction became final in 1983. As a result, the rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.

The first exception suggested by Justice Harlan -- that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Mackey*, 401 U.S., at 692 (opinion concurring in judgments in part and dissenting in part) -- is not relevant here. Application of the fair cross section requirement to the petit jury would not accord constitutional protection to any primary activity whatsoever.

The second exception suggested by Justice Harlan -- that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *id.*, at 693 (quoting *Palko*, 302 U.S., at 325) -- we apply with a modification. The language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure:

"Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly

demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime." 401 U.S., at 693-694 (emphasis added).

In *Desist*, Justice Harlan had reasoned that one of the two principal functions of habeas corpus was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," and concluded "from this that all 'new' constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas." 394 U.S., at 262. In *Mackey*, Justice Harlan gave three reasons for shifting to the less defined *Palko* approach. First, he observed that recent precedent, particularly *Kaufman v. United States*, 394 U.S. 217 (1969) (permitting Fourth Amendment claims to be raised on collateral review), led "ineluctably . . . to the conclusion that it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged." 401 U.S., at 694. Second, he noted that cases such as *Coleman v. Alabama*, 399 U.S. 1 (1970) (invalidating lineup procedures in the absence of counsel), gave him reason to doubt the marginal effectiveness of claimed improvements in factfinding. 401 U.S., at 694-695. Third, he found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values." *Id.*, at 695.

We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial. . . . Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.

Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted). [fn 2 omitted]

An examination of our decision in *Taylor* applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is "implicit in the concept of ordered liberty." The requirement that the jury venire be composed of a fair cross section of the community is based on the role of the jury in our system. Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment

of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S., at 530. But as we stated in *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975), which held that *Taylor* was not to be given retroactive effect, the fair cross section requirement "[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the *Sixth Amendment*." Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second exception we have articulated.

Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. In the words of Justice Brennan, such an inequitable result would be "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S., at 301. But the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'" *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in judgment) (quoting *Desist*, 394 U.S., at 255 (Douglas, J., dissenting)). See also *Fuller v. Alaska*, 393 U.S. 80, 82 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith*. "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." 479 U.S., at 327-328.

Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

For the reasons set forth above, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins as to Part I, concurring in part and concurring in the judgment.

I

The plurality wrongly resuscitates Justice Harlan's early view, indicating that the only procedural errors deserving correction on collateral review are those that undermine "an accurate determination of innocence or guilt" See *ante*, at 313. I cannot agree that it is "unnecessarily anachronistic," *ante*, at 312, to issue a writ of habeas corpus to a petitioner convicted in a manner that violates fundamental principles of liberty. Furthermore, a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings. Even when assessing errors at the guilt phase of a trial, factual innocence is too capricious a factor by which to determine if a procedural change is sufficiently "bedrock" or "watershed" to justify application of the fundamental fairness exception. See *ante*, at 311. In contrast, given our century-old proclamation that the Constitution does not allow exclusion of jurors because of race, *Strauder v. West Virginia*, 100 U.S. 303 (1880), a rule promoting selection of juries free from racial bias clearly implicates concerns of fundamental fairness.

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today a plurality of this Court, without benefit of briefing and oral argument, adopts a novel threshold test for federal review of state criminal convictions on habeas corpus. It does so without regard for -- indeed, without even mentioning -- our contrary decisions over the past 35 years delineating the broad scope of habeas relief. The plurality further appears oblivious to the importance we have consistently accorded the principle of *stare decisis* in nonconstitutional cases. Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review. In my view, the plurality's "blind adherence to the principle of treating like cases alike" amounts to "letting the tail wag the dog" when it stymies the resolution of substantial and unheralded constitutional questions. *Griffith v. Kentucky*, 479 U.S. 314, 332 (1987) (White, J., dissenting). Because I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ, particularly in the absence of any discussion of these momentous changes by the parties or the lower courts, I dissent.

Questions and Comments:

1. **New Rules, uniformity, and collateral review:** *Teague v. Lane* marked a significant shift from the *Linkletter* approach, reducing retroactivity questions to just two timeframes:
 - A "new" rule of constitutional law applies to all cases not yet final on direct review at the time the decision is announced.

- A “new” rule does not apply to cases finalized before the decision, unless narrow exceptions apply. Finality is defined as the date when a writ of certiorari is denied on direct appeal or, if no petition is filed, the last day a timely petition for certiorari could have been filed.⁵⁸²

How does this definition of finality affect the duties of appellate counsel? The Court’s insistence on uniformity of treatment of cases on direct review enables appellants to monitor issues being raised on certiorari to the Supreme Court, and injecting those issues into their cases so that they will benefit from a favorable ruling in that other case. For example, in *Walton v. Caspari*⁵⁸³ the habeas petitioner’s direct appeal became final on April 19, 1986, the last day on which a timely petition for writ of certiorari could have been filed. Because *Batson v. Kentucky*⁵⁸⁴ was filed April 30, 1986, the court denied him the benefit of *Batson*’s new rule amending the burden of proof for establishing an equal protection clause violation by the prosecutor’s racially discriminatory use of peremptory challenges. Had Walton petitioned for certiorari raising his *Batson* claim, his case would have remained “pending” on direct review, allowing him to benefit from *Batson*’s new standard. What lessons does this case teach about the benefits that might flow from filing certiorari petitions?

2. **“New Rule” defined:** While *Linkletter* considered the issue of retroactivity when a decision announced a rule that was a clear break with precedent, e.g., where a controlling decision is overruled, under *Teague*, a rule is “new” and nonretroactive unless it was “dictated by precedent existing at the time the defendant’s conviction became final.”⁵⁸⁵ The difference is stark; under *Linkletter*, a recent case would apply on collateral review if the law was already trending in that direction. Equally important, the Court could use habeas corpus cases to elucidate legal principles that are better developed on a postconviction record, such as claims of ineffective assistance of counsel or *Brady v. Maryland* violations, which often require evidence developed after a conviction becomes final. Under *Teague*, the definition of “new rule” leads to the denial of habeas relief in cases where only minor differences exist from prior precedent.
3. **The role of state courts in constitutional interpretation:** Dissenting and concurring justices in *Teague* raised concerns about the restrictive standard for retroactivity. Under *Linkletter*, decisions aligned with emerging legal trends could apply on collateral review. Under *Teague*, however, habeas relief is often denied to prisoners whose constitutional rights were violated but whose cases became final before the decisive precedent was announced. Does *Teague* discourage both federal habeas courts and state courts from recognizing logical extensions of constitutional law or emerging legal trends? Consider

⁵⁸² *Allen v. Hardy*, 478 U.S. 255 (1986).

⁵⁸³ 916 F.2d 1352 (8th Cir.1990).

⁵⁸⁴ 476 U.S. 79 (1986).

⁵⁸⁵ 489 U.S. at 301.

Justice O'Connor's dissent in *Roper v. Simmons*,⁵⁸⁶ expressing displeasure with "the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989)." Is it desirable or undesirable for state courts to anticipate trends in federal law when deciding a prisoner's postconviction claims?

4. **Retroactivity as a threshold issue:** *Teague* established retroactivity as a threshold question, encouraging state attorneys to argue that any habeas claim not clearly governed by existing Supreme Court precedent requires a "new rule" and is therefore barred. What burden does this place on habeas petitioners when framing legal claims in their petitions? Does this approach limit petitioners' ability to pursue discovery, evidentiary hearings, or further fact development if the state can convince the federal court that the prisoner's claim requires a new rule?
5. **Exceptions to non-retroactivity—power to punish:** *Teague* allows retroactive application of new rules creating substantive rights. Substantive rules are those that place certain primary, private conduct beyond the power of criminal law. For example:
 - *Penry v. Lynaugh*—deciding as a threshold issue that a rule banning execution of intellectually disabled persons would be retroactive.⁵⁸⁷
 - *Roper v. Simmons*—holding an Eighth Amendment ban on execution of juveniles to be retroactive.⁵⁸⁸
 - *Montgomery v. Louisiana*⁵⁸⁹—ruling that the *Miller v. Alabama*⁵⁹⁰ holding of 2012, that mandatory life sentences without parole should not apply to juveniles convicted of murder, should be applied retroactively.⁵⁹¹
6. **Exceptions to non-retroactivity—watershed rules:** *Teague* forbids the retroactive application of new procedural rules, e.g., rules that govern the investigation and trial of a case. It acknowledged an except for "watershed" rules or "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."⁵⁹² The Court has yet to find another example beyond *Gideon v. Wainwright* decisions that qualify "new procedures without which the likelihood of an accurate conviction is seriously

⁵⁸⁶ 543 U.S. 551, 593-594 (2005) (O'Connor, J., dissenting).

⁵⁸⁷ 492 U.S. 302 (1989).

⁵⁸⁸ 543 U.S. 551 (2005).

⁵⁸⁹ 577 U.S. 190 (2016).

⁵⁹⁰ 567 U.S. 460 (2012).

⁵⁹¹ 577 U.S. 190 (2016).

⁵⁹² *Teague*, *supra*, at 311, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

diminished.”⁵⁹³ Constituting a “watershed” or “bedrock” principle of justice, *Gideon v. Wainwright* incorporated the Sixth Amendment right to counsel into the Fourteenth Amendment Due Process Clause so that it could be applied against the States on habeas corpus. Justice Stevens, concurring, wrote that “factual innocence is too capricious a factor by which to determine if a procedural change is sufficiently “bedrock” or “watershed” to justify application of the fundamental fairness exception. *Schriro v. Summerlin*⁵⁹⁴ addressed whether *Ring v. Arizona*,⁵⁹⁵ which found that capital defendants have a Sixth Amendment right to jury determination of eligibility for the death penalty, applied retroactively to Summerlin, who under Arizona law was sentenced to death by a judge. The Court described a bedrock procedural rule as one intended to enhance the accuracy of a conviction or sentence by regulating how a defendant’s culpability is determined. Procedural rules are presumptively nonretroactive unless they qualify as “bedrock” or “watershed” principles. *Teague* cited *Gideon* as the only example of a procedural rule that met this “bedrock” standard. Could rules that expand the right to a jury trial, strengthen the right to confront and cross-examine witnesses, or increase protections against race discrimination qualify as bedrock principles? If these rules are procedural rather than substantive, do they meet the “bedrock” standard for retroactive application?

7. **Are procedures protecting the reliability of convictions “watershed rules?”** The Court has not found a case that satisfies the “watershed rule” retroactivity exception, but the dissenters in *Teague* suggested that race discrimination in jury selection could very well affect the reliability of proceedings. Another constitutional right recognized as affecting the reliability of a criminal judgment is the Sixth Amendment right to confront and cross-examine witnesses. Could *Crawford v. Washington*,⁵⁹⁶ which changed the standard for deciding Sixth Amendment Confrontation Clause violations, be considered a “bedrock procedural element”? How broadly or narrowly should this exception be interpreted?

III. *Teague*’s “New Rule” Approach: When Is an Outcome “Dictated by Precedent”?

Teague v. Lane provided states with a powerful defense to habeas petitions. Under *Teague*, if a petitioner relies on existing Supreme Court precedent but applies it to a somewhat novel or different fact pattern, the state can argue that granting relief would require establishing a “new rule” of constitutional law, which is barred by *Teague*’s anti-retroactivity doctrine. This section examines cases where the Court barred habeas claims that required a new rule to support relief.

⁵⁹³ *Teague* at 313.

⁵⁹⁴ 542 U.S. 348, 353 (2004).

⁵⁹⁵ 536 U.S. 584 (2002).

⁵⁹⁶ 541 U.S. 36 (2004).

In *Butler v. McKellar*,⁵⁹⁷ Horace Butler invoked his right to counsel during police interrogation, prompting officers to stop questioning him as required by *Edwards v. Arizona*. Later, however, the police resumed questioning Butler, asked him to waive his *Miranda* rights, and interrogated him about a different crime, leading to a confession. Under *Edwards*, only the suspect can reinitiate interrogation after invoking the right to counsel. Nonetheless, Arizona courts admitted Butler's confession and sentenced him to death, arguing that *Edwards* applied only when the interrogation involved the same crime, not a different one.

After Butler's direct appeal became final, the Supreme Court decided *Arizona v. Roberson*, which extended *Edwards* to prohibit police from reinitiating interrogation about any crime after a suspect invokes the right to counsel. While *Roberson* would have vindicated Butler's position, under *Teague*, the key question became whether *Roberson* was "dictated by" *Edwards* or whether it constituted a "new rule."

BUTLER V. MCKELLAR

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

* * * *

On the same day the court denied Butler's rehearing petitions, we handed down our decision in *Roberson*. We held in *Roberson* that the *Fifth Amendment* bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 48 U.S., at 682. On Butler's motion for reconsideration, the original Fourth Circuit panel considered Butler's new contention that *Roberson* requires suppression of his statements taken in the separate investigation of Lane's murder. Although the panel conceded that the substance of its prior conclusion "was cast into immediate and serious doubt" by our subsequent decision in *Roberson*, *Butler v. Aiken*, 864 F.2d 24, 25 (CA4 1988), it nevertheless determined that Butler was not entitled to the retroactive benefit of *Roberson*. According to the panel, the *Edwards-Roberson* limitations on police interrogation are only tangentially related to the truth-finding function. 864 F.2d, at 25. They are viewed most accurately as part of the prophylactic protection of the *Fifth Amendment* right to counsel created to be "guidelines" for the law enforcement profession. *Ibid.* (citing *Roberson*, *supra*, at 680-682). The interrogation of Butler, while unquestionably contrary to present "guidelines," was conducted in strict accordance with established law at the time. The panel, therefore, denied Butler's petition for rehearing. A majority of the Circuit judges denied, over a dissent, Butler's petition for a rehearing en banc. We granted certiorari, 490 U.S. 1045 (1989), and now affirm.

Last Term in *Penry v. Lynaugh*, 492 U.S. 302 (1989), we held that in both capital and noncapital cases, "new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." *Id.*, at 313 (citing *Teague v. Lane*, 489 U.S., at 311-313; see

⁵⁹⁷ 494 U.S. 407 (1990).

infra, at 415-416 (discussing the exceptions and their inapplicability to the instant case). Referring to *Teague*, we reiterated that, in general, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Penry*, 492 U.S., at 314. Put differently, and, indeed, more meaningfully for the majority of cases, a decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.*, at 314 (quoting *Teague*, *supra*, at 301) (emphasis in original).

A new decision that explicitly overrules an earlier holding obviously "breaks new ground" or "imposes a new obligation." In the vast majority of cases, however, where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult.

* * * *

Butler contends that *Roberson* did not establish a new rule and is, therefore, available to support his habeas petition. Butler argues that *Roberson* was merely an application of *Edwards* to a slightly different set of facts. Brief for Petitioner 9; Reply Brief for Petitioner 18. In support of his position, Butler points out that the majority had said that *Roberson's* case was directly controlled by *Edwards*. Brief for Petitioner 10. At oral argument Butler's counsel also pointed out that the *Roberson* opinion had rejected Arizona's request to create an "exception" to *Edwards* for interrogations concerning separate investigations. Tr. of Oral Arg. 4. According to counsel, the opinion in *Roberson* showed that the Court believed *Roberson's* case to be within the "logical compass" of *Edwards*. Tr. of Oral Arg. *passim*.

But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In *Roberson*, for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U.S., at 679, n. 3. That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a "new rule."

The question remains whether the new rule in *Roberson* nevertheless comes within one of the two recognized exceptions under which a new rule is available on collateral review.

Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S., at 307 (plurality opinion) (quoting *Mackey*, 401 U.S., at 692 (Harlan, J., concurring in judgments in part and dissenting in part)). This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in *Roberson*. Nor did *Roberson* address any

"categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders. See *Penry*, 492 U.S., at 329.

Under the second exception, a new rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty.'"" *Teague*, 489 U.S., at 311 (plurality opinion) (quoting *Mackey*, 401 U.S., at 693 (Harlan, J., concurring in judgments in part and dissenting in part) (in turn quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.))). *Teague*, it should be noted, however, discerned a latent danger in relying solely on this famous language from *Palko*:

"Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. . . . Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic. . . . [W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.

Because a violation of *Roberson's* added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination -- indeed, it may increase that likelihood -- we conclude that *Roberson* did not establish any principle that would come within the second exception.

The judgment of the Court of Appeals is therefore *Affirmed*.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I, II, and III, dissenting.

* * * *

* * * *

The majority suggests obliquely that adoption of a "'new rule' principle [that] validates reasonable, good-faith interpretations of existing precedents," *ante*, at 414 -- which in turn means that adjudication according to "prevailing" law requires only strict "decisional obedience" to existing precedents -- would still serve the "*deterrence* function" animating federal habeas review. *Ibid.* (emphasis in original). But this claim begs a central question: deterrence of what? Under the definition of "prevailing" law embraced today, federal courts may not entertain habeas petitions challenging state-court rejections of constitutional claims unless those state decisions are clearly erroneous. So at best, the threat of habeas review will deter state courts only from completely indefensible rejections of federal claims. State courts essentially are told today that, save for outright "illogical" defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees -- no matter how cramped and unfaithful to the principles underlying existing precedent -- will no longer be subject to oversight through the federal habeas

system. State prosecutors surely will offer every conceivable basis in each case for distinguishing our prior precedents, and state courts will be free to "disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided [by the Supreme Court] approach." *United States v. Johnson*, 457 U.S. 537, 561 (1982) (quoting *Desist*, *supra*, at 277 (Fortas, J., dissenting)); cf. *Johnson*, *supra*, at 561 (rejecting contention that "all rulings resolving unsettled *Fourth Amendment* questions should be nonretroactive [to cases pending upon direct review because otherwise,] in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior").

* * * *

Most significantly, the limited scope of the deterrence promised by the Court's holding today defeats Congress' purpose in establishing the scheme of federal habeas review of state criminal proceedings. Congress established such review because it perceived a potential "inadequacy of state procedures to raise and preserve federal claims [and was] concern[ed] that state judges may be unsympathetic to federally created rights." *Kaufman v. United States*, 394 U.S. 217, 225-226 (1969).⁵⁹⁸ Congress intended the "[t]hreat of habeas" both to "serv[e] as a necessary additional incentive for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards," *ante*, at 413 (citations omitted), and to provide petitioners a *remedy* for unlawful state deprivations of their liberty interests through a fresh and full review of their claims by an Article III court. As we recognized in *Fay v. Noia*, 372 U.S. 391, 424 (1963), "the manifest federal policy [underlying § 2254(a) is] that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for *plenary* federal judicial review" (emphasis added). See also, e. g., *Kaufman*, *supra*, at 228 ("Congress has determined that the full protection of . . . constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims"). It has long been established, therefore, that federal habeas proceedings ought not accord any deference to the state court's constitutional ruling under collateral attack.⁵⁹⁹ Instead, the federal court must determine for itself the proper scope of constitutional principles and their application to the particular factual circumstances. As explained by Justice Frankfurter, "[t]he congressional requirement is [that the] State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed

⁵⁹⁸ [Court's footnote 8]. Congress was aware that popularly elected state judges on occasion experience various political and institutional pressures, from which life-tenured federal judges are insulated, to narrow federal constitutional protections in order to advance the State's interest in law enforcement. See, e. g., *Reed v. Ross*, 468 U.S. 1, 15 (1984) ("Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand"); *Rose v. Mitchell*, 443 U.S. 545, 563 (1979) ("There is strong reason to believe that federal [habeas] review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective").

⁵⁹⁹ [Court's footnote 9]. Cf. *Brown v. Allen*, 344 U.S. 443, 458 (1953) (for purposes of habeas proceedings, the "state adjudication carries [only] the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues").

fairness, may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. 443, 508 (1953). Congress thus entitled petitioners to *de novo* review of their federal claims in federal habeas proceedings. But the Court's decision today denies federal courts the role on habeas review that Congress envisioned because it limits them to remedying only clearly unreasonable state-court applications of federal law, rather than all erroneous ones.

Questions and Comments:

1. **When is the right to counsel a “bedrock” procedural right?** In *Teague*, the Court identified the rule from *Gideon v. Wainwright*—extending the right to counsel to State felony prosecutions—as a “watershed” and “bedrock” principle that is necessary for the reliability of criminal convictions. Why should Roberson’s right to counsel differ from *Gideon*’s by this standard?
2. **Congressional intent?** Congress was and is silent on the issue of retroactivity; *Teague* and *Linkletter* are purely Court made doctrines. The dissenters in *Teague* argue that the decision undermines the federal statute authorizing federal habeas corpus review of state judgments. What is the effect of *Teague* on the Court’s statutory and constitutional obligation to adjudicate constitutional controversies?
3. **“Susceptible to debate among reasonable minds”:** The majority in *Butler* uses this term to describe a new rule. The dissent characterizes this as a “wrong but reasonable” standard for reviewing state criminal judgments. “Reasonable” is an imprecise, subjective term. How would a petitioner establish that a state judge’s view of the issue is unreasonable? How far out of the mainstream would a state court have to tread to be called unreasonable? Can this approach adequately protect constitutional rights, particularly in death penalty cases? What potential problems arise from this approach?
4. **Meaningful, independent federal adjudication:** The dissent revisits the reasoning in *Brown v. Allen* and suggests that *Teague* significantly weakens its principles. How does *Teague* undercut *Brown*’s framework? What is the new relationship between State and federal courts under *Teague*? *Teague* adopted Justice Harlan’s distinction between “substantive” or “procedural,” and that the Constitution “requires substantive rules to have retroactive effect regardless of when a conviction became final.”⁶⁰⁰ The Court narrowly defines substantive rules as those that exempt a petitioner from the state’s authority to punish. What aspects of the Bill of Rights qualify as substantive? How would you classify:
 - The right to a jury trial?
 - The Sixth Amendment right to counsel?

⁶⁰⁰ *Teague* at 312.

- The Confrontation Clause?
- A Double Jeopardy ruling (which prohibits retrial and conviction)?
- An Eighth Amendment ruling limiting punishment?

To date, only Eighth Amendment Cruel and Unusual Punishment Clause decisions have been considered substantive and retroactive. Are there other rules that might qualify as substantive under *Teague*?

IV. Substantive Retroactive Rules: The Power to Punish

In the same term as *Teague*, the Supreme Court decided *Penry v. Lynaugh*, a case that served as an example of the Court's new retroactivity framework. The Court granted certiorari on two claims. First, Penry alleged that the jury instructions implementing the Texas statutory mechanism for deciding life or death precluded the jury from considering his intellectual disability as a mitigating factor, in violation of *Lockett v. Ohio*. Second, Penry alleged that the execution of intellectually disabled prisoners violates the Eighth Amendment's Cruel and Unusual Punishment Clause under the Eighth Amendment. *Teague* was a preliminary hurdle to both claims.

PENRY V. LYNAUGH

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case, we must decide whether petitioner, Johnny Paul Penry, was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence. We must also decide whether the Eighth Amendment categorically prohibits Penry's execution because he is mentally retarded.

On the morning of October 25, 1979, Pamela Carpenter was brutally raped, beaten, and stabbed with a pair of scissors in her home in Livingston, Texas. She died a few hours later in the course of emergency treatment. Before she died, she described her assailant. Her description led two local sheriff's deputies to suspect Penry, who had recently been released on parole after conviction on another rape charge. Penry subsequently gave two statements confessing to the crime and was charged with capital murder.

At a competency hearing held before trial, a clinical psychologist, Dr. Jerome Brown, testified that Penry was mentally retarded. As a child, Penry was diagnosed as having organic brain damage, which was probably caused by trauma to the brain at birth. App. 34-35. Penry was tested over the years as having an IQ between 50 and 63, which indicates mild to moderate retardation. 1 Id., at 36-38, 55. Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealed that Penry, who was 22 years old at the time of the crime, had the mental age of a 6 1/2-year-old, which means that "he has the ability to learn and the learning or the knowledge of the average 6 1/2 year old kid." Id., at 41. Penry's social maturity, or ability to function in the world, was that of a 9- or 10-year-old. Dr. Brown testified that "there's a point at

which anyone with [Penry's] IQ is always incompetent, but, you know, this man is more in the borderline range." *Id.*, at 47.

* * * *

The jury rejected Penry's insanity defense and found him guilty of capital murder. Tex. Penal Code Ann. § 19.03 (1974 and Supp. 1989). The following day, at the close of the penalty hearing, the jury decided the sentence to be imposed on Penry by answering three "special issues":

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989).

If the jury unanimously answers "yes" to each issue submitted, the trial court must sentence the defendant to death. Arts. 37.071(c)-(e). Otherwise, the defendant is sentenced to life imprisonment. *Ibid.*

* * * *

Penry is currently before the Court on his petition in federal court for a writ of habeas corpus. Because Penry is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a "new rule." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions. *Id.*, at 311-313.

* * * *

Penry's conviction became final on January 13, 1986, when this Court denied his petition for certiorari on direct review of his conviction and sentence. Sub nom. *Penry v. Texas*, *supra*. This Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), were rendered before his conviction became final. Under the retroactivity principles adopted in *Griffith v. Kentucky*, 479 U.S. 314 (1987), Penry is entitled to the benefit of those decisions. Citing *Lockett* and *Eddings*, Penry argues that he was sentenced to death in violation of the Eighth Amendment because, in light of the jury instructions given, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background, which he offered as the basis for a sentence less than death. Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in

determining whether a defendant should be sentenced to death. We conclude, for the reasons discussed below, that the rule Penry seeks is not a "new rule" under Teague.

* * * *

Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence.

The first special issue asks whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased . . . would result." Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term "deliberately," and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood "deliberately" to mean something more than that Penry was guilty of "intentionally" committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.

Penry's mental retardation was relevant to the question whether he was capable of acting "deliberately," but it also "had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]." [*Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988)] Personal culpability is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally "culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood. [*California v. Brown*, 479 U.S., at 545 (O'Connor, J., concurring)]. See also [*Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (evidence concerning a defendant's "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment")].

In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime "deliberately." Thus, we cannot be sure that the jury's answer to the first special issue reflected a "reasoned moral response" to Penry's mitigating evidence.

The second special issue asks “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes. Although this evidence is relevant to the second issue, it is relevant only as an aggravating factor because it suggests a “yes” answer to the question of future dangerousness. The prosecutor argued at the penalty hearing that there was “a very strong probability, based on the history of this defendant, his previous criminal record, and the psychiatric testimony that we've had in this case, that the defendant will continue to commit acts of this nature.” App. 214. Even in a prison setting, the prosecutor argued, Penry could hurt doctors, nurses, librarians, or teachers who worked in the prison.

Penry’s mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future. As Judge Reavley wrote for the Court of Appeals below:

“What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence.” 832 F. 2d, at 925 (footnote omitted) (emphasis in original).

The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse.

The third special issue asks “whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.” On this issue, the State argued that Penry stabbed Pamela Carpenter with a pair of scissors not in response to provocation, but “for the purpose of avoiding detection.” App. 215. Penry's own confession indicated that he did not stab the victim after she wounded him superficially with a scissors during a struggle, but rather killed her after her struggle had ended and she was lying helpless. Even if a juror concluded that Penry’s mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the “unreasonableness” of his conduct in response to “the provocation, if any, by the deceased.” Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation.

* * * *

“In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence.” *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely

because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character, and crime." *Franklin*, 487 U.S., at 184 (O'Connor, J., concurring in judgment) (quoting *California v. Brown*, 479 U.S., at 545 (O'Connor, J., concurring)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson*, 428 U.S., at 305, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S., at 605; *Eddings*, 455 U.S., at 119 (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett, supra*, at 605.

IV

Penry's second claim is that it would be cruel and unusual punishment, prohibited by the *Eighth Amendment*, to execute a mentally retarded person like himself with the reasoning capacity of a 7-year-old. He argues that because of their mental disabilities, mentally retarded people do not possess the level of moral culpability to justify imposing the death sentence. He also argues that there is an emerging national consensus against executing the mentally retarded. The State responds that there is insufficient evidence of a national consensus against executing the retarded, and that existing procedural safeguards adequately protect the interests of mentally retarded persons such as Penry.

A

Under *Teague*, we address the retroactivity issue as a threshold matter because Penry is before us on collateral review. 489 U.S., at 310. If we were to hold that the *Eighth Amendment* prohibits the execution of mentally retarded persons such as Penry, we would be announcing a "new rule." *Id.*, at 301. Such a rule is not dictated by precedent existing at the time Penry's conviction became final. Moreover, such a rule would "brea[k] new ground" and would impose a new obligation on the States and the Federal Government. *Ibid.* (citing *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), which held that the *Eighth Amendment* prohibits the execution of insane persons, as a case announcing a new rule).

In *Teague*, we concluded that a new rule will not be applied retroactively to defendants on collateral review unless it falls within one of two exceptions. Under the first exception articulated

by Justice Harlan, a new rule will be retroactive if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Teague, supra, at 307* (quoting *Mackey, 401 U.S., at 692* (Harlan, J., concurring in judgments in part and dissenting in part)). Although *Teague* read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that the *Eighth Amendment*, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, *Ford v. Wainwright, supra, at 410* (insanity), or because of the nature of their offense, *Coker v. Georgia, 433 U.S. 584 (1977)* (rape) (plurality opinion). In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey, supra, at 693*. Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Thus, if we held, as a substantive matter, that the *Eighth Amendment* prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review. Accordingly, we address the merits of Penry's claim.

* * * *

In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the *Eighth Amendment* precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether "death is the appropriate punishment" can be made in each particular case. While a national consensus against execution of the mentally retarded may someday emerge reflecting the "evolving standards of decency that mark the progress of a maturing society," there is insufficient evidence of such a consensus today.

Accordingly, the judgment below is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **New rule or dictated by precedent?** Penry's lawyers succeeded by grounding his challenge to the Texas sentencing scheme in an existing rule, *Lockett v. Ohio*'s holding that the sentencer cannot be precluded from considering mitigating evidence of his intellectual disability. In a previous case, *Jurek v. Texas*,⁶⁰¹ the Court rejected an Eighth Amendment challenge to the Texas three-question sentencing procedure. *Jurek* acknowledged that a capital jury "must be allowed to consider . . . all relevant evidence not only on why a death sentence should be imposed, but also why it should not be imposed."⁶⁰² Because Texas allowed the defense to present all relevant evidence for the jury's consideration, *Jurek* found the statute constitutional. How did Penry's counsel convince the Court that the Texas statute did not satisfy this requirement in his case? Penry's approach to this challenge was to identify a foundational rule to capital sentencing—*Lockett v. Ohio*—and persuasively argue that it was violated by the inability of a Texas jury to return a life sentence if it found his intellectual disability to be mitigating. On remand, Texas applied the same statutory mechanism that it used in Penry's first trial, but instructed the jury "that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant."⁶⁰³ The instruction advised the jury that if it found mitigating evidence with sufficient weight to justify a life sentence, "a negative finding should be given to one of the special issues."⁶⁰⁴ Based on the Court's analysis in *Penry I*, did this instruction satisfy *Lockett*? The Court concluded that it did not because "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."⁶⁰⁵ The key to Penry's success in both Supreme Court cases was to identify the correct controlling precedent, and meticulously demonstrate that it was violated based on the facts in his case.
2. **Retroactivity of substantive rules:** Retroactivity is a threshold issue; before addressing the merits of Penry's substantive Eighth Amendment claim, because Penry was asking for a new rule exempting intellectually disabled persons from execution, the Court had to determine whether that rule satisfied one of *Teague*'s exceptions to retroactivity. The Court found that Penry satisfied *Teague*'s first exception to nonretroactivity: rules that place certain conduct or individuals beyond the state's power to punish. Although this enabled the Court to reach the merits of Penry's Eighth Amendment claim, Penry did not succeed in convincing the Court that modern standards of decency prohibits the execution of intellectually disabled defendants.

⁶⁰¹ 428 U.S. 262 (1976).

⁶⁰² *Id.* at 271.

⁶⁰³ *Penry v. Johnson*, 532 U.S. 782, 789-90 (2001).

⁶⁰⁴ *Id.* at 798.

⁶⁰⁵ *Id.* at 804.

3. **Substantive Eighth Amendment decisions:** Thirteen years after *Penry*, the Court revisited the Eighth Amendment in *Atkins v. Virginia*,⁶⁰⁶ holding that a societal shift against executing intellectually disabled individuals had rendered the practice inconsistent with modern standards of decency. In *Atkins*, the Court did not address retroactivity, likely because *Penry* had already established that rules exempting individuals from certain punishments qualify as substantive and retroactive. The same principle applies to other cases meeting *Teague*'s first exception, including:

- *Roper v. Simmons*—exempting juveniles from capital punishment.⁶⁰⁷
- *Graham v. Florida*—holding life without parole is cruel and unusual punishment for juvenile offenders convicted of offenses other than homicide.⁶⁰⁸
- *Kennedy v. Louisiana*—exempting persons convicted of sexual assault of a child from the death penalty.⁶⁰⁹

The Supreme Court did not even discuss retroactivity in these cases. *Graham* and *Kennedy* were direct review cases, so a retroactivity discussion would not be expected, but *Roper* was a collateral review case. The Court appears to treat the retroactivity of cases meeting this exception as obvious. On its face, the rule qualifies, or it does not, and the issue does not seem overly complicated in most cases. Why does the Court consistently treat retroactivity in these cases as self-evident? Does this reflect the simplicity of applying *Teague*'s first exception to substantive rules?

4. **Substantive rules prohibiting conviction:** *Teague*'s exception allowing retroactivity of substantive decisions would likely apply in a case such as *Lawrence v. Texas*,⁶¹⁰ which struck down a Texas law criminalizing certain consensual sex acts between same-sex partners. *Lawrence* did not require a *Teague* analysis because it was a direct review case. But if it had, how would *Teague*'s framework have applied? In order for *Lawrence* to prevail, the Court would have had to overrule *Bowers v. Hardwick*,⁶¹¹ so under either *Linkletter* or *Teague*, granting *Lawrence* relief would require a new rule. Under *Penry*, would *Lawrence* have been retroactive given its substantive nature?

⁶⁰⁶ 536 U.S. 304 (2002).

⁶⁰⁷ 543 U.S., *supra* n. 24.

⁶⁰⁸ 560 U.S. 48 (2010).

⁶⁰⁹ 554 U.S. 407 (2008).

⁶¹⁰ 539 U.S. 558 (2003).

⁶¹¹ 478 U.S. 186 (1986).

After *Roper v. Simmons* exempted juvenile offenders from capital punishment, the Court granted certiorari in *Miller v. Alabama*⁶¹² to consider whether life without parole for juvenile offenders convicted of homicide also violates the Eighth Amendment’s Cruel and Unusual Punishment Clause. The Court determined that such a sentence is not per se cruel and unusual punishment *unless* imposed pursuant to a statute mandating life without parole in all cases regardless of the offender’s age.⁶¹³ Petitioner Evan Miller sought certiorari from direct review of his conviction by the Alabama Court of Criminal Appeals,⁶¹⁴ but in a companion case, *Jackson v. Hobbs*, Kuntrell Jackson petitioned for certiorari review from an Arkansas Supreme Court decision denying habeas corpus relief after his conviction became final. Even though Jackson was seeking a new rule on collateral review, the Court did not discuss *Teague* in its decision. This fits the pattern observed in the preceding paragraph—application of *Teague*’s retroactivity exception for substantive rules seemed obvious. However, lower courts were split on whether *Miller* is retroactive—it did not put *all* juveniles outside the power of the State to punish with life without parole, only that whose crimes reflect “irreparable corruption.”⁶¹⁵ But, it did prohibit imposition of such a sentence without an opportunity for the offender to challenge it with evidence. Does this holding satisfy *Teague*’s first exemption? If so, must a state postconviction court also apply *Miller* retroactively? The Court granted certiorari in *Montgomery v. Louisiana*⁶¹⁶ to address the issue.

In 1963, a Louisiana jury convicted 17-year-old Henry Montgomery of murder and sentenced him to death. The Louisiana Supreme Court reversed that conviction because of pretrial publicity, and a second jury returned a verdict of guilty without capital punishment. Louisiana law required the trial court, without exception, to sentence Montgomery to life without parole.⁶¹⁷ Montgomery had been in prison for nearly 50 years when *Miller v. Alabama* was decided. He was 69 years old when the Supreme Court granted certiorari to determine whether he would get the benefit of *Miller*’s ruling prohibiting mandatory life without parole for juvenile offenders convicted of homicide.

MONTGOMERY V. LOUISIANA

This is another case in a series of decisions involving the sentencing of offenders who were juveniles when their crimes were committed. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile’s special circumstances in light of the principles and

⁶¹² 567 U.S. 460 (2012).

⁶¹³ 567 U.S., *supra* n. 25.

⁶¹⁴ *Miller v. State*, 63 So. 3d 676 (Ala. Crim. App., 2010).

⁶¹⁵ *Id.* at 479-480.

⁶¹⁶ 577 U.S. 190

⁶¹⁷ *State v. Montgomery*, 257 La. 461, 242 So. 2d 818 (La. 1970).

purposes of juvenile sentencing. In the wake of *Miller*, the question has arisen whether its holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided. Courts have reached different conclusions on this point. [citations omitted] Certiorari was granted in this case to resolve the question.

* * * *

Almost 50 years after *Montgomery* was first taken into custody, this Court decided *Miller v. Alabama*, 567 U.S. 460. *Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.” *Id.*, at 465. “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” mandatory life without parole “poses too great a risk of disproportionate punishment.” *Id.*, at 479. *Miller* required that sentencing courts consider a child’s “diminished culpability and heightened capacity for change” before condemning him or her to die in prison. *Ibid.* Although *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect “irreparable corruption.” *Id.*, at 479-480 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

Amicus argues that a State is under no obligation to give a new rule of constitutional law retroactive effect in its own collateral review proceedings. As those proceedings are created by state law and under the State’s plenary control, amicus contends, it is for state courts to define applicable principles of retroactivity. Under this view, the Louisiana Supreme Court’s decision does not implicate a federal right; it only determines the scope of relief available in a particular type of state proceeding—a question of state law beyond this Court’s power to review.

If, however, the Constitution establishes a rule and requires that the rule have retroactive application, then a state court’s refusal to give the rule retroactive effect is reviewable by this Court. Cf. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that on direct review, a new constitutional rule must be applied retroactively “to all cases, state or federal”). States may not disregard a controlling, constitutional command in their own courts. See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 1 Wheat. 304, 340-341 (1816); see also *Yates v. Aiken*, 484 U.S. 211, 218 (1988) (when a State has not “placed any limit on the issues that it will entertain in collateral proceedings . . . it has a duty to grant the relief that federal law requires”). Amicus’ argument therefore hinges on the premise that this Court’s retroactivity precedents are not a constitutional mandate.

* * * *

In this case, the Court must address part of the question left open in [*Danforth v. Minnesota*, 552 U.S. 264 (2008)]. The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*’s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*’s first exception for

substantive rules; the constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here.

III

This leads to the question whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive.

As stated above, a procedural rule "regulate[s] only the manner of determining the defendant's culpability." *Schiro*, 542 U.S., at 353. A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330; see also *Schiro*, *supra*, at 353 (A substantive rule "alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, *Miller* announced a substantive rule that is retroactive in cases on collateral review.

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. §6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

Petitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison's silkscreen department and that he strives to offer advice and serve as a role model to other inmates. These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy. The petitioner's submissions are relevant, however, as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation.

* * * *

Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of

what this [***623] Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.

The judgment of the Supreme Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Procedural or substantive?** On the question of retroactivity, *Montgomery* acknowledged that “*Miller’s* holding has a procedural component” because a sentencer can still impose a sentence of life without parole on a juvenile convicted of murder, but only after considering the offender’s youth and attendant circumstances.⁶¹⁸ *Miller’s*, *Jackson’s*, and *Montgomery’s* sentences of life without parole constituted cruel and unusual punishment because the sentencer had no power to respond to mitigating evidence. Life without parole was mandatory. The relief each received was a modification of their sentence so that they could apply for parole, and present mitigating evidence in support of that application. How is this different from *Penry v. Lynaugh* and *Penry v. Johnson*? In light of *Montgomery*, is *Lockett v. Ohio* a procedural or substantive holding?
2. **Procedures inherent in substantive rules?** In *Montgomery*, the Court acknowledged that *Miller* has a procedural component since a sentencer may still impose life without parole for juveniles, but only after considering their youth and mitigating factors. It continued to explain that sometimes “a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish.”⁶¹⁹ The Court cited *Ford v. Wainwright*—prohibiting the execution of the insane,⁶²⁰ and *Atkins v. Virginia*—prohibiting execution of intellectually disabled persons—⁶²¹ as examples of substantive rules that require a procedure allowing a prisoner to prove that he belongs to a protected class. *Miller’s* substantive rule “drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.”⁶²² How does this distinction affect procedural requirements?

⁶¹⁸ *Montgomery*, *supra*, at 209-210.

⁶¹⁹ *Id.* at 210.

⁶²⁰ 477 U.S. 379 (1986).

⁶²¹ 536 U.S. 304 (2002).

⁶²² *Montgomery*, at 210.

3. **State retroactivity rules:** *Montgomery* makes clear that states must enforce retroactive laws. In *Danforth v. Minnesota*, the Court ruled that *Teague* is not binding on states, and that states are free to have their own discovery rules. *Montgomery* makes clear that state retroactivity rules must allow enforcement of retroactive federal rights. How does this compare to the Independent, Adequate State Ground rule? Section VI, below, discusses the responses of different states to *Teague*'s retroactivity rule.

V. Watershed Rules and Bedrock Principles: Procedures Implicit in the Concept of Ordered Liberty

In *Teague*, the Court acknowledged that its second exception to non-retroactivity—procedural rules that are "implicit in the concept of ordered liberty"—would apply only in rare cases. The Court offered *Gideon v. Wainwright* as the sole example of such a rule, which emphasizes its unique gravity and impact on the reliability of criminal convictions. Rules of comparable significance would be applied retroactively, but the Court suggested such cases would be exceedingly rare.

The Court described this exception as covering “new procedures without which the likelihood of an accurate conviction is seriously diminished. Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”⁶²³ The cases in which the Court has examined the retroactivity of new procedural rules bear out this prediction. However, it is important to consider whether it is reasonable to discount the potential significance of protections against race discrimination, the right to constitutional jury instructions, the right to confront and cross-examine witnesses, or the right for juries—not judges—in order to determine punishment.

In *Ring v. Arizona*, the Court invalidated an Arizona sentencing procedure that allowed judges, rather than juries, to determine the factual issues required to impose the death penalty.⁶²⁴ This decision overturned *Walton v. Arizona*.⁶²⁵ Clearly, *Ring* is a "new rule," but would it qualify for retroactive application under *Teague*'s second exception? Does the requirement for jury determination of facts critical to sentencing meet the high threshold of being “implicit in the concept of ordered liberty”?

⁶²³ *Teague* at 313.

⁶²⁴ 536 U.S. 584 (2002).

⁶²⁵ 497 U.S. 639 (1990).

SCHRIRO V. SUMMERLIN

* * * *

Respondent argues...that *Ring* falls under the retroactivity exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S., at 495 (quoting *Teague*, 489 U.S., at 311). He offers several reasons why juries are more accurate factfinders, including the tendency of group deliberation to suppress individual eccentricities; the jury's protection from exposure to inadmissible evidence; and its better representation of the common sense of the community.

The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so--they certainly thought juries were more independent, see *Blakely v. Washington*, 542 U.S. 296, 305-308 (2004)). Nor is the question whether juries actually are more accurate factfinders than judges (again, perhaps so). Rather, the question is whether judicial factfinding so "seriously diminishe[s]" accuracy that there is an "'impermissibly large risk'" of punishing conduct the law does not reach. *Teague, supra*, at 312-313 (quoting *Desist v. United States*, 394 U.S. 244, 2620 (1969) (Harlan, J., dissenting)) (emphasis added). The evidence is simply too equivocal to support that conclusion.

First, for every argument why juries are more accurate factfinders, there is another why they are less accurate. The Ninth Circuit dissent noted several, including juries' tendency to become confused over legal standards and to be influenced by emotion or philosophical predisposition. 341 F.3d, at 1129-1131 (opinion of Rawlinson, J.). Members of this Court have opined that judicial sentencing may yield more consistent results because of judges' greater experience. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Our decision in *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam), is on point. There we refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States. While *DeStefano* was decided under our pre-*Teague* retroactivity framework, its reasoning is germane. We noted that, although "the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . '[w]e would not assert . . . that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" 392 U.S., at 633-634 (quoting *Duncan, supra*, at 158). We concluded that "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S., at 634. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

The dissent contends that juries are more accurate because they better reflect community standards in deciding whether, for example, a murder was heinous, cruel, or depraved. Post, at 361-362 (opinion of Breyer, J.). But the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved as determined by community standards. See *Ariz. Rev.*

Stat. Ann. § 13-703(F)(6) (West 1978). It is easy to find enhanced accuracy in jury determination when one redefines the statute's substantive scope in such manner as to ensure that result. The dissent also advances several variations on the theme that death is different (or rather, "dramatically different," post, at 363). Much of this analysis is not an application of *Teague*, but a rejection of it, in favor of a broader endeavor to "balance competing considerations," post, at 362. Even were we inclined to revisit *Teague* in this fashion, we would not agree with the dissent's conclusions. Finally, the dissent notes that, in *DeStefano*, we considered factors other than enhanced accuracy that are no longer relevant after *Teague*. See post, at 365. But we held in that case that "[a]ll three factors favor only prospective application of the rule." 392 U.S., at 633 (emphasis added). Thus, the result would have been the same even if enhanced accuracy were the sole criterion for retroactivity.

* * * *

The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review. The contrary judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

* * * *

The majority...overlooks three...considerations that lead me to the opposite conclusion.

First, the factfinder's role in determining the applicability of aggravating factors in a death case is a special role that can involve, not simply the finding of brute facts, but also the making of death-related, community-based value judgments. The leading single aggravator charged in Arizona, for example, requires the factfinder to decide whether the crime was committed in an "especially heinous, cruel, or depraved manner." Ariz. Rev. Stat. Ann. § 13-703(F)(6) (West Supp. 2003); see Office of Attorney General, State of Arizona, Capital Case Commission Final Report (2002). Three of the other four *Ring*-affected States use a similar aggravator. See Colo. Rev. Stat. § 18-1.3-1201(5)(j) (Lexis 2003); Idaho Code § 19-2515(9)(e) (Lexis Supp. 2003); Neb. Rev. Stat. § 29-2523(1)(d) (1995). Words like "especially heinous," "cruel," or "depraved"--particularly when asked in the context of a death sentence proceeding--require reference to community-based standards, standards that incorporate values. A jury is better equipped than a judge to identify and to apply those standards accurately. See *supra*, at 360.

Second, *Teague's* basic purpose strongly favors retroactive application of *Ring's* rule. *Teague's* retroactivity principles reflect the Court's effort to balance competing considerations. See 489 U.S., at 309-313; *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in two judgments and dissenting in one); *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). On the one hand, interests related to certain of the Great Writ's basic objectives--protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures--favor applying a new procedural rule retroactively. *Teague, supra*, at 312-313; *Mackey*, 401 U.S., at 693-694. So too does the legal system's commitment to "equal justice"--i.e., to "assur[ing] a uniformity of ultimate treatment among prisoners." *Id.*, at 689.

Where death-sentence-related factfinding is at issue, these considerations have unusually strong force. This Court has made clear that in a capital case "the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). Hence, the risk of error that the law can tolerate is correspondingly diminished. At the same time, the "qualitative difference of death from all other punishments"--namely, its severity and irrevocability--"requires a correspondingly greater degree of scrutiny of the capital sentencing determination" than of other criminal judgments. *California v. Ramos*, 463 U.S. 992, 998-999 (1983); see also *Spaziano*, 468 U.S., at 468 (Stevens, J., concurring in part and dissenting in part) (the Eighth Amendment mandates special safeguards to ensure that death is "a justified response to a given offense"); *Ake v. Oklahoma*, 470 U.S. 68, 87, (1985) (Burger, C. J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases").

* * * *

Justice Scalia's observation, in his concurring opinion in *Ring*, underscores the point. He wrote there that "the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed" would undermine "our people's traditional . . . veneration for the protection of the jury in criminal cases." 536 U.S., at 612 (emphasis in original). If that is so, it is equally so whether the judge found that aggravating factor before or after *Ring*.

* * * *

Third, *DeStefano v. Woods*, 392 U.S. 631 (1968) (per curiam), fails to give the majority the support for which it hopes. *DeStefano* did decide that *Duncan's* holding--that the Sixth Amendment jury trial right applies to the States--should not have retroactive effect. But the Court decided *DeStefano* before *Teague*. And it explicitly took into account "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 392 U.S., at 633 (internal quotation marks omitted).

The latter two factors, "reliance" and "effect on the administration of justice," argued strongly against retroactivity. Retroactivity there, unlike here, would have thrown the prison doors open wide--at least in Louisiana and possibly in other States as well. *Id.*, at 634. The Court believed that the first factor--"the purpose to be served by the new standards"--also favored

prospective application only. But the Court described that purpose broadly, as "prevent[ing] arbitrariness and repression"; it recognized that some judge-only trials might have been fair; and it concluded that the values served by the jury trial guarantee "would not measurably be served by requiring retrial of *all* persons convicted in the past" without a jury. *Id.*, at 633-634 (emphasis added).

By contrast, this case involves only a small subclass of defendants deprived of jury trial rights, the relevant harm within that subclass is more widespread, the administration of justice problem is far less serious, and the reliance interest less weighty. For these reasons, I believe the *DeStefano* Court would have come out differently had it been considering *Ring's* rule. Insofar as *DeStefano* has any relevance here, it highlights the importance, when making retroactivity decisions, of taking account of the considerations that underlie *Teague's* categorical rules. And, as shown above, those considerations argue in favor of retroactivity in this case. See *supra*, at 362-365.

As I have pointed out, the majority does not deny that *Ring's* rule makes some contribution to greater accuracy. It simply is unable to say "confidently" that the absence of *Ring's* rule creates an "impermissibly large risk" that the death penalty was improperly imposed. *Ante*, at 356-357. For the reasons stated, I believe that the risk is one that the law need not and should not tolerate. Judged in light of *Teague's* basic purpose, *Ring's* requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings.

I respectfully dissent.

Questions and Comments:

1. **The cost-benefit analysis of retroactivity:** Justice Breyer's dissent highlights the potential cost of not applying new rules retroactively to cases already final on collateral review. He references *DeStefano v. Woods*, in which the Court declined to apply *Duncan v. Louisiana* retroactively. In *Duncan*, the Court established the right to a jury trial, but retroactive application would have required retrials for all individuals in Louisiana convicted by judges without juries. Is the administrative burden on the state a sufficient reason in itself to deny retroactive application of a new rule? How does this compare to *Gideon v. Wainwright*, which retroactively invalidated all uncounseled felony convictions, regardless of whether the conviction resulted from a plea or trial? In *Sawyer v. Smith*, the Court observed that the costs imposed on states by retroactive application often outweigh the benefits.⁶²⁶ When does the benefit of retroactivity justify its cost? Should the number of affected cases influence the Court's decision on retroactivity? How do we distinguish

⁶²⁶ 497 U.S. 227 (1990).

between procedures that avoid seriously diminished accuracy in outcomes and those that merely enhance accuracy?

2. **Measuring reliability:** Do you agree with the majority in *Summerlin* that jury sentencing is not critical to the reliability of outcomes? How can the Court determine what degree of added reliability is necessary for a fair outcome? What evidence or data might the Court consider to evaluate the reliability of jury sentencing compared to judicial sentencing? Reflect on the Court’s decision in *Edwards v. Vannoy*,⁶²⁷ which declined to apply *Ramos v. Louisiana* retroactively. In *Ramos*, the Court found that Louisiana’s allowance of 10-2 jury convictions violated the Sixth Amendment’s right to a unanimous jury. The Court in *Ramos* acknowledged the racially discriminatory origins of Louisiana’s 10-2 verdict provision and described the decision as “momentous and consequential.” Despite this, *Edwards* denied retroactivity. Similarly, other significant cases, such as *Duncan v. Louisiana*, *Crawford v. Washington*, and *Batson v. Kentucky*, have also been denied retroactive effect. Is *Teague*’s prediction that watershed rules are largely “a thing of the past” a self-fulfilling prophecy? How should the Court balance the significance of a rule’s societal impact against its administrative and systemic costs when considering retroactivity? What about cases such as *Duncan*, *Ramos*, and *Batson* that struck down rules having roots in racism?

EDWARDS V. VANNOY

JUSTICE KAVANAUGH delivered the opinion of the Court.

Last Term in *Ramos v. Louisiana*, 590 U. S. 83 (2020), this Court held that a state jury must be unanimous to convict a criminal defendant of a serious offense. *Ramos* repudiated this Court’s 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404, which had allowed non-unanimous juries in state criminal trials. The question in this case is whether the new rule of criminal procedure announced in *Ramos* applies retroactively to overturn final convictions on federal collateral review. Under this Court’s retroactivity precedents, the answer is no.

* * * *

Having determined that *Ramos* announced a new rule requiring jury unanimity, we must consider whether that new rule falls within an exception for watershed rules of criminal procedure that apply retroactively on federal collateral review.

This Court has stated that the watershed exception is “extremely narrow” and applies only when, among other things, the new rule alters “our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” *Whorton*, 549 U. S., at 417-418 (internal quotation marks omitted).

⁶²⁷ 593 U.S. 255 (2021).

In the abstract, those various adjectives—watershed, narrow, bedrock, essential—do not tell us much about whether a particular decision of this Court qualifies for the watershed exception. In practice, the exception has been theoretical, not real. The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court’s landmark decision in *Gideon v. Wainwright*, 372 U. S. 335, 344-345 (1963). See *Whorton*, 549 U. S., at 419, 421. The Court has never identified any other pre-*Teague* or post-*Teague* rule as watershed. None.

Moreover, the Court has flatly proclaimed on multiple occasions that the watershed exception is unlikely to cover any more new rules. Even 32 years ago in *Teague* itself, the Court stated that it was “unlikely” that additional watershed rules would “emerge.” 489 U. S., at 313 (plurality opinion). And since *Teague*, the Court has often reiterated that “it is unlikely that any such rules have yet to emerge.” *Whorton*, 549 U. S., at 417 (internal quotation marks and alteration omitted); see also *Beard v. Banks*, 542 U. S. 406, 417 (2004); *Summerlin*, 542 U. S., at 352; *Tyler*, 533 U. S., at 667, n. 7; *Graham v. Collins*, 506 U. S. 461, 478 (1993); *Sawyer*, 497 U. S., at 243; *Butler v. McKellar*, 494 U. S. 407, 416 (1990).

Consistent with those many emphatic pronouncements, the Court since *Teague* has rejected every claim that a new procedural rule qualifies as a watershed rule. For example, in *Beard v. Banks*, 542 U. S., at 408, the Court declined to retroactively apply the rule announced in *Mills v. Maryland*, 486 U. S. 367, 384 (1988), that capital juries may not be required to disregard certain mitigating factors. In *O’Dell v. Netherland*, 521 U.S. 151, 153 (1997), the Court refused to retroactively apply the rule announced in *Simmons v. South Carolina*, 512 U. S. 154, 156, (1994), that a capital defendant must be able, in certain circumstances, to inform the sentencing jury that he is parole ineligible. In *Lambrix v. Singletary*, 520 U. S., at 539-540, the Court declined to retroactively apply the rule announced in *Espinosa v. Florida*, 505 U. S. 1079, 1082, (1992) (per curiam), that sentencers may not weigh invalid aggravating circumstances before recommending or imposing the death penalty. In *Sawyer v. Smith*, 497 U. S., at 229, the Court refused to retroactively apply the rule announced in *Caldwell v. Mississippi*, 472 U. S. 320, 323, (1985), which prohibited a death sentence by a jury led to the false belief that responsibility for the sentence rested elsewhere.

The list of cases declining to retroactively apply a new rule of criminal procedure extends back long before *Teague* to some of this Court’s most historic criminal procedure decisions. For example, in *Johnson v. New Jersey*, 384 U. S. 719, 721 (1966), the Court declined to retroactively apply *Miranda v. Arizona*, 384 U. S. 436, 444-445 (1966), which required that police inform individuals in custody of certain constitutional rights before questioning them. And in *Linkletter v. Walker*, 381 U. S., at 639-640, the Court refused to retroactively apply *Mapp v. Ohio*, 367 U. S. 643, 655 (1961), which incorporated the Fourth Amendment exclusionary rule against the States.

* * * *

Because *Teague* tightened the previous standard set forth in *Linkletter v. Walker*, 381 U. S. 618 (1965), for applying a decision retroactively on federal collateral review, pre-*Teague* decisions holding that a rule is retroactive are not as relevant as pre-*Teague* decisions holding that

a rule is not retroactive, such as *DeStefano*. and *Batson*. Consistent with the Court’s long line of retroactivity precedents, we hold that the Ramos jury-unanimity rule does not apply retroactively on federal collateral review.⁶²⁸ [court’s fn 6]

In so concluding, we recognize that the Court’s many retroactivity precedents taken together raise a legitimate question: If landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. In *Teague* itself, the Court recognized that the purported exception was unlikely to apply in practice, because it was “unlikely” that such watershed “components of basic due process have yet to emerge.” 489 U. S., at 313 (plurality opinion). The Court has often repeated that “it is unlikely that any of these watershed rules has yet to emerge.” *Tyler*, 533 U. S., at 667, n. 7 (alteration and internal quotation marks omitted); see also, e.g., *Whorton*, 549 U. S., at 417; *Summerlin*, 542 U. S., at 352. And for decades, the Court has rejected watershed status for new procedural rule after new procedural rule, amply demonstrating that the purported exception has become an empty promise.

Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must “be regarded as retaining no vitality.” *Herrera v. Wyoming*, 587 U. S. 329, 342 (2019) (internal quotation marks omitted).

[concurring opinions of JUSTICES GORSUCH & THOMAS omitted]

Dissenting opinions of JUSTICE KAGAN, joined by JUSTICE BREYER and JUSTICE SOTOMAYOR

* * * *

If there can never be any watershed rules—as the majority here asserts out of the blue—then, yes, jury unanimity cannot be one. The result follows trippingly from the premise. But adopting the premise requires departing from judicial practice and principle. In overruling a critical

⁶²⁸ [Court’s footnote 6] The Ramos rule does not apply retroactively on federal collateral review. States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state postconviction proceedings. See *Danforth v. Minnesota*, 552 U. S. 264, 282 (2008).

aspect of *Teague*, the majority follows none of the usual rules of *stare decisis*. It discards precedent without a party requesting that action. And it does so with barely a reason given, much less the “special justification” our law demands. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014). The majority in that way compounds its initial error: Not content to misapply *Teague*’s watershed provision here, the majority forecloses any future application. It prevents any procedural rule ever—no matter how integral to adjudicative fairness—from benefiting a defendant on habeas review. Thus does a settled principle of retroactivity law die, in an effort to support an insupportable ruling.

* * * *

And putting talk of *stare decisis* aside, there remains much more in *Ramos* to echo *Teague*. If, as today’s majority says, *Teague* is full of “adjectives,” so too is *Ramos*—and mostly the same ones. Jury unanimity, the Court pronounced, is an “essential element[]” of the jury trial right, and thus is “fundamental to the American scheme of justice.” 590 U. S., at 92-93). . . . Unanimity served as a critical safeguard, needed to protect against wrongful deprivations of citizens’ “hard-won liberty.” *Id.*, at 101. Or as Justice Story summarized the law a few decades after the Founding: To obtain a conviction, “unanimity in the verdict of the jury is indispensable.” *Id.*, at 91.

If a rule so understood isn’t a watershed one, then nothing is. . . . (And that is, of course, what the majority eventually says.) Once more, from the quotations just above: “fundamental,” “essential,” “vital,” “indispensable.” No wonder today’s majority declares a new-found aversion to “adjectives”—or, as a concurring opinion says, “all these words.” *Ante*, at 300 (Gorsuch, J., concurring). The unanimity rule, as *Ramos* described it, is as “bedrock” as bedrock comes. *Teague*, 489 U. S., at 315 (plurality opinion). It is as grounded in the Nation’s constitutional traditions—with centuries-old practice becoming part of the Sixth Amendment’s original meaning. And it is as central to the Nation’s idea of a fair and reliable guilty verdict. When can the State punish a defendant for committing a crime? Return again to *Ramos*, this time going back to Blackstone: Only when “the truth of [an] accusation” is “confirmed by the unanimous suffrage” of a jury “of his equals and neighbours.” 590 U. S., at 90 (quoting 4 Commentaries on the Laws of England 343 (1769)). For only then is the jury’s finding of guilt certain enough—secure enough, mistake-proof enough—to take away the person’s freedom.

Twice before, this Court retroactively applied rules that are similarly integral to jury verdicts. First, in *Ivan V. v. City of New York*, 407 U. S. 203, 204 (1972) (per curiam), we gave “complete retroactive effect” to the rule of *In re Winship*, 397 U. S. 358 (1970), that a jury must find guilt “beyond a reasonable doubt.” Like *Ramos*, *Winship* rested on an “ancient” legal tradition incorporated into the Constitution. 397 U. S., at 361. As in *Ramos*, that tradition served to “safeguard men” from “unjust convictions, with resulting forfeitures” of freedom. 397 U. S., at 362. And as in *Ramos*, that protection plays a “vital” part in “the American scheme of criminal procedure.” 397 U. S., at 363-364. With all that established, the *Ivan V.* Court needed just two pages to hold *Winship* retroactive, highlighting the reasonable-doubt standard’s “indispensable” role in “reducing the risk” of wrongful convictions. 407 U. S., at 204-205. Second, in *Brown v. Louisiana*, 447 U. S. 323 (1980), we retroactively applied the rule of *Burch v. Louisiana*, 441 U.

S. 130 (1979), that a six-person guilty verdict must be unanimous. Think about that for a moment: We held retroactive a unanimity requirement, no different from the one here save that it applied to a smaller jury. The reasoning should by now sound familiar. Allowing conviction by a non-unanimous jury “impair[s]” the “purpose and functioning of the jury,” undermining the Sixth Amendment’s very “essence.” *Brown*, 447 U. S., at 331 (plurality opinion). It “raises serious doubts about the fairness of [a] trial.” *Id.*, at 335, n. 13. And it fails to “assure the reliability of [a guilty] verdict.” *Id.*, at 334. So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, “there has been no jury verdict within the meaning of the Sixth Amendment.” *Sullivan v. Louisiana*, 508 U. S. 275, 280 (1993).[fn 4 omitted]

And something still more supports retroactivity here, for the opinions in *Ramos* (unlike in *Winship* or *Burch*) relied on a strong claim about racial injustice. The Court detailed the origins of Louisiana’s and Oregon’s non-unanimity rules, locating them (respectively) in a convention to “establish the supremacy of the white race” and “the rise of the Ku Klux Klan.” 590 U. S., at 141 (internal quotation marks omitted). Those rules, the Court explained, were meant “to dilute the influence [on juries] of racial, ethnic, and religious minorities”—and particularly, “to ensure that African-American juror service would be meaningless.” *Ibid.* (internal quotation marks omitted). Two concurring opinions linked that history to current practice. “In light of the[ir] racist origins,” Justice Kavanaugh stated, “it is no surprise that non-unanimous juries can make a difference”—that “[t]hen and now” they can “negate the votes of black jurors, especially in cases with black defendants.” *Id.*, at 128. But that statement precludes today’s result. If the old rule functioned “as an engine of discrimination against black defendants,” *id.*, at 127 (Kavanaugh, J.) its replacement must “implicat[e]” (as watershed rules do) “the fundamental fairness and accuracy of the criminal proceeding,” *Beard*, 542 U. S., at 417 (internal quotation marks omitted). Or as Justice Kavanaugh put the point more concretely, the unanimity rule then helps prevent “racial prejudice” from resulting in wrongful convictions. *Ramos*, 590 U. S., at 129. The rule should therefore apply not just forward but back, to all convictions rendered absent its protection.

* * * *

I would not discard *Teague*’s watershed exception and so keep those unfairly convicted people from getting new trials. Instead, I would accept the consequences of last Term’s holding in *Ramos*. A decision like that comes with a promise, or at any rate should. If the right to a unanimous jury is so fundamental—if a verdict rendered by a divided jury is “no verdict at all”—then Thedrick Edwards should not spend his life behind bars over two jurors’ opposition. I respectfully dissent.

Questions and Comments:

1. **Is *Teague* a precursor to AEDPA?** Justice Thomas, joined by Justice Gorsuch, suggested that the Court should have resolved the issue based solely on 28 U.S.C. § 2254(d)(1). This

section provides that relief "shall not be granted" on any claim adjudicated on the merits in state court unless the state court decision was an unreasonable application of clearly established federal law. In Justice Thomas' view, since *Apodaca v. Oregon* was the Supreme Court's final word on the subject when Edwards' conviction became final, the analysis could have ended there. How might the case have been decided differently if the Court had focused exclusively on § 2254(d)(1)? Is *Edwards v. Vannoy* a formula for future curtailments of habeas corpus? This section of the Antiterrorism and Effective Death Penalty Act will be discussed in more detail in Chapter 8.

2. **The historic role of the writ:** Justice Gorsuch, also joined by Justice Thomas, concurred in the judgment but emphasized his narrow view of the common law writ of habeas corpus. He argued that relief is only appropriate if the court of conviction lacked jurisdiction over the defendant or the offense, citing post-Reconstruction era cases for authority. Gorsuch pointed to *Frank v. Mangum* to support the idea that extreme departures from established criminal trial procedures could be akin to a loss of jurisdiction, especially if no corrective mechanism like an appeal existed. How does Justice Gorsuch's view of habeas corpus differ from broader interpretations? Why does he consider *Brown v. Allen* to have "upended centuries of settled precedent," and what practical problems does he foresee as a result? Justice Gorsuch also views the Court's use of *Teague* as a step toward bringing the Court closer to the decision in *Frank v. Mangum*. Do you agree with this view? Why or why not?
3. **Federal vs. state adjudication:** Whether considered as a new rule of retroactivity or a substantive limit on the writ, *Teague* and its progeny have fundamentally altered the relationship between federal and state courts in protecting constitutional rights. How has *Teague* affected the respective roles of state and federal courts in ensuring individuals' constitutional rights, particularly for prisoners who belong to historically marginalized groups that have faced arbitrary and discriminatory treatment in the criminal justice system? Is the dual sovereignty review process, where both state and federal courts review the constitutionality of criminal convictions, necessary or desirable? Does it enhance the fairness and reliability of criminal judgments? How might state courts behave if the U.S. Supreme Court were the only recourse for state prisoners claiming that their convictions violate the U.S. Constitution? What should the relationship between state and federal courts look like moving forward?

VI. State Retroactivity Rules

In *Danforth v. Minnesota*, the Supreme Court held that states are free to create and apply their own retroactivity rules for Supreme Court decisions. In that case, Minnesota courts denied Stephen Danforth's Sixth Amendment Confrontation Clause claim, reasoning that under *Teague v. Lane*, *Crawford v. Washington* was a "new rule" and therefore not retroactive since Danforth's appeal had already become final when *Crawford* was decided. The U.S. Supreme Court reversed and remanded, emphasizing that there was no precedent suggesting that federal retroactivity rules restrict state courts' authority to remedy constitutional violations. While *Teague* governs federal habeas corpus relief for state prisoners, it is not binding on states that choose to adopt a more expansive standard.

On remand, the Minnesota Supreme Court decided to follow *Teague*, citing the importance of the policy interest in finality, as other states had done. However, the court also noted that *Teague*'s exception for rules "critical to fundamental fairness" provided room for independent judgment. The Minnesota court asserted that it would not be bound by the U.S. Supreme Court's decisions on retroactivity but would instead "independently review cases to determine whether they meet our understanding of fundamental fairness." States have taken a variety of approaches to the question of retroactivity:

- Some states, like Minnesota, have adopted *Teague* or a modified version of it.
- Others continue to follow *Linkletter v. Walker* or similar standards, even in cases where the U.S. Supreme Court has declined to apply a precedent retroactively.

For example, consider Missouri's decision in *State v. Whitfield*⁶²⁹ addressing the retroactivity of *Ring v. Arizona*. This highlights how states can diverge in their handling of retroactivity and constitutional protections.

STATE V. WHITFIELD

In 1994, a jury convicted Joseph Whitfield of first-degree murder, but could not agree on punishment during the penalty phase, voting 11 to 1 in favor of life imprisonment. The judge then undertook the four-step process required by section 565.030.4 2 for determining punishment. He found the presence of statutory and non-statutory aggravating circumstances, determined these circumstances warranted death, considered whether there were mitigating circumstances and found they did not outweigh the circumstances in aggravation, and decided under all the circumstances to impose a death sentence. This Court affirmed the convictions and sentences and denied post-conviction relief. *State v. Whitfield*, 939 S.W.2d 361 (Mo. banc 1997), cert. denied, 522 U.S. 831 (1997).

Last year, in *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that the Sixth Amendment entitles "capital defendants...to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589. Mr. Whitfield contends his right under the Sixth and Fourteenth Amendments, as set out in *Ring*, was violated because the judge rather than the jury made the factual determinations on which his eligibility for the death sentence was predicated. This Court agrees.

* * * *

Teague [v. *Lane*] narrowed the situations in which a federal court will apply a new procedural rule retroactively to cases on collateral review, setting forth a generally applicable test rather than permitting federal courts to continue to make a case-by-case determination based on

⁶²⁹ 107 S.W.3d 253 (2019).

the Linkletter-Stovall factors. There are numerous reasons it adopted this new rule. As the Supreme Court of Nevada noted in *Colwell v. State*, 59 P.3d 463 (Nev. 2002):

In *Teague*, the Supreme Court, instead of focusing on the purpose and impact of a new constitutional rule, looked to the function of federal habeas review, which is to ensure that state courts conscientiously follow federal constitutional standards. The Court determined that this function is met by testing state convictions against the constitutional law recognized at the time of trial and direct appellate review, . . . Therefore, once a conviction has become final, federal habeas courts should generally not interfere with the state courts by applying new rules retroactively.

Colwell, 59 P.3d at 470.

As *Colwell* also noted, however, "Teague is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions." *Id.* This follows from the fact "states are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 1014 (1983). For this reason, "the Supreme Court has recognized that states may apply new constitutional standards 'in a broader range of cases than is required' by the Court's decision not to apply the standards retroactively." *Colwell*, 59 P.3d at 470-71, quoting, *Johnson v. New Jersey*, 384 U.S. 719 (1966); *see also State v. Fair*, 263 Ore. 383, 502 P.2d 1150, 1152 (Or. 1972) ("We are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires").

It is up to each state to determine whether to apply the rule set out in *Teague*, to continue to apply the rule set out in *Linkletter-Stovall*, or to apply yet some other rule appropriate for determining retroactivity of a new constitutional rule to cases on collateral review. So long as the state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster.

While this Court has on occasion cited federal cases dealing with retroactivity that in turn relied on *Teague*, this Court has never been presented with a case requiring it to decide between the Linkletter-Stovall and *Teague* tests. Neither has the State asked us to adopt the *Teague* test, nor even cited *Teague* to us in its brief. While Missouri shares many of the policy concerns *Teague* discusses concerning the finality of convictions, these concerns are well protected by the three-factor test set out in *Linkletter-Stovall* and traditionally applied by this Court. Further, the latter test permits this Court to consider the particular facts and legal issues relevant to the specific issue before the Court - for instance, here, to consider that the right asserted is the fundamental right to trial by jury and that the stake is of the highest magnitude - the defendant's life.

Finally, this case involves a motion to recall mandate. As discussed above, Missouri has traditionally recognized that a motion to recall mandate may be used to obtain relief from

convictions and sentences that are inconsistent with federal constitutional rules. [*Thompson v. State*, 659 S.W.2d 635, 768 (Mo. 2002)].

For these reasons, as a matter of state law, this Court chooses not to adopt the *Teague* analysis but instead chooses to continue applying the *Linkletter - Stovall* approach to the issue of the retroactivity of *Ring*, an approach that comports better with Missouri's legal tradition.⁶³⁰ Applying the analysis set out in *Linkletter-Stovall* here, this Court must consider (1) the purpose to be served by the new rule, (2) the extent of reliance by law enforcement on the old rule, and (3) the effect on the administration of justice of retroactive application of the new standards.

The purpose to be served by the rule set out in *Ring* is to ensure a jury of defendant's peers finds each of the factual elements necessary to his conviction and sentence of death. The Supreme Court and this Court have both held that the right to trial by jury is a fundamental right in serious criminal prosecutions. *Benton v Maryland*, 395 U.S. 784 (1969); *Spidle v. State*, 446 S.W.2d 793, 794-95 (Mo. 1969). In a case not involving the death penalty, the Supreme Court held that this was not a sufficient basis in itself to require retroactive application of the rule requiring a jury trial in such cases. *DeStefano v. Woods*, 392 U.S. 631, 633-34 (1968). It went on to consider the impact of its new rule on the administration of justice and the extent of reliance on the old rule and determined that the effect was so great that the new rule would not be applied retroactively. *Id.*

By contrast, here, the second and third factors clearly favor retroactivity. Unlike new constitutional rules dealing with Fourth Amendment violations, the rule at issue here will not invalidate any searches or preclude the admission of any evidence. And, unlike in states such as Arizona in which the statutes required judges to determine whether to impose the death penalty, in Missouri juries have always made the decision whether to impose the death penalty except in those few cases in which the jury was unable to reach a verdict. Moreover, under *Griffith*, *Ring* must be applied to all future death penalty cases and to those not yet final or still on direct appeal.

Thus, only those few Missouri death penalty cases that are no longer on direct appeal and in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty will be affected by the retroactive application of *Ring*. As a result, the effect of application of *Ring* to cases on collateral review will not cause dislocation of the judicial or prosecutorial system. This Court's preliminary review of its records has identified only five potential such cases. 17

Even in those five cases, the effect on the administration of justice of retroactive application of *Ring* will be minimal, as is evident from application of the new rule to the instant case. Although

⁶³⁰ [Court's footnote 15] While *Teague's* restrictive federal approach to retroactivity may effect a "proper allocation of responsibility between the state and federal courts in the area of constitutional criminal procedure" and eliminate the "perceived encroachment of federal habeas on state courts," Mary C. Hutton, *Retroactivity In The States: The Impact of Teague v. Lane On State Postconviction Remedies*, 44 ALA. L. REV. 421, 449 (1993), it has been suggested that "the *Teague* test essentially prevents state courts from achieving their goal [of correcting injustice], for through its focus on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case." 44 ALA. L. REV. at 450.

the sentence imposed by the trial court is reversed, no new guilt or penalty phase trial need be held. This is because section 565.030.4, for the reasons discussed above, does not permit the death penalty to be imposed unless the fact finder finds the first three factors set out in that subsection against defendant, and as noted, the record only shows that the judge made these findings. Under the principles set out in *Ring*, which apply retroactively to Mr. Whitfield on this motion to recall mandate, the court below violated his constitutional right in making the requisite findings itself and sentencing him to death. The only option was to impose a life sentence.

* * * *

The separate opinion seems to assume that the judgment is based on the jury's factual findings, and the issue is what presumptions can be indulged in about at what point the jury deadlocked. But, section 565.030.4 provides that a defendant shall be sentenced to life imprisonment unless the jury finds steps 1, 2, 3, and 4 against him or her. It also provides that, when the jury deadlocks, the jury's findings simply disappear from the case and the court is to make its own independent findings. That is what occurred here. Thus, any presumptions as to what the jury may have found are simply irrelevant. Here, the judgment of death, based on the court's findings, constituted constitutional error. For the reasons set out above, that error was not harmless beyond a reasonable doubt. 21 Therefore, had this case been tried after *Ring*, the proper course of action for the judge to follow would have been to sentence defendant to life imprisonment. The fact that the applicability of *Ring* was not determined until later does not change the remedy in the present case. It is still to enter the judgment the trial court should have entered - a sentence of life imprisonment without eligibility for probation or parole.

This result is anticipated, and required, by section 565.040.2, which provides in pertinent part:

"In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor...."

Sec. 565.040.2 (emphasis added). Because the imposition of Mr. Whitfield's death sentence has been determined to be in violation of his right under the Sixth and Fourteenth Amendments to a jury determination of the facts rendering him eligible for death, section 565.040.2 clearly applies. It expressly states that a defendant whose sentence is vacated on constitutional grounds shall be resentenced to life in prison. It does not, as the separate opinion suggests, state that a defendant shall be sentenced to life imprisonment only if his death sentence is held unconstitutional on the basis that the defendant was never really eligible for the death penalty in the first place, such as defendants who are mentally retarded or as to whom no statutory aggravator applies, and that defendants whose sentences are overturned on procedural grounds shall receive new trials. Rather, it states that "in the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court...shall sentence the defendant to life imprisonment." *Id.* (emphasis added).

Mr. Whitfield's death sentence, imposed pursuant to chapter 565, is herein held to be unconstitutional because it violates his right to be sentenced on determinations made by a jury. 23 Section 565.040.2 states that in the event that a death sentence imposed pursuant to chapter 565 is held to be unconstitutional, the defendant shall be sentenced to life imprisonment. Mr. Whitfield accordingly is entitled to be resentenced to a term of life imprisonment without eligibility for probation, parole, or release except by act of the governor.

III. CONCLUSION

For the foregoing reasons, this Court recalls its mandate in *Whitfield*, 939 S.W.2d 361, sets aside Mr. Whitfield's sentence of death, and pursuant to section 565.040.2, Rule 84.14, and this Court's authority under section 565.035.5(2), sets aside the sentence of death and resentsences defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor. In all other respects, the judgment is affirmed as provided in this Court's opinion of January 21, 1997.

Questions and Comments:

1. ***Teague vs. Linkletter***: How do the policies and analyses used in *Teague* differ from those in the *Linkletter* standard as applied in *State v. Whitfield*? While both courts emphasize the importance of finality, what additional values or interests are considered in each decision? Does federalism influence the Missouri Supreme Court's decision in *Whitfield*? How persuasive did the Missouri court find retroactivity standards adopted by other states?
2. **States rejecting *Teague***: The Missouri Supreme Court noted that it was not alone in rejecting *Teague* or adopting a modified version of it. It cited decisions from South Dakota, New Jersey, Alabama, Nevada, and Oregon, including:
 - *Cowell v. Leapley*—"We find the *Teague* rule to be unduly narrow as to what issues it will consider on collateral review."⁶³¹
 - *State v. Lark*—acknowledging *Teague* but relying on state precedent and independently deciding to apply decisions to all cases on direct review.⁶³²
 - *Ex Parte Coker*—"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions."⁶³³

⁶³¹ 458 N.W.2d 514 (S.D. 1990).

⁶³² 117 N.J. 331, 567 A.2d 197 (N.J. 1989).

⁶³³ 575 So. 2d 43 (Ala. 1990).

- *Colwell v. State*—reserving the power to decide “whether a rule is new and whether it falls within the two exceptions to non-retroactivity”⁶³⁴
- *State v. Fair*—“We are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires.”⁶³⁵

What policies or values might prompt a state to adopt a broader or more expansive view of retroactivity? Why might states reserve the ability to independently determine the retroactivity of new constitutional rules?

3. **States following *Teague*:** Some states, like Arizona and Colorado, adhere to *Teague* to ensure uniformity between state and federal retroactivity rules, simplifying the work of lawyers and trial judges. For example:

- *State v. Slemmer*—“Retroactivity law is complex enough without requiring counsel and trial judges to apply different retroactivity rules depending on whether the substantive decision is grounded on state or federal constitutional principles—especially when many decisions are grounded on both.”⁶³⁶
- *People v. Bradbury*—Adhering to the state's consistent policy of following the lead of the United States Supreme Court.⁶³⁷

If a rule enhances the reliability of a jury’s verdict, does that justify leaving an unconstitutionally obtained conviction in place? How does the goal of uniformity weigh against the interests of fairness and individual rights?

⁶³⁴ 59 P.3d 463, 471 (Nev. 2002).

⁶³⁵ 263 Ore. 383, 502 P.2d 1150, 1152 (Or. 1972).

⁶³⁶ 170 Ariz. 174, 823 P.2d 41, 49 (Ariz. 1991).

⁶³⁷ 68 P.3d 494, 498 (Colo. Ct. App. 2002).

CHAPTER 7: FACT DEVELOPMENT IN POSTCONVICTION PROCEEDINGS

I. Introduction

Habeas Corpus is not an appeal; it is an independent cause of action about the constitutionality of a conviction and sentence. “It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.”⁶³⁸ The existence of the right to present evidence and argue facts is what distinguished *Frank v. Mangum* and *Moore v. Dempsey*—whether the federal habeas court could hear evidence and make its own conclusions about the lynch-mob dominated trials, or whether it had to rule based on the State courts’ dubious findings that denied reality. The ability of the federal court to conduct independent fact inquiries is central to the tension between the court’s duty to respect State courts’ adjudications, and its equally powerful duty to adjudicate prisoners’ constitutional claims.

The importance of robust federal evidentiary hearings on habeas corpus is revealed by the fact-intensive opinions in cases that grant relief from glaring injustices—prejudicial constitutional violations exposed by investigation and established with persuasive evidence and witness testimony. The successful outcome of *Schlup v. Delo*,⁶³⁹ which established the standard for colorable claims of actual innocence on federal habeas, was the product of thorough investigation into corrupt prison administration, rival prison gangs, and an evidentiary presentation that reconstructed the movements of hundreds of inmates through a maximum-security prison. The tide turned for George Porter in *Porter v. McCollum*⁶⁴⁰ when his attorneys gathered documentation of his military service in the Korean War, and presented testimony of fellow soldiers and officers who described in horrific detail the stories of Porter’s brave and heroic combat service—a hearing that transformed him from a death row inmate convicted of a double homicide to a traumatized war hero whose wounds never healed. Thomas Joe Miller-El was sentenced to death by an all-white jury, but his life was saved by the factual record and hearing in *Miller-El v. Cockrell*⁶⁴¹ that established beyond dispute that the Dallas County prosecuting attorney engaged in every conceivable contrivance to eliminate Black citizens from jury service in capital cases.

Every successful habeas corpus petition is built on a strong evidentiary foundation. This chapter is about the right to a hearing in habeas corpus cases and discusses cases focusing on the issue of whether or under what circumstances a hearing may or must be granted or denied. But the reader is encouraged to read between the lines of these and other cases to imagine the investigation and teamwork involved in putting together the facts that support the petitioner’s constitutional

⁶³⁸ *Townsend v. Sain*, 400 U.S. 293, 312 (1963).

⁶³⁹ 513 U.S. 298 (1995).

⁶⁴⁰ 558 U.S. 30 (2009).

⁶⁴¹ 537 U.S. 322 (2003).

claims. The habeas petition rises or falls on the evidence supporting it. The factual underpinnings of a claim for relief are so important that habeas corpus relief is seldom granted in the absence of an evidentiary hearing. This is why the right to present evidence in federal court is such a hotly contested issue. The majority and dissenting opinions in these cases reveal why hearings are an essential component of a fair process.

This chapter discusses evidentiary hearings during the collateral review process and habeas corpus. As noted in Chapter 1, Introduction to Habeas Corpus, fact development occurs in the trial-level courts in the state postconviction proceedings and in the United States District Court in federal habeas corpus proceedings, at stages four and seven of the postconviction review process, depicted in bold type face in this chart:

Stages of Postconviction Review

Direct Review	Collateral Review	Federal Habeas
3. Certiorari (SCOTUS)	6. Certiorari (SCOTUS)	9. Certiorari (SCOTUS)
2. Appeal (State Appellate Court)	5. Appeal (State Appellate Court)	8. Appeal (Federal Circuit Court of Appeals)
1. Trial (State Trial Court)	4. Postconviction Motion (State Trial-level Court)	7. Habeas Corpus (Federal District Court)

The prisoner is the plaintiff (more commonly designated “petitioner” or “movant”) in such proceedings, and like other civil plaintiffs, bears the burden of proof and the risk of non-persuasion. As with any other cause of action, a claim for relief has elements that must be proven. Prisoners are entitled to relief for a violation of *Brady v. Maryland*⁶⁴² only if they can show that the prosecution failed to disclose exculpatory evidence that is favorable to the defense and material to the outcome of the case. Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁶⁴³ A claim the trial counsel was ineffective under *Strickland v. Washington*⁶⁴⁴ requires proof that trial

⁶⁴² 373 U.S. 83 (1963).

⁶⁴³ *Kyles v. Whitley*, 514 U.S. 419, 433 (1985). The Court’s factually detailed analysis of the nondisclosed evidence in *Kyles* is an excellent illustration of the nature and quality of the evidentiary showing needed to prevail in a habeas case.

⁶⁴⁴ 466 U.S. 668 (1984).

counsel performed deficiently, and that the defendant suffered prejudice as a result. To establish prejudice, the petitioner must show that the outcome of the case “would reasonably likely have been different absent [counsel’s] errors.”⁶⁴⁵

Because allegations alone do not prove themselves, a postconviction or habeas hearing is a trial to a court without a jury. Petitioners must present evidence to persuade the court to find all of the elements of their claims, usually through documents, testimony, and evidence. If, for example, the petitioner alleged that trial counsel was ineffective for failing to consult a competent ballistics expert to examine bullets at the crime scene, the hearing would likely include trial evidence surrounding the ballistics issue, the bullets themselves, trial counsel’s testimony, and the testimony of a ballistics expert so that the Court could reach an informed conclusion as to whether counsel’s failure was prejudicially deficient.⁶⁴⁶ Without investigation, discovery, and the presentation of evidence, the vast majority of habeas corpus claims are doomed to failure.

II. Pleading the Facts

A motion for postconviction relief or petition for writ of habeas corpus initiates a cause of action. The petitioner must allege sufficient facts and legal grounds to state a claim upon which relief can be granted. Habeas corpus is a civil remedy, but unlike typical tort or contract actions, habeas petitioners bear the burden of pleading and proving a case sufficient enough to reopen and set aside a final judgment. In addition to identifying a controlling constitutional right, the petitioner must also allege specific facts demonstrating that the right was violated and that a remedy is justified. This challenge is formidable, as petitioners must overcome powerful principles of finality, comity, and federalism.

In *Blackledge v. Allison*,⁶⁴⁷ the petitioner, proceeding *pro se*, faced these obstacles in the context of a conviction based on a guilty plea—a formal confession in open court, where concerns about finality are particularly strong. The Court dedicated much of its opinion to emphasizing the essential role of plea bargaining in the criminal justice system, noting that it conserves judicial and law enforcement resources while protecting the public by expediting the disposition of cases when the defendant might otherwise remain free on bail pending trial. Plea deals also benefit defendants by reducing the uncertainty of trial, ensuring a speedy disposition of the charges, and allowing them to begin rehabilitation. The Court stressed that these benefits accrue “only if dispositions by guilty plea are accorded a great measure of finality.”⁶⁴⁸ It further warned that routinely granting postconviction hearings to challenge guilty plea convictions “would eliminate the chief virtues of

⁶⁴⁵ *Id.* at 696.

⁶⁴⁶ This hypothetical comes from *Hinton v. Alabama*, 571 U.S. 263 (2014), in which a successful claim of ineffective assistance of counsel for failing to hire a competent ballistics expert led to the exoneration of Anthony Ray Hinton from Alabama’s death row.

⁶⁴⁷ 431 U.S. 63 (1977).

⁶⁴⁸ *Id.* at 71.

the plea system—speed, economy, and finality.”⁶⁴⁹

BLACKLEDGE V. ALLISON

Mr. Justice Stewart delivered the opinion of the Court.

The respondent, Gary Darrell Allison, an inmate of a North Carolina penitentiary, petitioned a Federal District Court for a writ of habeas corpus. The court dismissed his petition without a hearing, and the Court of Appeals reversed, ruling that in the circumstances of this case summary dismissal was improper. We granted certiorari to review the judgment of the Court of Appeals.

I

Allison was indicted by a North Carolina grand jury for breaking and entering, attempted safe robbery, and possession of burglary tools. At his arraignment, where he was represented by court-appointed counsel, he initially pleaded not guilty. But after learning that his codefendant planned to plead guilty, he entered a guilty plea to a single count of attempted safe robbery, for which the minimum prison sentence was 10 years and the maximum was life. *N.C. Gen. Stat. § 14-89.1* (1969).

In accord with the procedure for taking guilty pleas then in effect in North Carolina, the judge in open court read from a printed form 13 questions, generally concerning the defendant's understanding of the charge, its consequences, and the voluntariness of his plea. Allison answered "yes" or "no" to each question, and the court clerk transcribed those responses on a copy of the form, which Allison signed. So far as the record shows, there was no questioning beyond this routine; no inquiry was made of either defense counsel or prosecutor. Two questions from the form are of particular relevance to the issues before us: Question No. 8 – “Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum [*sic*] of 10 years to life?” to which Allison answered "Yes"; and Question No. 11 – “Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?” to which Allison answered “No.”

The trial judge then accepted the plea by signing his name at the bottom of the form under a text entitled “Adjudication,” which recited the three charges for which Allison had been indicted, that he had been fully advised of his rights, was in fact guilty, and pleaded guilty to attempted safe robbery “freely, understandingly and voluntarily,” with full awareness of the consequences, and “without undue... compulsion... duress, [or] promise of leniency.” Three days later, at a sentencing hearing, of which there is no record whatsoever, Allison was sentenced to 17-21 years in prison.

After unsuccessfully exhausting a state collateral remedy, Allison filed a pro se petition in a Federal District Court seeking a writ of habeas corpus. The petition alleged:

⁶⁴⁹ *Id.* at 72.

“[h]is guilty plea was induced by an unkept promise, and therefore was not the free and willing choice of the petitioner, and should be set aside by this Court. An unkept bargain which has induced a guilty plea is grounds for relief. *Santobello v. New York*, 404 U.S. 257, 267 (1971).”

The petition went on to explain and support this allegation as follows:

“The petitioner was led to believe and did believe, by Mr. Pickard [Allison's attorney], that he Mr. N. Glenn Pickard had talked the case over with the Solicitor and the Judge, and that if the petitioner would plead guilty, that he would only get a 10 year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea[ded] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel.”

“The petitioner believing that he was only going to get a ten year active sentence, allowed himself to be pled guilty to the charge of attempted safe robbery, and was shocked by the Court with a 17-21 year sentence.”

“The petitioner was promised by his Attorney, who had consulted presumably with the Judge and Solicitor, that he was only going to get a ten year sentence, and therefore because of this unkept bargain, he is entitled to relief in this Court.”

“The petitioner is aware of the fact that he was questioned by the trial Judge prior to sentencing, but as he thought he was only going to get ten years, and had been instructed to answer the questions, so that the Court would accept the guilty plea, this fact does not preclude him from raising this matter especially since he was not given the promised sentence by the Court.”

“The fact that the Judge, said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence.”

The petitioner here, Warden Blackledge, filed a motion to dismiss and attached to it the “transcript” of the plea hearing, consisting of nothing more than the printed form filled in by the clerk and signed by Allison and the state-court judge. The motion contended that the form conclusively showed that Allison had chosen to plead guilty knowingly, voluntarily, and with full awareness of the consequences. The Federal District Court agreed that the printed form “conclusively shows that [Allison] was carefully examined by the Court before the plea was accepted. Therefore, it must stand.” Construing Allison's petition as alleging merely that his lawyer's prediction of the severity of the sentence turned out to be inaccurate, the District Court found no basis for relief and, accordingly, dismissed the petition.

* * * *

The Court of Appeals for the Fourth Circuit reversed. It held that Allison's allegation of a broken promise, as amplified by the explanation that his lawyer instructed him to deny the existence of any promises, was not foreclosed by his responses to the form questions at the state guilty-plea proceeding. The appellate court reasoned that when a *pro se*, indigent prisoner makes allegations that, if proved, would entitle him to habeas corpus relief, he should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter affidavits conclusively proving their falsity. The case was therefore remanded for an evidentiary hearing. 533 F. 2d 894.

The petitioner warden sought review in this Court, 28 U.S.C. § 1254(1), and we granted certiorari, 429 U.S. 814, to consider the significant federal question presented.

* * * *

The allegations in this case were not in themselves so “vague [or] conclusory,” *Machibroda*, 368 U.S., at 495, as to warrant dismissal for that reason alone. Allison alleged as a ground for relief that his plea was induced by an unkept promise.⁶⁵⁰ But he did not stop there. He proceeded to elaborate upon this claim with specific factual allegations. The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication. The critical question is whether these allegations, when viewed against the record of the plea hearing, were so “palpably incredible,” *ibid.*, so “patently frivolous or false,” *Herman v. Claudy*, 350 U.S. 116, 119, as to warrant summary dismissal. In the light of the nature of the record of the proceeding at which the guilty plea was accepted, and of the ambiguous status of the process of plea bargaining at the time the guilty plea was made, we conclude that Allison's petition should not have been summarily dismissed.

* * * *

Allison was arraigned a mere 37 days after the *Santobello* decision was announced, under a North Carolina procedure that had not been modified in light of *Santobello* or earlier decisions of this Court recognizing the process of plea bargaining. That procedure itself reflected the atmosphere of secrecy which then characterized plea bargaining generally. No transcript of the proceeding was made. The only record was a standard printed form. There is no way of knowing whether the trial judge in any way deviated from or supplemented the text of the form. The record is silent as to what statements Allison, his lawyer, or the prosecutor might have made regarding promised sentencing concessions. And there is no record at all of the sentencing hearing three days later, at which one of the participants might well have made a statement shedding light upon the veracity of the allegations Allison later advanced.

⁶⁵⁰ [Court's footnote 8] Allison's petition stated that his lawyer, "who had consulted presumably with the Judge and Solicitor," had promised that the maximum sentence to be imposed was 10 years. This allegation, in light of the other circumstances of this case, raised the serious constitutional question whether his guilty plea was knowingly and voluntarily made. See *Santobello v. New York*, 404 U.S. 257; *Brady v. United States*, 397 U.S. 742, 755.

The litany of form questions followed by the trial judge at arraignment nowhere indicated to Allison (or indeed to the lawyers involved) that plea bargaining was a legitimate practice that could be freely disclosed in open court. Neither lawyer was asked to disclose any agreement that had been reached, or sentencing recommendation that had been promised. The process thus did nothing to dispel a defendant's belief that any bargain struck must remain concealed - a belief here allegedly reinforced by the admonition of Allison's lawyer himself that disclosure could jeopardize the agreement. Rather than challenging respondent's counsel's contention at oral argument in this Court that "at that time in North Carolina plea bargains were never disclosed in response to such a question on such a form," counsel for the petitioners conceded at oral argument that "[that] form was a minimum inquiry."

Although "[l]ogically the general inquiry should elicit information about plea bargaining, . . . it seldom has in the past." . . . Particularly if, as Allison alleged, he was advised by counsel to conceal any plea bargain, his denial that any promises had been made might have been a courtroom ritual more sham than real. We thus cannot conclude that the allegations in Allison's habeas corpus petition, when measured against the "record" of the arraignment, were so "patently false or frivolous"⁶⁵¹ as to warrant summary dismissal.

Had these commendable procedures been followed in the present case, Allison's petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored. But the salutary reforms recently implemented by North Carolina highlight even more sharply the deficiencies in the record before the District Court in the present case.

This is not to say that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing. As in civil cases generally, there exists a procedure whose purpose is to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment. Upon remand the warden will be free to make such a motion, supporting it with whatever proof he wishes to attach.⁶⁵² If he chooses to do so, Allison will then be required either to produce some contrary proof indicating that there is a genuine issue of fact to be resolved by the District Court or to explain his inability to provide such proof. *Fed. Rules Civ. Proc. 56(e), (f)*.

Moreover, as is now expressly provided in the Rules Governing Habeas Corpus Cases, the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures

⁶⁵¹ [Court's footnote 15] There is another ground to support the view that the allegations were not wholly incredible. Allison was indicted on three separate charges. All three were listed in the printed arraignment form, but he pleaded guilty to only one of them; the other two may well have been dismissed pursuant to an agreement. And this is not a case in which there is a record of the sentencing proceedings, . . . or where delay by the prisoner in seeking postconviction relief . . . undercuts the credibility of his allegations.

⁶⁵² [Court's footnote 21] Indeed, it would seem easier for the State than for an indigent, untutored prisoner to obtain affidavits from the principals, particularly given the potential availability of discovery, see n. 23, *infra*.

in an effort to avoid the need for an evidentiary hearing. Under Rule 6, a party may request and the judge may direct that discovery take place, and “there may be instances in which discovery would be appropriate [before an evidentiary hearing, and would show such a hearing] to be unnecessary....” Advisory Committee note to Rule 6, Rules Governing Habeas Corpus Cases, 28 U.S.C. p. 268 (1976 ed.). Under Rule 7, n24 the judge can direct expansion of the record to include any appropriate materials that “enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing.”⁶⁵³

In short, it may turn out upon remand that a full evidentiary hearing is not required. But Allison is “entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts.” *Harris v. Nelson*, 394 U.S., at 298. See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 *Harv. L. Rev.* 321, 337-338 (1973).⁶⁵⁴ Upon that understanding, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Questions and Comments:

1. **Fact-development tools:** Fact development is essential to judicial decision-making, civil and criminal. *Blackledge v. Allison* is a pragmatic decision that balances the competing forces of finality, fairness, and judicial economy by outlining multiple tools for fact-finding. Depending on the needs of case, a court may resolve issues of fact by ordering discovery, filing documents and affidavits, and taking testimony at an evidentiary hearing.

⁶⁵³ [Court’s footnote 25] There may be cases in which expansion of the record will provide “evidence against a petitioner’s extra-record contentions... so over-whelming as to justify a conclusion that an [allegation of a dishonored plea agreement] does not raise a substantial issue of fact.” *Moorhead v. United States*, 456 F. 2d 992, 996 (CA3). But before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea agreement. See *Walters v. Harris*, 460 F. 2d, at 992. “When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.” Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Cases, 28 U.S.C. p. 269 (1976 ed.), quoting *Raines v. United States*, 423 F. 2d 526, 530 (CA4).

⁶⁵⁴ [Court’s footnote 26] The correspondence between the Magistrate and Allison pertaining to Allison’s petition for rehearing, see *supra*, at 70, did not provide such an opportunity. The Magistrate directed Allison to obtain a notarized statement from his codefendant, who allegedly had heard Allison’s attorney make the promise as to sentence. Allison was confined in prison and without legal assistance. The codefendant was confined in a different prison. In these circumstances, the Magistrate imposed upon Allison a novel and formless burden of supplying proof, without the benefit of compulsory process and without any intimation that dismissal would follow if that burden were not met. It can thus hardly be said that Allison was granted a “full opportunity for presentation of the relevant facts” or that his petition received “careful consideration and plenary processing.”

In *Schlup v. Delo*,⁶⁵⁵ the Court emphasized that “a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented.” Schlup’s petition was accompanied by a motion for an evidentiary hearing and affidavits from eyewitnesses whose statements, if true, established his innocence. The Court in Schlup held that when a habeas petitioner presents new evidence that undermines the credibility of trial witnesses, “the habeas court may have to make some credibility assessments.”⁶⁵⁶ On remand in *Blackledge v. Allison*, what would happen if Allison’s trial counsel provided an affidavit denying that he told Allison the judge would not sentence him to more than ten years—reducing the issue to Allison’s word against his lawyer’s? Would a hearing be necessary? Is there additional evidence that might tip the balance? What additional information could Allison request or present to support his claim?

2. **Reliable findings serve finality and fairness:** Justice Powell noted: “The case before us today is not necessarily an example of abuse of the system. It is an example, however, of how finality can be frustrated by failure to adhere to proper procedures at the trial court level.”⁶⁵⁷ The absence of a transcript from Allison’s guilty plea hearing weighed in his favor by making his allegation more plausible. Absent a contemporary transcript of a plea hearing, it is inappropriate to dismiss a petitioner’s claim—asserting that counsel failed to fully advise him of the consequences of his plea—without a hearing or other fact-finding measures.⁶⁵⁸
3. **Pleading a prima facie case:** The Court’s analysis begins with whether Allison pleaded a sufficient case. Under the rules governing § 2254 cases, Rules 2(c)(1) and (2), a petition must “specify all grounds for relief available to petitioner” and “state the facts supporting each ground.” The identical language appears in § 2255 Rules 2(b)(1) and (2). The Administrative Office of the United States Courts has created a form for *pro se* petitioners initiating proceedings under 28 U.S.C. §§ 2254 and 2255.⁶⁵⁹ Approximately 65% to 70% of federal district courts require habeas petitioners to use some version of this form.
4. **“Refuted by the Record”?** Allison alleged specific facts, but the government countered that his claims were refuted by the record, citing his answers on the form he completed when entering his guilty plea. His responses on the form contradicted the claims in his petition. However, the Court found that his allegations were not so “patently false or frivolous,” “implausible,” or “conclusively” without merit as to justify dismissal without further fact development. What made Allison’s claim plausible? How should lower courts

⁶⁵⁵ 513 U.S. 298, 332 (1995) (quoting *Agosto v. INS*, 436 U.S. 748 (1978)).

⁶⁵⁶ *Id.* at 330.

⁶⁵⁷ *Blackledge v. Allison*, *supra*, at 84 (Powell, J., concurring).

⁶⁵⁸ *Williams v. Estelle*, 681 F.2d 946 (5th Cir. 1982).

⁶⁵⁹ *Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254*, US COURTS, Form AO 241, <https://www.uscourts.gov/forms-rules/forms/petition-writ-habeas-corpus-under-28-usc-ss-2254>, (September 1, 2017).

apply this standard in future cases?

5. **Hurdles facing pro se litigants:** One significant challenge facing both courts and petitioners is that most federal habeas petitioners proceed *pro se* and often the lack legal knowledge, language skills, and resources to adequately plead their cases. This is reflected in decisions denying petitions for seemingly obvious procedural deficiencies. For example, merely directing a federal court to review transcripts, case records, and appellate briefs—without specifically pleading supporting facts for each ground of relief—is insufficient.⁶⁶⁰ Courts have cautioned that district courts should interpret *pro se* petitions with leniency and allow borderline cases to proceed, but fact-pleading is essential, even for *pro se* litigants.⁶⁶¹ Even a lenient court cannot know what is omitted from a pleading. Allison’s factual allegations, if true, were sufficient to justify the issuance of a writ of habeas corpus. Another situation in which a petition may be deemed inadequate is when the petition lacks the specificity necessary to determine the claim’s merits. For example, a claim of ineffective assistance of trial counsel for failing to interview witnesses is insufficient unless it identifies the witnesses and describes the substance of their expected testimony. Without this information, the court cannot properly evaluate the performance prong of *Strickland v. Washington*.⁶⁶²
6. **Blackledge standard unaffected by AEDPA:** Although the Antiterrorism and Effective Death Penalty Act does not directly address pleading sufficiency, it imposes a statute of limitations and procedural limits on the federal courts’ power to hear evidence and grant relief. These limitations are discussed in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

III. Discovery

Blackledge identifies discovery as a fact-finding tool, but it is more commonly used as an investigative tool. Habeas corpus is a civil remedy, and as the following cases demonstrate, discovery can be essential to obtaining facts and documents that will substantiate a petitioner’s claims. Note in the following cases the Court’s recognition that discovery can be important in habeas cases, but that some threshold showing is required before the petitioner will be allowed to conduct discovery.

HARRIS V. NELSON⁶⁶³

MR. JUSTICE FORTAS delivered the opinion of the Court.

⁶⁶⁰ Adams v. Armontrout, 897 F.2d 332 (8th Cir. 1990).

⁶⁶¹ Williams v. Kullman, 722 F.2d 1048 (2nd Cir. 1983).

⁶⁶² 466 U.S. 668 (1984); *See* Saunders v. United States, 236 F.3d 950 (8th Cir. 2001).

⁶⁶³ 394 U.S. 286 (1969).

This case presents the question whether state prisoners who have commenced habeas corpus proceedings in a federal district court may, in proper circumstances, utilize the instrument of interrogatories for discovery purposes.

* * * *

Rule 1 of the Federal Rules of Civil Procedure provides that: "These rules govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in *Rule 81*." At the time of the decision below *Rule 81 (a)(2)* provided, in relevant part, that the Rules were not applicable in habeas corpus "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity."

* * * *

It is, of course, true that habeas corpus proceedings are characterized as "civil." See, *e. g.*, *Fisher v. Baker*, 203 U.S. 174, 181 (1906). But the label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense. There is no indication that with respect to pretrial proceedings for the development of evidence, habeas corpus practice had conformed to the practice at law or in equity "to the extent" that the application of rules newly developed in 1938 to govern discovery in "civil" cases should apply in order to avoid a divergence in practice which had theretofore been substantially uniform. Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of *Rule 81 (a)(2)*, the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

* * * *

To conclude that the Federal Rules' discovery provisions do not apply completely and automatically by virtue of *Rule 81 (a)(2)* is not to say that there is no way in which a district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition. Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized, and as we have discussed, *supra*, at 290-292, are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts. Congress has provided that once a petition for a writ of habeas corpus is filed, unless the court is of the opinion that the petitioner is not entitled to an order to show cause, the writ must be awarded "forthwith," or an order to show cause must be issued. 28 U. S. C. § 2243. Thereafter, if the court concludes that the petitioner is

entitled to an evidentiary hearing, cf. *Townsend v. Sain*, *supra*; 28 U. S. C. § 2254, it shall order one to be held promptly. 28 U. S. C. § 2243.

Flexible provision is made for taking evidence by oral testimony, by deposition, or upon affidavit and written interrogatory. 28 U. S. C. § 2246. Cf. §§ 2245, 2254 (e). The court shall "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U. S. C. § 2243. But with respect to methods for securing facts where necessary to accomplish the objective of the proceedings Congress has been largely silent. Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U. S. C. § 1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price v. Johnston*, 334 U.S. 266, 282 (1948), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries. *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911) (subpoenas *duces tecum*); *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F.2d 126, 127 (C. A. 1st Cir. 1941) (order that certain documents be produced for the purpose of pretrial discovery). In *Price v. Johnston*, *supra*, this Court held explicitly that the purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are "agreeable" to the usages and principles of law, extend to habeas corpus proceedings.

At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law." 28 U. S. C. § 1651.

We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

Accordingly, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings in accordance with this opinion.

Reversed and remanded.

Questions and Comments:

1. **Statutes and Court Rules:** Absent specific discovery provisions in statutes and rules relating to habeas corpus, the Court relied on the All Writs Act, which authorizes federal courts to issue any order “necessary and appropriate” to preserve their jurisdiction.⁶⁶⁴ The Court suggested that “the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.” In response, Rule 6 of the Rules Governing § 2254 Cases was adopted to regulate discovery in habeas corpus proceedings:

Rule 6. Discovery

(a) Leave of court required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) Deposition expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner’s attorney to attend the deposition.

Habeas Rule 7 gives federal courts discretion to direct the parties to expand the record by including “additional materials relating to the petition,” such as “letters . . . , documents, exhibits, [sworn answers to] written interrogatories” and affidavits. Habeas Rule 8 permits evidentiary hearings but is subject to 28 U.S.C. § 2254(e), which places substantial limits on the power of federal courts to hear evidence that was not part of the state court record. This issue is discussed further in Chapter 8, The Antiterrorism and Effective Death Penalty Act. Notably, if a hearing is ordered, the judge “must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.”⁶⁶⁵

⁶⁶⁴ 28 U.S.C. §1651

⁶⁶⁵ Habeas Rule 8(c).

2. **Good Cause:** The “good cause” standard aligns with the court’s duty to “provide the necessary facilities and procedures for an adequate inquiry” when confronted with a facially sufficient constitutional claim requiring further fact development. The Court expressed confidence that the district court’s discretion and pleading standards would generally prevent abuse of the discovery process. It added the striking observation: “We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact.”⁶⁶⁶ What prompted the Court to make this statement? Also, Rule 6 allows for the appointment of counsel when “necessary for effective discovery.” While representation benefits the prisoner, it also ensures an orderly discovery process that adheres to professional norms. See also ABA Criminal Justice Standards: Postconviction Remedies Standard 22-4.5(c) regarding discovery and summary disposition on an expanded record without plenary evidentiary hearing: “Employment of the various discovery techniques in this context should be subject to continuing court supervision.”
3. **Discovery and diligence:** Discovery plays a critical role in a habeas corpus and state postconviction proceedings. *Schlup v. Delo* exemplifies this.⁶⁶⁷ Much of the evidence supporting Schlup’s innocence emerged through discovery—most notably, a videotape of the surveillance camera and transcripts of inmate interviews confirming that Schlup was in the prison dining hall, several hundred yards from the housing unit, when the stabbing occurred.⁶⁶⁸ Beyond uncovering crucial evidence, reasonable discovery requests can also show the prisoner’s diligence. The dissent in *McCleskey v. Zant*⁶⁶⁹ powerfully argues that the discovery efforts of McCleskey’s previous counsel proved his diligence in his pursuing McCleskey’s claim that the prosecutor planted an informant in his cell to elicit statements in violation of *Massiah v. United States*.⁶⁷⁰ McCleskey’s counsel requested documents and deposed prosecutors and law enforcement officials—all of whom denied an agreement with the informant. However, their agreement was documented in records and remained undisclosed until McCleskey’s second habeas petition.⁶⁷¹
4. **Relationship between discovery and pleading:** The good-case standard from *Harris v. Nelson* requires that the petitioner sufficiently plead a claim on which relief can be granted. Discovery serves no purpose if the claim would fail even if the petitioner’s allegations were true.⁶⁷² In this respect, *Harris v. Nelson* and *Blackledge v. Allison* significantly overlap—petitioners who cannot satisfy the burden to plead a sufficient case are not entitled to discovery. What does this suggest about the timing of discovery? Some courts have ruled that discovery is unavailable before a habeas corpus petition is filed, as Federal Rules of

⁶⁶⁶ *Harris v. Nelson*, *supra*, at 300.

⁶⁶⁷ 513 U.S. 398 (1995).

⁶⁶⁸ *Id.* at 308-309.

⁶⁶⁹ 499 U.S. 467 (1991).

⁶⁷⁰ 377 U.S. 201 (1964).

⁶⁷¹ *McCleskey v. Zant*, *supra*, at 526 (Marshall, J., dissenting).

⁶⁷² *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1989).

Civil Procedure do not permit pre-complaint discovery.⁶⁷³ However, the State's *Brady v. Maryland* disclosure obligations are ongoing.⁶⁷⁴ At least one district court has interpreted this to allow pre-petition discovery where the petitioner made a *prima facie* showing of a *Brady* violation in a discovery motion.⁶⁷⁵ Additionally, disclosure obligations may arise under the Freedom of Information Act, 5 USCS § 552, or State open records laws, independent of whether a federal habeas petition is pending.⁶⁷⁶

5. **Discovery and exhaustion:** In addition to stating a *prima facie* claim for relief, a petitioner may need to show that the claim is properly before the federal court. For example, under *Rose v. Lundy*, a federal court may not proceed on a mixed petition containing both exhausted and unexhausted claims. Thus, a court may deny discovery because the petition includes unexhausted claims.⁶⁷⁷ Likewise, discovery may be denied on a procedurally defaulted claim.⁶⁷⁸ *Townsend v. Sain*, discussed in the next section, established a rebuttable presumption that a State court's fact-finding is correct unless the petitioner provides legally sufficient grounds to challenge it. A petitioner unable to overcome this correctness presumption may be denied discovery, especially if State courts allowed an opportunity for discovery.⁶⁷⁹ On the other hand, discovery could produce new facts supporting a claim that is unexhausted. Further, discovery might be relevant to the issue of procedural bar if it turns on a question of fact. For example, an argument that there is cause and prejudice to excuse a procedural default, such as ineffective assistance of counsel,⁶⁸⁰ may require discovery pertaining to counsel's investigation, performance, and decisions to resolve.
6. **District court supervision:** Either party's right to discovery may be limited by principles commonly encountered in civil cases, such as privilege. District courts have discretion to limit discovery, particularly in cases involving implicit waivers of privilege. For example, when a petitioner alleges ineffective assistance of counsel, this claim may waive attorney-client privilege—but is limited to matters directly relevant to the claim. The district court may limit discovery to the scope of that waiver and strictly police those limits.⁶⁸¹ Additionally, district courts may order the State to provide a habeas petitioner access to physical evidence for DNA testing, provided that the order safeguards the integrity of the

⁶⁷³ *Calderon v. United States Dist. Court*, 98 F.3d 1102 (9th Cir. 1996).

⁶⁷⁴ *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997).

⁶⁷⁵ *Harlow v. Murphy*, No. 05-CV-039-B, 2008 U.S. Dist. LEXIS 124288, *56 (D. Wyo. Feb. 15, 2008).

⁶⁷⁶ *See, e.g., United States Department of Justice v. Landano*, 508 U.S. 165, 168 (1993).

⁶⁷⁷ *Calderon v. United States Dist. Court*, 120 F.3d 927 (9th Cir. 1997).

⁶⁷⁸ *Wellons v. Hall*, 554 F.3d 923 (11th Cir. 2009); *Rucker v. Norris*, 563 F.3d 766 (8th Cir. 2009).

⁶⁷⁹ *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).

⁶⁸⁰ *See, e.g., Martinez v. Ryan*, 566 U.S. 1 (2012), or *Holland v. Florida*, 560 U.S. 631 (2010).

⁶⁸¹ *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003).

evidence and the reliability of DNA testing.⁶⁸²

In a habeas corpus proceeding, “good cause” for discovery hinges on the likelihood that the petitioner can demonstrate entitlement to relief. The starting point for a good-cause analysis is whether the petitioner has pled a sufficient claim upon which relief can be granted. If so, will discovery enable a petitioner to have a “fair and meaningful evidentiary hearing” as suggested in *Harris v. Nelson*? In *Bracy v. Gramley*,⁶⁸³ Chief Justice William Rehnquist analyzed this issue when the habeas petitioner sought discovery related to his trial judge’s corrupt actions—in *other* cases. Bracy’s request seems like a tall order, but his ability to articulate the need for discovery in his unique circumstances is instructive. Note that the Court related Bracy’s need for discovery to what he had already pled, and also to the elements of proof he would have to satisfy in order to prevail. His case serves as an example of how petitioners can justify discovery requests in habeas proceedings.

BRACY V. GRAMLEY

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William Bracy was tried, convicted, and sentenced to death before then-Judge Thomas J. Maloney for his role in an execution-style triple murder. Maloney was later convicted of taking bribes from defendants in criminal cases. Although he was not bribed in this case, he “fixed” other murder cases during and around the time of petitioner’s trial. Petitioner contends that Maloney therefore had an interest in a conviction here, to deflect suspicion that he was taking bribes in other cases, and that this interest violated the fair-trial guarantee of the Fourteenth Amendment’s Due Process Clause. We hold that petitioner has made a sufficient factual showing to establish “good cause,” as required by Habeas Corpus Rule 6(a), for discovery on his claim of actual judicial bias in his case.

Maloney was one of many dishonest judges exposed and convicted through “Operation Greylord,” a labyrinthine federal investigation of judicial corruption in Chicago. Maloney served as a judge from 1977 until he retired in 1990, and it appears he has the dubious distinction of being the only Illinois judge ever convicted of fixing a murder case. Before he was appointed to the bench, Maloney was a criminal-defense attorney with close ties to organized crime who often paid off judges in criminal cases. By the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption. Once a judge, Maloney exploited many of the relationships and connections he had developed while bribing judges to solicit bribes for himself. For example, Lucius Robinson, a bailiff through whom Maloney had bribed judges while in

⁶⁸² *Earley v. Braxton*, 258 F.3d 250 (4th Cir. 2001).

⁶⁸³ 520 U.S. 899 (1997) (“We also agree, and the State concedes, that *the duty to disclose is ongoing and extends to all stages of the judicial process*,” citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (emphasis added)).

practice, and Robert McGee, one of Maloney's former associates, both served as “bag men,” or intermediaries, between Maloney and lawyers looking for a fix. Two such lawyers, Robert J. Cooley and William A. Swano, were key witnesses against Maloney at his trial.

Maloney was convicted in Federal District Court of conspiracy, racketeering, extortion, and obstructing justice in April 1993. Four months later, petitioner filed this habeas petition in the United States District Court for the Northern District of Illinois, claiming, among other things, that he was denied a fair trial because “in order to cover up the fact that [Maloney] accepted bribes from defendants in some cases, [he] was prosecution oriented in other cases.” *United States ex rel. Collins v. Welborn*, 868 F. Supp. 950, 990 (ND Ill. 1994). Petitioner also sought discovery in support of this claim. Specifically, he requested (1) the sealed transcript of Maloney's trial; (2) reasonable access to the prosecution's materials in Maloney's case; (3) the opportunity to depose persons associated with Maloney; and (4) a chance to search Maloney's rulings for a pattern of pro-prosecution bias.⁶⁸⁴ The District Court rejected petitioner's fair-trial claim and denied his supplemental motion for discovery, concluding that “[petitioner's] allegations contain insufficient specificity or good cause to justify further discovery.” *Id.*, at 991.

The Court of Appeals affirmed by a divided vote. The court conceded the “appearance of impropriety” in petitioner's case but reasoned that this appearance did not require a new trial because it “provided only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it.” 81 F.3d at 688-689. Next, the court agreed that petitioner's theory--that Maloney's corruption “permeated his judicial conduct”--was “plausible,” *id.*, at 689, but found it not “sufficiently compelling [an] empirical proposition” to justify presuming actual judicial bias in petitioner's case, *id.*, at 690. Finally, the court held that petitioner had not shown “good cause” for discovery to prove his claim, as required by 28 U.S.C. § 2254 Rule 6(a). *Id.*, at 690. This was because, in the court's view, even if petitioner were to uncover evidence that Maloney sometimes came down hard on defendants who did not bribe him, “it would not show that he followed the practice *in this case.*” *Id.*, at 691 (emphasis added). In any event, the court added, because petitioner had failed to uncover any evidence of actual bias without discovery, “the probability is slight that a program of depositions aimed at crooks and their accomplices . . . will yield such evidence.” *Ibid.* We granted certiorari to address whether, on the basis of the showing made in this particular case, petitioner should have been granted discovery under Habeas Corpus Rule 6(a) to support his judicial-bias claim. 519 U.S. (1997). We now reverse.

A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course. Thus, in *Harris v. Nelson*, 394 U.S. 286 (1969), we concluded that the “broad discovery provisions” of the Federal Rules of Civil Procedure did not apply in habeas proceedings. We held, however, that the All Writs Act, 28 U.S.C. § 1651, gave

⁶⁸⁴ [Court's footnote 3] The Government apparently conducted such research in the Maloney case. See Proffer of the Government's Evidence in Aggravation, App. 67 (“[A] review of computer printouts listing all of [one attorney's] felony cases before Judge Maloney reveals that [the attorney] obtained not guilty results in all six of the cases he had before Judge Maloney”).

federal courts the power to “fashion appropriate modes of procedure,” 394 U.S. at 299, including discovery, to dispose of habeas petitions “as law and justice require,” *id.*, at 300. We then recommended that “the rule-making machinery . . . be invoked to formulate rules of practice with respect to federal habeas corpus . . . proceedings.” *Id.*, at 300, n. 7. Accordingly, in 1976, we promulgated and Congress adopted the Rules Governing § 2254 Cases. Of particular relevance to this case is Rule 6(a), which provides:

"A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

Before addressing whether petitioner is entitled to discovery under this Rule to support his judicial-bias claim, we must first identify the “essential elements” of that claim. See *United States v. Armstrong*, 517 U.S. 456, 468 (1996). Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. See, e.g., *Aetna*, *supra*, at 820-821; *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); 28 U.S.C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a)(1980). But the floor established by the Due Process Clause clearly requires a “fair trial in a fair tribunal,” *Withrow v. Larkin*, 421 U.S. 35, 46 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See, e.g., *Aetna*, *supra*, at 821-822; *Tumey*, *supra*, at 523.

The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes. A judge who accepts bribes from a criminal defendant to fix that defendant's case is “biased” in the most basic sense of that word, but his bias is directed against the State, not the defendant. Petitioner contends, however, that Maloney's taking of bribes from some criminal defendants not only rendered him biased against the *State* in those cases, but also induced a sort of compensatory bias against *defendants* who did *not* bribe Maloney. Maloney was biased in this latter, compensatory sense, petitioner argues, to avoid being seen as uniformly and suspiciously “soft” on criminal defendants. The Court of Appeals, in its opinion, pointed out that this theory is quite speculative; after all, it might be equally likely that a judge who was “on the take” in *some* criminal cases would be careful to at least appear to favor *all* criminal defendants, so as to avoid apparently wild and unexplainable swings in decisions and judicial philosophy. 81 F.3d at 689-690.⁶⁸⁵ In any event, difficulties of proof aside, there is no question that, if it could be proved, such compensatory, camouflaging bias on Maloney's part in petitioner's own case would violate the Due Process Clause

⁶⁸⁵ [Court's footnote 5] At Maloney's trial, however, attorney William Swano provided testimony that lends some support to petitioner's compensatory-bias theory. See 81 F.3d at 697 (Rovner, J., dissenting). According to Swano, Maloney retaliated against one of Swano's clients in one of the rare cases when Swano failed to offer Maloney a bribe and, in bribe negotiations in a later case, Maloney's bag man Robert McGee admitted as much. Swano testified that he learned that in order “to practice in front of Judge Maloney . . . we had to pay.” *Ibid.*

of the Fourteenth Amendment. We now turn to the question whether petitioner has shown “good cause” for appropriate discovery to prove his judicial-bias claim.

In the District Court, petitioner contended that he was “deprived of his right to a fair trial” because “there is cause to believe that Judge Maloney's discretionary rulings in this case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty.” In support, he submitted a copy of Maloney's 1991 indictment, and a newspaper article describing testimony from Maloney's trial, in which attorney William Swano described an additional, uncharged incident where he bribed Maloney to fix a murder case. In a supplemental motion for discovery, petitioner's codefendant Roger Collins alleged that “[a] Government witness in the Maloney case has advised . . . that co-defendant Bracy's trial attorney was a former partner of Thomas Maloney.” Collins attached to that motion a copy of the United States' Proffer of Evidence in Aggravation in Maloney's case, which describes in considerable detail Maloney's corruption both before and after he became a judge. (“Although [it is] difficult to imagine, Thomas Maloney's life of corruption was considerably more expansive than proved at trial”). The United States' proffer asserts, for example, that Maloney fixed serious felony cases regularly while a practicing criminal-defense attorney;⁶⁸⁶ that, as a judge, he continued to corrupt justice through the same political relationships and organized-crime connections he had exploited as a lawyer;⁶⁸⁷ and that at least one attorney from Maloney's former law firm, Robert McGee, was actively involved in assisting Maloney's corruption, both before and after he became a judge, and also bribed Maloney himself. In addition, the proffer confirms that petitioner's murder trial was sandwiched tightly between other murder trials that Maloney fixed.⁶⁸⁸

⁶⁸⁶ [Court's footnote 7] The government introduced evidence that Maloney regularly bribed Judge Maurice Pompey and Cook County Deputy Sheriff Lucius Robinson (who would later serve as Maloney's “bag man”); that on numerous occasions, using his organized-crime connections, Maloney fixed cases for his client Michael Bertucci; and that Maloney helped orchestrate the fix in the murder case of underworld hit man Harry Aleman.

⁶⁸⁷ [Court's footnote 8] For example, Lucius Robinson and Robert McGee, who were involved in Maloney's corruption as a lawyer, later facilitated his bribe-taking when he became a judge. *United States v. Maloney*, 71 F.3d 645, 650-652 (CA7 1995), cert. denied, 519 U.S. 927 (1996). As the government alleged in its proffer, “Maloney was closely tied to the [sic] La Cosa Nostra prior to his appointment to the bench and . . . major organized crime figures looked forward to [his] appointment as an opportunity to have a 'good friend' on the bench . . . [and] after his elevation to the bench, Maloney continued his close First Ward/organized crime connections, fixing the results of several murder cases of import to organized crime.”

⁶⁸⁸ [Court's footnote 9] Petitioner was tried in July 1981. William Swano testified at Maloney's trial that, in October 1980, he bribed Maloney in the murder case of Swano's client, Wilfredo Rosario. Maloney excluded Rosario's confession and, in May 1981, acquitted Rosario after a bench trial. *Maloney*, 71 F.3d at 650. Also in May 1981, Maloney took a bribe to throw the murder case of Lenny Chow, a hit man for a Chinatown crime organization. At a bench trial that August, Maloney admitted a dying declaration, but found it unreliable, and acquitted Chow. *Maloney, supra*, at 650. In 1982, Maloney and Swano fixed another murder case in which one Owen Jones was charged with beating a man to death with a lead pipe. Maloney took \$ 4,000-5,000 from Jones's mother, using his former associate Robert McGee as a “bag man,” to acquit Jones on the felony-murder charge, and to convict him of voluntary manslaughter only. *Maloney, supra*, at 651.

As just noted above, petitioner's attorney at trial was a former associate of Maloney's, and Maloney appointed him to defend this case in June 1981. The lawyer announced that he was ready for trial just a few weeks later. He did not request additional time to prepare penalty-phase evidence in this death-penalty case even when the State announced at the outset that, if petitioner were convicted, it would introduce petitioner's then-pending Arizona murder charges as evidence in aggravation. At oral argument before this Court, counsel for petitioner suggested, given that at least one of Maloney's former law associates--Robert McGee--was corrupt and involved in bribery, that petitioner's trial lawyer might have been appointed with the understanding that he would not object to, or interfere with, a prompt trial, so that petitioner's case could be tried before, and camouflage the bribe negotiations in, the *Chow* murder case. This is, of course, only a theory at this point; it is not supported by any solid evidence of petitioner's trial lawyer's participation in any such plan. It is true, however, that McGee was corrupt and that petitioner's trial coincided with bribe negotiations in the *Chow* case and closely followed the *Rosario* murder case, which was also fixed.

We conclude that petitioner has shown "good cause" for discovery under Rule 6(a). In *Harris*, we stated that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." 394 U.S. at 299. Habeas Corpus Rule 6 is meant to be "consistent" with *Harris*. Advisory Committee's Note on Habeas Corpus Rule 6, 28 U.S.C., p. 479. Ordinarily, we presume that public officials have "properly discharged their official duties." *Armstrong*, 517 U.S. at 464 (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). Were it possible to indulge this presumption here, we might well agree with the Court of Appeals that petitioner's submission and his compensatory-bias theory are too speculative to warrant discovery. But, unfortunately, the presumption has been soundly rebutted: Maloney was shown to be thoroughly steeped in corruption through his public trial and conviction. We emphasize, though, that petitioner supports his discovery request by pointing not only to Maloney's conviction for bribe-taking in other cases, but also to additional evidence, discussed above, that lends support to his claim that Maloney was actually biased *in petitioner's own case*. That is, he presents "specific allegations" that his trial attorney, a former associate of Maloney's in a law practice that was familiar and comfortable with corruption, may have agreed to take this capital case to trial quickly so that petitioner's conviction would deflect any suspicion the rigged *Rosario* and *Chow* cases might attract. It may well be, as the Court of Appeals predicted, that petitioner will be unable to obtain evidence sufficient to support a finding of actual judicial bias in the trial of his case, but we hold that he has made a sufficient showing, as required by Habeas Corpus Rule 6(a), to establish "good cause" for discovery. Although, given the facts of this particular case, it would be an abuse of discretion not to permit any discovery, Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Good Cause:** The petitioner in *Bracy v. Gramley* successfully demonstrated why and how discovery would yield information relevant to a claim on which relief could be granted—a quintessential showing of good cause. What are the key components of Bracy’s showing? Would he have obtained discovery if his trial counsel had *not* been implicated in the corrupt trial judge’s bribery scheme? Compare *Bracy* to *Kemp v. Ryan*,⁶⁸⁹ where the petitioner was denied discovery of evidence showing that corrections officers engaged in misconduct in other cases. The court ruled that Kemp failed to show that this misconduct stemmed from a policy or practice that also affected his case. How did Bracy successfully make that connection?
2. **Specificity of request:** The specificity of the discovery request affects whether the petitioner can show good cause. Bracy identified specific documents and sealed court records from the prosecution of his trial judge he sought to obtain. The bribery scheme for which the judge was convicted involved Bracy’s trial counsel, who was also a witness in that case. These concrete and specific facts clarified what he wanted and why. In contrast, a generalized request that fails to specify the exact information sought will not meet the good-cause standard.⁶⁹⁰
3. **Information not otherwise accessible:** Another factor supporting a finding of good cause is whether the requested information is otherwise available. For example, in a case where a private prosecutor—hired by the victim’s family—allegedly violated a habeas petitioner’s due process rights by usurping the role of the State prosecutor, the habeas court allowed the petitioner to take depositions. Only the private prosecutor, the district attorney, and the district attorney’s staff could shed light on the private lawyer’s control over trial strategy and prosecutorial decisions.⁶⁹¹ Exigency may also justify discovery. Where a witness had knowledge of the true perpetrator but was afraid to come forward except by deposition, the petitioner established good cause to take the deposition—even though the claim was unexhausted.⁶⁹² Additionally, petitioners who show diligent pursuit of their constitutional claims in State court are entitled to discovery in federal habeas

⁶⁸⁹ 638 F.3d 1245 (9th Cir. 2011).

⁶⁹⁰ Teti v. Bender, 507 F.3d 50 (1st Cir. 2007).

⁶⁹¹ East v. Scott, 55 F.3d 996 (5th Cir. 1997).

⁶⁹² Calderon v. United States Dist. Court, 144 F.3d 618 (9th Cir. 1998).

proceedings.⁶⁹³

4. **Discredited science:** Good cause justifying discovery is frequently found in habeas proceedings involving questionable forensic evidence. For instance, when a habeas petitioner alleged that an expert witness' testimony was perjured, he was entitled to discovery regarding the circumstances of the expert's perjury because habeas relief would be justified if the prosecutor knew or should have known of the false testimony.⁶⁹⁴ What discovery methods might be appropriate to explore such an issue? See also *Pham v. Terhune*, which ordered the disclosure of notes from a criminalist who tested an alternative suspect for gunshot residue. The court deemed this evidence essential to the petitioner's claim that the government had withheld exculpatory evidence.⁶⁹⁵ A notable post-AEDPA case granting discovery is *Han Tak Lee v. Glunt*,⁶⁹⁶ in which the petitioner was convicted based on now-discredited arson "science" regarding the origin of the fire that caused the deaths. The court ruled that discovery was essential to Lee's claim that the use of discredited forensic evidence violated due process.

IV. Evidentiary Hearings

A. Pre-AEDPA Right to Prove Facts

Moore v. Dempsey established that federal courts must adjudicate constitutional claims properly presented in habeas corpus petitions. As discussed in Chapters 2 and 3, the Court subsequently explored tension between federal and state authority in adjudicating state prisoner's claims. *Brown v. Allen*⁶⁹⁷ solidified federal habeas corpus as a remedy for violations of State prisoners' constitutional rights, but it provided little guidance on when a federal hearing was appropriate or necessary. The Court stated that a federal evidentiary hearing should occur only in "unusual circumstances"⁶⁹⁸ or where there was a "vital flaw" in state procedures.⁶⁹⁹ Finally, in *Townsend v. Sain*, the Court granted certiorari to define when and under what circumstances a

⁶⁹³ See, e.g., *Williams v. Schriro*, 423 F. Supp. 2d 994 (D. Ariz. Feb. 20, 2007), allowing discovery where Williams credibly claimed that the state violated *Brady v. Maryland* by withholding evidence pointing to another potential suspect in the murder of petitioner's girlfriend.

⁶⁹⁴ *Drake v. Portuondo*, 321 F.3d 338 (2nd Cir. 2009).

⁶⁹⁵ 400 F.3d 740 (CA9 Cal 2005).

⁶⁹⁶ 667 F.3d 397 (3rd Cir. 2012).

⁶⁹⁷ 344 U.S. 443 (1953).

⁶⁹⁸ *Id.* at 463.

⁶⁹⁹ *Id.* at 506 (Frankfurter, J., concurring).

federal court may or must hold an evidentiary hearing. The Court acknowledged that *Brown v. Allen* had produced “widely divergent, in fact often irreconcilable, results.”⁷⁰⁰

In 1955, nineteen-year-old Charles Townsend was convicted of murder and sentenced to death in Cook County, Illinois. A confirmed heroin addict, Townsend began experiencing withdrawal symptoms as he was being interrogated nearly twenty hours after his arrest. A police physician injected him with drugs to ease his severe and painful stomach cramps, but interrogation continued, and Townsend confessed to several murders and robberies, including a robbery in which the victim identified someone else as the robber. A central issue at trial was the admissibility of Townsend’s confession made shortly after being injected with a drug containing hyoscine, commonly known as scopolamine or “truth serum.” Townsend argued that his confession was coerced, induced by the drug, and inadmissible under the Fourteenth Amendment. Despite conflicting testimony about the effects of the drug and whether it overbore Townsend’s will, the trial court admitted the confession without issuing findings of fact or legal reasoning. The Illinois Supreme Court affirmed the conviction, and Townsend subsequently exhausted all state postconviction remedies without success.

Townsend then filed for federal habeas corpus relief, alleging that his constitutional rights had been violated because the confession was involuntary and the state courts had not provided a full and fair evidentiary hearing on the matter. The federal district court dismissed the petition without holding a hearing, relying solely on the state court records. On appeal, the Seventh Circuit affirmed, holding that federal habeas review was limited to the undisputed portions of the state court record. The U.S. Supreme Court granted certiorari to resolve whether a federal court must conduct a plenary evidentiary hearing in such circumstances.

The issue is whether federal courts must independently reassess factual disputes when state proceedings lack sufficient findings or use incorrect legal standards, particularly concerning the voluntariness of a confession obtained under potentially coercive circumstances.

TOWNSEND V. SAIN

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The theory of petitioner’s application for habeas corpus . . . relied upon the hitherto undisputed testimony and alleged: (1) that petitioner vomited water and blood at the police station when he became ill from the withdrawal of narcotics; (2) that scopolamine is a “truth serum” and that this fact was not brought out at the motion to suppress or at the trial; (3) that scopolamine “either alone or combined with Phenobarbital, is not the proper medication for a narcotic addict [and that] . . . the effect of the intravenous injection of hyoscine and phenobarbital . . . is to produce a physiological and psychological condition adversely affecting the mind and will . . . [and] a psychic effect which removes the subject thus injected from the scope of reality; so that the person

⁷⁰⁰ *Townsend v. Sain*, 372 U.S. 466, 310 (1963).

so treated is removed from contact with his environment, he is not able to see and feel properly, he loses proper use of his eye-sight, his hearing and his sense of perception and his ability to withstand interrogation”; (4) that the police doctor willfully suppressed this information and information of the identity of hyoscine and scopolamine, of his knowledge of these things, and of his intention to inject the hyoscine for the purpose of producing in Townsend “a physiological and psychological state . . . susceptible to interrogation resulting in . . . confessions . . .”; (5) that the injection caused Townsend to confess; (6) that on the evening of January 1, immediately after the injection of scopolamine, petitioner confessed to three murders and one robbery other than the murder of Boone and the robbery of Anagnost. Although there was some mention of other confessions at the trial, only the confession to the Anagnost robbery was specifically testified to.

Initially, in their answer, respondents stated: “Respondents admit the factual allegations of the petition well pleaded, but deny that Petitioner is held in custody by Respondents in violation of the constitution or laws of the United States” However, in the course of the first argument before the District Court it appeared that respondents admitted nothing alleged in the petition but merely took the position that the petition, on its face, was insufficient to entitle Townsend either to a hearing or to his release. In the course of the second argument, after the remand by this Court, respondents admitted that “if the allegations of the petition are taken as true, then the petitioner is entitled to the relief he seeks . . . ,” and that Townsend had confessed to at least five crimes after the injection of hyoscine. But respondents denied that “petitioner was adversely influenced by its [the hyoscine's] administration to the extent that his confession was obtained involuntarily”; that “Hyoscine is the truth serum”; that “the police surgeon or the prosecution concealed pertinent, material and relevant facts”; or that hyoscine was an improper medication under the circumstances. Despite respondents' concession that a dispute as to these facts existed, the district judge denied Townsend the opportunity to call witnesses or to produce other evidence in support of his allegations and dismissed the petition.

Before we granted the most recent petition for certiorari we requested respondents to submit an additional response directed to certain of the allegations of the petition for habeas corpus. Respondents submitted an “additional answer to petition for habeas corpus” in which they again admitted that Townsend had made confessions immediately after the injection of drugs. Specifically they admitted that petitioner confessed to the robberies of Anagnost and one Joseph Martin and to the murders of Boone, Thomas Johnson, Johnny Stinson, and Willis Thompson. The additional answer revealed the following additional information respecting Townsend's confessions to these crimes. Anagnost had identified another person, rather than petitioner, as his assailant. Thomas Johnson, before his death, had stated that his injury had been an accident. The Assistant State's Attorney did not even bother to transcribe Townsend's statement with respect to Thompson's murder “because the defendant could not recall the details of the assault which led to the death” At the Thompson coroner's inquest, when the deputy coroner noted that Townsend was then unable to remember even that he had committed the crime, Officer Cagney complained: “Why shouldn't we be given credit for these Clean-ups.” Despite these circumstances which made conviction for the Anagnost robbery and the Johnson and Thompson murders, at best, a remote possibility, petitioner was indicted for all of the crimes to which he had confessed. However, after

a jury trial, he was acquitted of the murder of Johnny Stinson, and on the very day that he was sentenced to death for the Boone murder, on the motion of the prosecutor, the indictments for the murders of Johnson and Thompson and for the robberies of Anagnost and Martin were dismissed.

Although the petition for habeas corpus contains allegations which would constitute a claim that the police doctor, at the trial, had perjured himself, the heart of Townsend's claim is that his confession was inadmissible simply because it was caused by the injection of hyoscine. We must first determine whether petitioner's allegations, if proved, would establish the right to his release.

I.

* * * *

Thus we conclude that the petition for habeas corpus alleged a deprivation of constitutional rights. The remaining question before us then is whether the District Court was required to hold a hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question.

The problem of the power and duty of federal judges, on habeas corpus, to hold evidentiary hearings -- that is, to try issues of fact⁷⁰¹ [Court's n6] anew -- is a recurring one. The Court last dealt at length with it in *Brown v. Allen*, 344 U.S. 443, in opinions by Justices Reed and Frankfurter, both speaking for a majority of the Court. Since then, we have but touched upon it. We granted certiorari in the 1959 Term to consider the question, but ultimately disposed of the case on a more immediate ground. *Rogers v. Richmond*, 365 U.S. 534, 540. It has become apparent that the opinions in *Brown v. Allen*, *supra*, do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results. We mean to express no opinion on the correctness of particular decisions. But we think that it is appropriate at this time to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings.

II.

The broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus are reviewed at length in the Court's opinion in *Fay v. Noia*, *post*, p. 391, and need not be repeated here. We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day. We pointed out, too, that the Act of February 5, 1867, c. 28, § 1, 14 Stat. 385-386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and

⁷⁰¹ By "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators . . ." *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

determine the facts *de novo* in the largest terms, restated what apparently was the common-law understanding. *Fay v. Noia*, *post*, p. 416, n. 27. The hearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 U. S. C. § 2243. In construing the mandate of Congress, so plainly designed to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detentions, this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention. “Since *Frank v. Mangum*, 237 U.S. 309, 331, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure ‘to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution,’ even though the events which were alleged to infringe did not appear upon the face of the record of his conviction.” *Hawk v. Olson*, 326 U.S. 271, 274. *Brown v. Allen* and numerous other cases have recognized this.

The rule could not be otherwise. The whole history of the writ -- its unique development -- refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See *Frank v. Mangum*, 237 U.S. 309, 345-350 (dissenting opinion of Mr. Justice Holmes). It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

III.

We turn now to the considerations which in certain cases may make exercise of that power mandatory. The appropriate standard -- which must be considered to supersede, to the extent of any inconsistencies, the opinions in *Brown v. Allen* -- is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a

collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.⁷⁰²

The existence of the exhaustion of state remedies requirement (announced in *Ex parte Royall*, 117 U.S. 241, and now codified in 28 U. S. C. § 2254) lends support to the view that a federal hearing is not always required. It presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in habeas corpus.

It would be unwise to overly particularize this test. The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus. But experience proves that a too general standard -- the "exceptional circumstances" and "vital flaw" tests of the opinions in *Brown v. Allen* -- does not serve adequately to explain the controlling criteria for the guidance of the federal habeas corpus courts. Some particularization may therefore be useful. We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

(1) There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits. If relief has been denied in prior state collateral proceedings after a hearing but without opinion, it is often likely that the decision is based upon a procedural issue -- that the claim is not collaterally cognizable -- and not on the merits. On the other hand, if the prior state hearing occurred in the course of the original trial -- for example, on a motion to suppress allegedly unlawful evidence, as in the instant case -- it will usually be proper to assume that the claim was rejected on the merits.

If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court

⁷⁰² [Court's footnote 9] In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law.

cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence, such as was present in *Rogers v. Richmond*, that there is reason to suspect that an incorrect standard was in fact applied.⁷⁰³ Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration." *Rogers v. Richmond, supra*, at 546. See *Frank v. Mangum, supra*, at 347 (Holmes, J., dissenting). Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

(2) This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske v. Kansas*, 274 U.S. 380, 385; *Blackburn v. Alabama*, 361 U.S. 199, 208-209. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, e. g., *Blackburn v. Alabama, supra*; *Moore v. Michigan*, 355 U.S. 155. The duty of the Federal District Court on habeas is no less exacting.

(3) However, the obligation of the Federal District Court to scrutinize the state-court findings of fact goes farther than this. Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for

⁷⁰³ [Court's footnote 10] Of course, under *Rogers v. Richmond*, a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law. However, there will be situations in which statements of the trier of fact will do no more than create doubt as to whether the correct standard has been applied. In such situations a District Court hearing to determine the constitutional issue will be necessary.

reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew. Of course, there are procedural errors so grave as to require an appropriate order directing the habeas applicant's release unless the State grants a new trial forthwith. Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.

(4) 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. Also, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation of newly discovered evidence.

(5) The conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment is, however, in some respects too limited to provide complete guidance to the federal district judge on habeas. If, for any reason not attributable to the inexcusable neglect of petitioner, see *Fay v. Noia*, *post*, p. 438 (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. The standard of inexcusable default set down in *Fay v. Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures. Compare *Price v. Johnston*, 334 U.S. 266, 291: "The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief."

(6) Our final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded. It is the province of the district judges first to determine such necessities in accordance with the general rules. The duty to try the facts anew exists in every case in which the state court has not after a full hearing reliably found the relevant facts.

IV.

It is appropriate to add a few observations concerning the proper application of the test we have outlined.

First. The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the

holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice or to waste the time of the federal courts in the trial of frivolous claims.

Second. Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas. That was settled in *Brown v. Allen, supra*, at 506 (opinion of Mr. Justice Frankfurter).

Third. A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinarily such a record -- including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents -- is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. See *United States ex rel. Jennings v. Ragan*, 358 U.S. 276; *Townsend v. Sain*, 359 U.S. 64. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so.

Fourth. It rests largely with the federal district judges to give practical form to the principles announced today. We are aware that the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their paramount responsibility in this area.

V.

Application of the foregoing principles to the particular litigation before us is not difficult. Townsend received an evidentiary hearing at his original trial, where his confession was held to be voluntary. Having exhausted his state remedies without receiving any further such hearing, he turned to the Federal District Court. Twice now, habeas corpus relief has been denied without an evidentiary hearing. On appeal from the second denial, the Court of Appeals held that "on habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record." That formulation was error. And we believe that on this record it was also error to refuse Townsend

an evidentiary hearing in the District Court. The state trial judge rendered neither an opinion, conclusions of law, nor findings of fact. He made no charge to the jury setting forth the constitutional standards governing the admissibility of confessions. In short, there are no indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession. The Illinois Supreme Court opinion rendered at the time of direct appeal contains statements which might indicate that the court thought the confession was admissible if it satisfied the “coherency” standard. Under that test the confession would be admissible “so long as the accused [was] . . . capable of making a narrative of past events or of stating his own participation in the crime” 11 Ill. 2d, at 43, 141 N. E. 2d, at 736. As we have indicated in Part I of this opinion, this test is not the proper one. Possibly the state trial judge believed that the admissibility of allegedly drug-induced confessions was to be judged by the “coherency” standard. However, even if this possibility could be eliminated, and it could be ascertained that correct standards of law were applied, it is still unclear whether the state trial judge would have excluded Townsend's confession as involuntary if he had believed the evidence which Townsend presented at the motion to suppress. The problem which the trial judge faced was novel and by no means without difficulty. We believe that the Federal District Court could not conclude that the state trial judge admitted the confession because he disbelieved the evidence which would show that it was involuntary. We believe that the findings of fact of the state trier could not be successfully reconstructed. We hold that, for this reason, an evidentiary hearing was compelled.

Furthermore, a crucial fact was not disclosed at the state-court hearing: that the substance injected into Townsend before he confessed has properties which may trigger statements in a legal sense involuntary.⁷⁰⁴ This fact was vital to whether his confession was the product of a free will and therefore admissible. To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the conclusion that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury, mere laymen, intelligently to grasp the nature of the substance under inquiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a “truth serum” was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. See *Fay v. Noia*, *post*, p. 438 (Part V).

On the remand it would not, of course, be sufficient for the District Court merely to hear new evidence and to read the state-court record. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in

⁷⁰⁴ [Court's footnote 13] It appears that at the suppression hearing it was not disclosed that hyoscine (the substance injected, along with phenobarbital, into Townsend) was identical to scopolamine, and neither was it disclosed that scopolamine is familiarly known as “truth serum.” Later on in the trial, there was testimony that hyoscine is identical to scopolamine, but not that scopolamine (or hyoscine) is a “truth serum.”

that record, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. This was not done here.

In deciding this case as we do, we do not mean to prejudge the truth of the allegations of the petition for habeas corpus. We decide only that on this record the federal district judge was obliged to hold a hearing.

Reversed and remanded.

Questions and Comments:

1. **Presumption of correctness—exceptions:** Whether a conviction was obtained in violation of the Constitution turns on questions of fact. In *Townsend*, the Court balanced state sovereignty interests against the rights of prisoners and the federal courts' duty to adjudicate constitutional claims accurately. On the States' side of the equation, the Court created a presumption: findings of fact made by a state court after a fair hearing will be presumed correct. On the habeas petitioners' side of the equation, the Court created a structured analysis assessing the fairness of fact-finding procedures based on principles of fair adjudication. Congress later amended 28 U.S.C. § 2254(d) to codify *Townsend's* rule:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.⁷⁰⁵

As the Court observed, § 2254(d) “was an almost verbatim codification of the standards delineated in *Townsend v. Sain*,⁷⁰⁶ for determining when a district court must hold an

⁷⁰⁵ P. L. 89-711, § 2, 80 Stat. 1105 (Nov. 2, 1966).

⁷⁰⁶ 372 U.S. 293 (1963).

evidentiary hearing before acting on a habeas petition.”⁷⁰⁷ The statutory exceptions to the presumption of correctness of state court fact findings closely follow *Townsend*’s language. The presumption of correctness is rebuttable. AEDPA’s revised § 2254(e), enacted in 1996, imposed substantial new limitations on the discretion of the federal court’s discretion to hold a hearing, but thirty years of decisions under *Townsend*’s standard has influenced the application of those limits. AEDPA’s limitations will be discussed in Section B.

2. **Presumption of correctness—“mixed” questions:** The habeas fact-development framework established in *Townsend v. Sain* begins with the obligation to presume that a fair state court process results in reliable findings of fact. Before AEDPA, federal habeas review of a state court’s legal conclusions was always *de novo*; it was the province of the federal courts to decide questions of federal law.⁷⁰⁸ In distinguishing between legal and factual findings, *Townsend v. Sain* discussed a category of constitutional claims where a hearing may be required because the “so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration.”⁷⁰⁹ These are called “mixed questions” of fact and law, which federal habeas courts review *de novo*. Unlike findings of historical fact—like whether a trial attorney did or did not interview a witness—mixed questions of law and fact are those typically decided by a totality of the circumstances, such as whether or not a person is “in custody” and therefore required to receive *Miranda*⁷¹⁰ warnings prior to police interrogation.⁷¹¹ *Townsend v. Sain* described mixed questions as those requiring “the application of a legal standard to the historical-fact determinations.”⁷¹² With respect to issues involving mixed questions, “The ultimate question—requiring a ‘totality of circumstances’ assessment—is a matter for independent federal determination.”⁷¹³ The Court in *Thompson v. Koehane*⁷¹⁴ pointed to competency to stand trial⁷¹⁵ and juror impartiality⁷¹⁶ as issues involving mixed questions of fact and law but are not subject to the presumption of correctness because they are the sort of decisions routinely made by “jurist-observers.” Therefore, these issues are entitled to presumptive weight. The Court provided a partial annotated list of issues that present mixed questions

⁷⁰⁷ *Miller v. Fenton*, 474 U.S. 104, 111 (1985).

⁷⁰⁸ *Wright v. West*, 505 U.S. 277 (1992).

⁷⁰⁹ *Townsend v. Sain*, 372 U.S. 293, at 315 (quoting *Rogers v. Richmond*, 365 U.S. 534, 546 (1959)).

⁷¹⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷¹¹ *Thompson v. Koehane*, 516 U.S. 99, 102 (1995). (“We hold that the issue whether a suspect is ‘in custody,’ and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review.”)

⁷¹² 372 U.S. at 309, n. 6.

⁷¹³ *Miller*, 474 U.S. at 112.

⁷¹⁴ *Thompson*, 516 U.S. 99 at 111.

⁷¹⁵ *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (*per curiam*).

⁷¹⁶ *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *Rushen v. Spain*, 464 U.S. 114, 120 (1983).

of law and fact and are therefore not entitled to the presumption of correctness: (1) the voluntariness of a confession,⁷¹⁷ (2) the effectiveness of counsel's assistance,⁷¹⁸ (3) conflicts of interest arising from an attorney's representation of multiple defendants,⁷¹⁹ (4) the constitutionality of pretrial identification procedures,⁷²⁰ and (5) the waiver of the Sixth Amendment right to counsel.⁷²¹ The same considerations that make voluntariness of a confession a mixed question of fact and law and not subject to a presumption of correctness also applies to in-court waivers of constitutional rights, such as whether a plea of guilty, the waiver of counsel, or waiver of other constitutional right reserved to the defendant was knowing, voluntary, and intelligent. *See, e.g., Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

3. AEDPA retains the presumption of correctness:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.⁷²²

While the provision tracks the presumption of correctness as applied under *Townsend*, questions of fact may be affected by 28 U.S.C. § 2254(d) and § 2254(e). These provisions limit when a federal habeas court may reject State courts' legal conclusions (§ 2254 (d)) and conduct evidentiary hearings (§ 2254 (e)). Further discussion of these restrictions is in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

4. **Deficient state court fact finding:** Decisions applying *Townsend v. Sain* illustrate when deficiencies in state fact-finding require federal courts to conduct independent determinations of fact. In *Jefferson v. Upton*, the petitioner alleged that defense counsel was ineffective in his capital trial for failing to investigate and present evidence of a serious head injury he suffered as a child which resulted in behavioral issues for which he had little or no control.⁷²³ The State court denied relief after an *ex parte* conversation with State counsel, during which the judge asked the State's attorneys to draft an opinion for the court—which the judge then signed verbatim. The federal district court granted habeas

⁷¹⁷ *Miller, supra*, at 110 (“Without exception, the Court's confession cases hold that the ultimate issue of ‘voluntariness’ is a legal question requiring independent federal determination.”); *Also see id.* at 116.

⁷¹⁸ *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

⁷¹⁹ *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980).

⁷²⁰ *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (*per curiam*).

⁷²¹ *Brewer v. Williams*, 430 U.S. 387, 397 and n. 4, 403-404 (1977).

⁷²² 28 U.S.C. § 2254(e)(1).

⁷²³ 560 U.S. 284 (2010) (*per curiam*).

relief, but the Eleventh Circuit reversed, relying solely on the presumption of correctness of the state court's fact findings, addressing only whether the state court's findings are fairly supported by the record under § 2254(d)(8).⁷²⁴ The Supreme Court reversed, noting that there are seven other statutory exceptions to the presumption of correctness that the Court of Appeals failed to address. "[B]y failing to address Jefferson's argument that the state court *procedures* deprived its findings of deference, the Court of Appeals applied the statute and our precedents incorrectly."⁷²⁵ How would you describe the procedural unfairness that occurred in *Jefferson v. Upton*? The *ex parte* communication between the judge and the prosecution raises multiple due process questions, including notice and opportunity to be heard at a dispositive court session and the lack of a fair and impartial decision maker. What issues arise when the judge signs an opinion written by the prosecution? Would the issues change if the judge gave the same opportunity to the petitioner?

5. **Judicial vs. executive fact finding:** In *Ford v. Wainwright*, the Court clarified that *Townsend v. Sain*'s presumption of correctness applies only to state *judicial* findings of fact.⁷²⁶ Alvin Ford was a severely mentally ill man on Florida's death row whose attorneys challenged his competence for execution under Florida law.⁷²⁷ The statute directed the governor to appoint a panel of three mental health experts to assess the prisoner, after which the governor would decide whether the execution should go forward. Ford's panel of experts agreed that he was mentally ill, but found him fit for execution, and the governor issued a warrant of execution without allowing Ford's attorney to argue contrary findings of their own expert. Although Ford's counsel submitted a report, nothing suggested that the governor read it or considered it. Florida courts summarily denied Ford's petition challenging the competency determination. Ford filed a federal habeas corpus petition, challenging the procedure used to determine his competence and alleged that the execution of one as mentally impaired as Ford would be cruel and unusual in violation of the Eighth Amendment. The Court majority agreed with Ford's Eighth Amendment argument and addressed how the Florida governor determined Ford was mentally fit for execution. They emphasized that *Townsend v. Sain* and § 2254(d)'s presumption applies only to a "determination [of] . . . a factual issue, *made by a State court of competent jurisdiction*."⁷²⁸ Writing for four justices, Justice Marshall said that "the most striking defect" in Florida's procedure "is the State's placement of the decision wholly within the executive branch."⁷²⁹ Justice Marshall mentioned aspects of the state procedures that "call into question" the

⁷²⁴ *Id.* at 292.

⁷²⁵ *Id.* at 293.

⁷²⁶ 477 U.S. 399 (1986).

⁷²⁷ Fla. Stat. § 922.07 (1985).

⁷²⁸ *Ford*, 477 U.S. 399 at 410 (emphasis added).

⁷²⁹ *Id.*

adequacy of the state procedures and resulting findings of fact.⁷³⁰ These involve the “cursory nature of the underlying psychiatric examinations” that included a single thirty-minute group interview and the “inconsistency and vagueness of the conclusions,” all of which “attest to the dubious value of such an examination.”⁷³¹ This is in addition to the denial of any opportunity for Ford’s counsel to present material relevant to his sanity, to offer differing psychiatric opinions, and “the denial of any opportunity to challenge or impeach the state-appointed psychiatrists’ opinions.”⁷³² Justice Powell, concurring, agreed that “no amount of stretching” could interpret § 2254(d)’s presumption of correctness of state judicial findings “to include the Governor.”⁷³³ Justice Powell also agreed that “the State did not give petitioner’s claim ‘a full and fair hearing.’”⁷³⁴ Although he would not require a “full scale sanity trial,” described by Justice Marshall, the Florida procedures “do not comport with basic fairness.”⁷³⁵ Although Justice O’Connor dissented from the Court’s decision that the execution of an insane prisoner violates the Eighth Amendment, she voted to grant relief because the Florida procedures denying Ford an opportunity to be heard violated “even the minimal requirements of due process.”⁷³⁶

6. **Inadequate state court fact-finding:** *Ford v. Wainwright* is but one example of the extensive body of case law under *Townsend v. Sain* and 28 U.S.C. § 2254(d) providing examples of deficiencies and omissions that remove state fact findings from the presumption of correctness and justify independent federal hearings and fact findings. *Townsend* produced an extensive body of case law on state court fact-finding. A preliminary question involved what fact-finding deserved deference. One justification for the presumption is the superior opportunity for the state trial judge to determine conflicting facts from live testimony.⁷³⁷ For this same reason, recitation of facts by a state appellate court may not carry the same presumption of reliability as explicit fact findings by a federal court.⁷³⁸ In that circumstance, the federal habeas court will turn to the state court record itself and make an independent determination of the facts.⁷³⁹ Pre-AEDPA examples of cases meeting the *Townsend* criteria include:

- *The merits were not resolved in the state court hearing.* Application of this

⁷³⁰ *Id.* at 415, n. 3.

⁷³¹ *Id.*

⁷³² *Id.* at 414-415.

⁷³³ *Id.* at 423 (Powell, J., concurring).

⁷³⁴ *Id.*

⁷³⁵ *Id.* at 425.

⁷³⁶ *Id.* at 430 (O’Connor, J., dissenting in part and concurring in part).

⁷³⁷ *Gardner v. Pogue*, 568 F.2d 648 (9th Cir. 1978).

⁷³⁸ *Thacker v. Bordenkircher*, 557 F.2d 98 (6th Cir. 1977).

⁷³⁹ *Turner v. Chavez*, 586 F.2d 111 (9th Cir. 1978); *Montes v. Jenkins*, 581 F.2d 609 (7th Cir. 1978).

exception to the presumption of correctness requires careful examination of the state court record to determine whether the state court adjudicated the claim or made the necessary fact findings.⁷⁴⁰ This exception might also apply if the state court's rejection of the petitioner's claim was based on procedural grounds, as discussed in Chapter 4, Procedural Bars: Independent, Adequate State Grounds, or where the petitioner diligently pursued a claim but the state court rejected it without making factual findings.⁷⁴¹ When the state court opinion is vague or ambiguous, the federal habeas court may attempt to reconstruct fact findings from the state court's application of legal standards if it is possible to do so. If the wrong legal standard was applied, and that state court did not make express findings on the issue, then an independent federal assessment of facts may be required.⁷⁴² If it is difficult to determine which of multiple theories the state might have rested upon, and no express findings were made, a federal hearing would be appropriate.⁷⁴³ If the state court applied the correct legal standard, the federal court could assume that it found facts indicating that the petitioner was not entitled to relief.⁷⁴⁴

- *The state court determination is unsupported by the record as a whole.* Even if explicit findings of fact are accompanied by a recitation of the correct legal standard, a federal hearing may be required under *Townsend* if the fact findings are not fairly supported by the record. To apply this exception, the federal court is required to look behind the state finding to determine whether they are fairly supported by evidence.⁷⁴⁵ In *Suggs v. LaVallee*, the state court record of Suggs' plea of guilty showed that the trial court did not inquire into the validity or factual basis of his plea, and therefore, the record could not show that his plea was knowing, voluntary, and intelligent.⁷⁴⁶
- *Inadequate state fact-finding procedure.* If the state procedure was inadequate, a federal hearing is required. Procedures were deemed inadequate when the procedure was so defective as to violate the Constitution—as in *Ford v. Wainwright* and *Suggs v. LaVallee* where the procedures themselves violated due process. A state procedure may also be inadequate because the court misallocated the burden

⁷⁴⁰ Rhinehart v. Gunn, 598 F.2d 557 (9th Cir. 1979).

⁷⁴¹ Wilkins v. Delo, 145 F.3d 1006, 1011 (8th Cir. 1998) (declining to defer to state court factfinding where “the state court made no findings of fact relevant to waiver of counsel.”).

⁷⁴² Fuller v. Luther, 575 F.2d 1098 (4th Cir. 1978).

⁷⁴³ Stotts v. Perini, 427 F. 2d 1296 (6th Cir. 1970).

⁷⁴⁴ Thompson v. Linn, 583 F.2d 739, 741 (5th Cir. 1978).

⁷⁴⁵ Jones v. Swenson, 469 F.2d 535, 537 (8th Cir.), cert. denied 412 U.S. 929 (1972) (finding a hearing unnecessary where the state court findings were supported by evidence adduced at a full and fair hearing); see also Tifford v. Wainwright, 592 F. 2d 233 (5th Cir. 1979) (finding Florida court's findings were not fairly supported by the record.).

⁷⁴⁶ 570 F.2d 1092 (2nd. Cir. 1978).

of proof⁷⁴⁷ or applied a standard of proof inconsistent with the constitutional standard for that claim.⁷⁴⁸ In such cases, a *de novo* federal hearing is required. Judges also recognized circumstances in which particular hearing procedures deprived the process of fairness or integrity, such as where a father acted as interpreter for his intellectually disabled son.⁷⁴⁹ The State court's exclusion or refusal to consider relevant evidence may render a fact-finding procedure inadequate.⁷⁵⁰

- *Newly discovered evidence.* This criteria is often argued in connection with one of *Townsend v. Sain*'s other circumstances for holding a federal hearing.⁷⁵¹ Courts generally limited this exception to evidence that was not available previously by due diligence,⁷⁵² and to evidence that was not merely cumulative or impeaching, and material in that the judgment would have been different.⁷⁵³ An excellent example is *Schneider v. Estelle*, where the petitioner alleged that the State presented perjured testimony and provided an affidavit of a neutral party indicating that the government agent admitted that he planned to say Schneider pulled a gun during a drug transaction.⁷⁵⁴ The State and federal district court denied Schneider's perjured testimony claim without a hearing, in part, because the prosecutor claimed he did not know the testimony was false. The Court of Appeals reversed and remanded for a hearing because the use of a gun made the difference between a capital offense or a crime with a ten-year maximum sentence. The Court said, "To evaluate properly Schneider's claim, the true facts need to be known."⁷⁵⁵
- *Material facts not adequately developed in State court.* This criterion for a hearing was limited substantially by *Keeney v. Tamayo-Reyes*, which is detailed in the next section. Before *Keeney*, courts applied two limitations suggested by *Townsend v.*

⁷⁴⁷ *Townsend v. Sain*, 372 U.S. 293, at 316.

⁷⁴⁸ *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

⁷⁴⁹ *Fairbanks v. Cowan*, 551 F.2d 97, 100 (6th Cir. 1977).

⁷⁵⁰ *See, e.g.*, *Gibson v. Blair*, 467 F.2d 842 (5th Cir. 1972) (federal hearing required because state court excluded evidence of discrimination that it deemed unintentional); *Campbell v. Minnesota*, 487 F.2d 1 (8th Cir. 1973) (federal hearing necessary where state court refused to allow petitioner to cross-examine affidavits); *Dixon v. Caldwell*, 471 F.2d 767 (5th Cir. 1972) (refusal to consider the petitioner's testimony because it was uncorroborated).

⁷⁵¹ *See, e.g.*, *Fast v. Wainwright*, 439 F. 2d 1162 (5th Cir. 1971) (arguing newly discovered evidence and that the facts were not adequately developed in state court).

⁷⁵² *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996), *cert. denied*, 138 L. Ed. 2d 1026, 117 S. Ct. 2526 (1997).

⁷⁵³ *Hudson v. United States*, 387 F.2d 331 (5th Cir. 1967).

⁷⁵⁴ 552 F.3d 593 (5th Cir. 1977).

⁷⁵⁵ *Id.* at 596.

Sain.⁷⁵⁶ First, the facts that were not developed in State court must be “crucial” to petitioner’s claim.⁷⁵⁷ In *Townsend*, this was true of the evidence surrounding petitioner’s drugged condition during his interrogation. The Court described this evidence as “crucial” and “indispensable to a fair, rounded development of facts.”⁷⁵⁸ The second limitation is that the failure to develop the facts is not due to “inexcusable neglect” or “deliberate by-pass” by the petitioner,⁷⁵⁹ borrowing the standard from *Fay v. Noia*.⁷⁶⁰

- *It appears the State trier of fact did not afford a full and fair fact hearing.* This catch-all phrase was deliberately left open-ended to leave district courts the discretion to try the facts anew if the State court did not reliably find facts or offer a full and fair hearing. In *Walker v. Wilmot*, the district court denied Walker’s coerced confession claim because Walker had not testified at the State court suppression hearing.⁷⁶¹ Because there was evidence that Walker may have been unaware that he had the ability to testify at his suppression hearing, the Court remanded the case for a hearing. The Court said, “When faced with such difficult questions, it would seem essential to have the fullest possible information as to what actually occurred.”⁷⁶² Another example is *Blankenship v. Estelle*, where the prosecution did not disclose that it had agreed to recommend lenience for its informant-witnesses.⁷⁶³ The Court of Appeals disagreed; although Blankenship did not cite *Giglio* in State court pleadings, he alleged sufficient facts to alert the State court to the essence of his claim. The State court denied a claim without a hearing, alleging that Blankenship had not adequately pled his *Giglio v. Illinois* claim in State court. Blankenship’s claim and the affidavit of a fellow prisoner, coupled with the release of the informant-witnesses after Blankenship’s trial, “constitute adequate factual allegations to entitle petitioner to an evidentiary hearing.”⁷⁶⁴

7. **Procedural facts:** A hearing might also be required to resolve fact questions relating to procedural issues. Consider *Miller v. Solem* where remanding the case to the district court allows the habeas petitioner to satisfy his burden and prove his successor habeas petition

⁷⁵⁶ *Townsend*, 312 U.S. 293 at 322.

⁷⁵⁷ *Id.* at 317.

⁷⁵⁸ *Id.* at 322.

⁷⁵⁹ *Id.* at 317.

⁷⁶⁰ 372 U.S. 391 (1963).

⁷⁶¹ 603 F.2d 1038 (2d Cir. 1979).

⁷⁶² *Id.* at 1041.

⁷⁶³ 545 F.2d 510 (5th Cir. 1977).

⁷⁶⁴ *Id.* at 515.

was not an abuse of the writ.⁷⁶⁵ The petitioner’s argument that there is cause and prejudice to excuse an alleged procedural default may also require an evidentiary hearing.⁷⁶⁶

8. **Townsend and AEDPA:** The Antiterrorism and Effective Death Penalty Act imposed new limits on the power of federal courts to conduct evidentiary hearings. 28 U.S.C. § 2254(d) forbids the grant of habeas corpus relief “with respect to any claim that was adjudicated on the merits in State court proceedings,” unless the adjudication of the claim was “contrary to, or an unreasonable application of, clearly established federal law,” § 2254(d)(1), or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁷⁶⁷ With respect to federal evidentiary hearings, 28 U.S.C. § 2254(e)(2) now provides: “If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim” except in limited circumstances. Although these provisions replace the *Townsend v. Sain* criteria embodied in the previous § 2254(d), *Townsend’s* reasoning continues to be reflected in decisions interpreting these provisions. For example, in *Brumfield v. Cain*, 576 U.S. 305 (2015), the Court affirmed a district court’s grant of habeas corpus relief under § 2254(d)(2) after granting an indigent petitioner resources to evaluate his claim that he has an intellectual disability and is therefore exempt from capital punishment. The state decision denying relief on the same claim was unreasonable because Louisiana had declined to provide Brumfield with the necessary mental health experts to investigate and pursue his claim, despite a persuasive showing that such resources were necessary. In *Williams v. Taylor*, 529 U.S. 420, 432 (2000), the Court interpreted § 2254(e) to apply only to cases in which “there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” Therefore, it was appropriate for the federal court to conduct an evidentiary hearing and grant habeas corpus relief on Williams’ claim that a juror was biased for failing to disclose she was related to any witnesses in the case when asked—she was previously married to the sheriff. Post-AEDPA hearing provisions are discussed in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

B. The Court Introduces Fact Bars

Chapter 3, Balancing the Roles of State and Federal Courts: Exhaustion of State Remedies, and Chapter 4, Procedural Bars: Independent Adequate State Grounds, describe a complex system in which a prisoner can easily forfeit or accidentally waive a claim by not discovering or asserting it in a timely manner, or by otherwise violating a rule of procedure. A claim properly exhausted and not procedurally defaulted was properly before the court for all purposes. *Townsend v. Sain* detailed a different set of standards for determining whether a habeas petitioner would be allowed

⁷⁶⁵ 758 F.2d 144, 145 (8th Cir. 1985).

⁷⁶⁶ *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc).

⁷⁶⁷ § 2254(d)(2).

to present evidence in federal court. As illustrated by *Frank v. Mangum*, *Moore v. Dempsey*, and the cases discussed in this unit, the ability to present evidence is essential to petitioners' ability to prove their convictions were obtained in violation of the Constitution. When the Court imported its procedural default jurisprudence into the analysis of a petitioner's right to present a particular piece of evidence, even conservative Justices Sandra Day O'Connor and Anthony Kennedy objected. *Keeney v. Tamayo-Reyes*⁷⁶⁸ represents one of the Court's last major pre-AEDPA restrictions on habeas corpus.

KEENEY V. TAMAYO-REYES

JUSTICE WHITE delivered the opinion of the Court.

Respondent is a Cuban immigrant with little education and almost no knowledge of English. In 1984, he was charged with murder arising from the stabbing death of a man who had allegedly attempted to intervene in a confrontation between respondent and his girlfriend in a bar.

Respondent was provided with a defense attorney and interpreter. The attorney recommended to respondent that he plead *nolo contendere* to first-degree manslaughter. Ore. Rev. Stat. § 163.118(1)(a) (1987). Respondent signed a plea form that explained in English the rights he was waiving by entering the plea. The state court held a plea hearing, at which petitioner was represented by counsel and his interpreter. The judge asked the attorney and interpreter if they had explained to respondent the rights in the plea form and the consequences of his plea; they responded in the affirmative. The judge then explained to respondent, in English, the rights he would waive by his plea, and asked the interpreter to translate. Respondent indicated that he understood his rights and still wished to plead *nolo contendere*. The judge accepted his plea.

Later, respondent brought a collateral attack on the plea in a state-court proceeding. He alleged his plea had not been knowing and intelligent and therefore was invalid because his translator had not translated accurately and completely for him the *mens rea* element of manslaughter. He also contended that he did not understand the purposes of the plea form or the plea hearing. He contended that he did not know he was pleading no contest to manslaughter, but rather that he thought he was agreeing to be tried for manslaughter.

After a hearing, the state court dismissed respondent's petition, finding that respondent was properly served by his trial interpreter and that the interpreter correctly, fully, and accurately translated the communications between respondent and his attorney. The State Court of Appeals affirmed, and the State Supreme Court denied review.

Respondent then entered Federal District Court seeking a writ of habeas corpus. Respondent contended that the material facts concerning the translation were not adequately developed at the state-court hearing, implicating the fifth circumstance of *Townsend v. Sain*, 372 U.S. 293, 313 (1963), and sought a federal evidentiary hearing on whether his *nolo contendere*

⁷⁶⁸ 504 U.S. 1 (1992).

plea was unconstitutional. The District Court found that the failure to develop the critical facts relevant to his federal claim was attributable to inexcusable neglect and that no evidentiary hearing was required. Respondent appealed.

The Court of Appeals for the Ninth Circuit recognized that the alleged failure to translate the *mens rea* element of first-degree manslaughter, if proved, would be a basis for overturning respondent's plea, 926 F.2d 1492, 1494 (1991), and determined that material facts had not been adequately developed in the state postconviction court, *id.*, at 1500, apparently due to the negligence of postconviction counsel. The court held that *Townsend v. Sain, supra*, at 317, and *Fay v. Noia*, 372 U.S. 391, 438 (1963), required an evidentiary hearing in the District Court unless respondent had deliberately bypassed the orderly procedure of the state courts. Because counsel's negligent failure to develop the facts did not constitute a deliberate bypass, the Court of Appeals ruled that respondent was entitled to an evidentiary hearing on the question whether the *mens rea* element of first-degree manslaughter was properly explained to him. 926 F.2d at 1502.

We granted certiorari to decide whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings. 502 U.S. 807 (1991). We reverse.

* * * *

The concerns that motivated the rejection of the deliberate bypass standard in [*Wainwright v. Sykes*, 433 U.S. 72 (1977), *Coleman v. Thompson*, 501 U.S. 722 (1991)], and other cases are equally applicable to this case. As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum.

Applying the cause-and-prejudice standard in cases like this will obviously contribute to the finality of convictions, for requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state-court proceedings dramatically increases the opportunities to relitigate a conviction.

Similarly, encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance. It reduces the "inevitable friction" that results when a federal habeas court "overturn[s] either the factual or legal conclusions reached by the state-court system." *Sumner v. Mata*, 449 U.S. 539, 550 (1981).

Also, by ensuring that full factual development takes place in the earlier, state-court proceedings, the cause-and-prejudice standard plainly serves the interest of judicial economy. It is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings.

Furthermore, ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum. The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with, and gives meaning to, the requirement of exhaustion. The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief. *Ex parte Royall*, 117 U.S. 241 (1886). The requirement that state prisoners exhaust state remedies before a writ of habeas corpus is granted by a federal court is now incorporated in the federal habeas statute. 28 U. S. C. § 2254. Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful.

The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court. Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits. Cf. *Picard v. Connor*, 404 U.S. 270, 275 (1971).

Finally, it is worth noting that applying the cause-and-prejudice standard in this case also advances uniformity in the law of habeas corpus. There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated. And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum. A different rule could mean that a habeas petitioner would not be excused for negligent failure to object to the introduction of the prosecution's evidence, but nonetheless would be excused for negligent failure to introduce any evidence of his own to support a constitutional claim.

Respondent Tamayo-Reyes is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure. We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing. Cf. *McCleskey v. Zant*, 499 U.S. at 494; *Murray v. Carrier*, 477 U.S. at 496.

The State concedes that a remand to the District Court is appropriate in order to afford respondent the opportunity to bring forward evidence establishing cause and prejudice, and we agree that respondent should have that opportunity. Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN, JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

* * * *

Jose Tamayo-Reyes' habeas petition stated that because he does not speak English he pleaded *nolo contendere* to manslaughter without any understanding of what "manslaughter" means. App. 58. If this assertion is true, his conviction was unconstitutionally obtained, see *Henderson v. Morgan*, 426 U.S. 637, 644-647 (1976), and Tamayo-Reyes would be entitled to a writ of habeas corpus. Despite the Court's attempt to characterize his allegation as a technical quibble -- "his translator had not translated accurately and completely for him the *mens rea* element of manslaughter," *ante*, at 3 -- this much is not in dispute. Tamayo-Reyes has alleged a fact that, if true, would entitle him to the relief he seeks.

Tamayo-Reyes initially, and properly, challenged the voluntariness of his plea in a petition for postconviction relief in state court. The court held a hearing, after which it found that "petitioner's plea of guilty was knowingly and voluntarily entered." Yet the record of the post-conviction hearing hardly inspires confidence in the accuracy of this determination. Tamayo-Reyes was the only witness to testify, but his attorney did not ask him whether his interpreter had translated "manslaughter" for him. Counsel instead introduced the deposition testimony of the interpreter, who admitted that he had translated "manslaughter" only as "less than murder." *Id.*, at 27. No witnesses capable of assessing the interpreter's performance were called; the attorney instead tried to direct the court's attention to various sections of the interpreter's deposition and attempted to point out where the interpreter had erred. When the prosecutor objected to this discussion on the ground that counsel was not qualified as an expert witness, his "presentation of the issue quickly disintegrated." 926 F.2d 1492, 1499 (CA9 1991). The state court had no other relevant evidence before it when it determined that Tamayo-Reyes actually understood the charge to which he was pleading.

Contrary to the impression conveyed by this Court's opinion, the question whether a federal court should defer to this sort of dubious "factfinding" in addressing a habeas corpus petition is one with a long history behind it, a history that did not begin with *Townsend v. Sain*.

The availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court. See, e. g., *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 269 (1978). It was settled over a hundred years ago that "the prosecution against [a criminal defendant] is a criminal prosecution, but the writ of habeas corpus ... is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right." *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883). Any possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such nonappellate functions as the allegation of facts, 28 U. S. C. § 2242, the taking of depositions and the propounding of interrogatories, § 2246, the introduction

of documentary evidence, § 2247, and, of course, the determination of facts at evidentiary hearings, § 2254(d).

* * * *

Habeas corpus has always differed from ordinary civil litigation, however, in one important respect: The doctrine of *res judicata* has never been thought to apply. [cases omitted] A state prisoner is not precluded from raising a federal claim on habeas that has already been rejected by the state courts. This is not to say that state court fact finding is entitled to no weight, or that every state prisoner has the opportunity to relitigate facts found against him by the state courts. Concerns of federalism and comity have pushed us from this extreme just as the importance of the writ has repelled us from the opposite extreme, represented by the strict application of *res judicata*. Instead, we have consistently occupied the middle ground. Even before *Townsend*, federal courts deferred to state court findings of fact where the federal district judge was satisfied that the state court had fairly considered the issues and the evidence and had reached a satisfactory result. See, e. g., *Brown, supra*, at 458, 465; *Frank v. Mangum*, 237 U.S. 309, 332-336 (1915). But where such was not the case, the federal court entertaining the habeas petition would examine the facts anew. See, e. g., *Ex parte Hawk*, 321 U.S. 114, 116 (1944); *Moore, supra*, at 92. In *Hawk*, for example, we stated that a state prisoner would be entitled to a hearing, 321 U.S. at 116, "where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised ... because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate." *Id.*, at 118. In *Brown*, we explained that a hearing may be dispensed with only "where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented." 344 U.S. at 463.

* * * *

Here, the Federal District Court has already determined that it will consider the claimed constitutional violation; the only question is how the court will go about it. When it comes to determining whether a hearing is to be held to resolve a claim that is already properly before a federal court, the federalism concerns underlying our procedural default cases are diminished somewhat. By this point, our concern is less with encroaching on the territory of the state courts than it is with managing the territory of the federal courts in a manner that will best implement their responsibility to consider habeas petitions. Our adoption of a cause and prejudice standard to resolve the first concern should not cause us reflexively to adopt the same standard to resolve the second. Federalism, comity, and finality are all advanced by declining to permit relitigation of claims in federal court in certain circumstances; these interests are less significantly advanced, once relitigation properly occurs, by permitting district courts to resolve claims based on an incomplete record.

* * * *

For a case to fit within this *Townsend* circumstance but none of *Townsend's* other circumstances, the case will very likely be like this one, where the material facts were not

developed because of attorney error. Any other reason the material facts might not have been developed, such as that they were unknown at the time or that the State denied a full and fair opportunity to develop them, will almost certainly be covered by one of *Townsend's* other circumstances. See *Townsend*, 372 U.S. at 313. We have already held that attorney error short of constitutionally ineffective assistance of counsel does not amount to "cause." See *Murray v. Carrier*, 477 U.S. at 488. As a result, the practical effect of the Court's ruling today will be that for a case to fall within *Townsend's* fifth circumstance but no other -- for a petitioner to be entitled to a hearing on the ground that the material facts were not adequately developed in state court but on no other ground -- the petitioner's attorney must have rendered constitutionally ineffective assistance in presenting facts to the state factfinder.

This effect is more than a little ironic. Where the state factfinding occurs at the trial itself, counsel's ineffectiveness will not just entitle the petitioner to a hearing -- it will entitle the petitioner to a new trial. Where, as in this case, the state factfinding occurs at a postconviction proceeding, the petitioner *has* no constitutional right to the effective assistance of counsel, so counsel's poor performance can *never* constitute "cause" under the cause and prejudice standard. *Coleman v. Thompson*, 501 U.S. at 752. After today's decision, the only petitioners entitled to a hearing under *Townsend's* fifth circumstance are the very people who do not need one, because they will have already obtained a new trial or because they will already be entitled to a hearing under one of the other circumstances. The Court has thus rendered unusable the portion of *Townsend* requiring hearings where the material facts were not adequately developed in state court.

* * * *

For these reasons, I think § 2254(d) presumes the continuing validity of our decision in *Townsend*, including the portion of the decision that recognized a "deliberate bypass" exception to a petitioner's right to a hearing where the material facts were not adequately developed in the state court.

Jose Tamayo-Reyes alleges that he pleaded *nolo contendere* to a crime he did not understand. He has exhausted state remedies, has committed no procedural default, has properly presented his claim to a Federal District Court in his first petition for a writ of habeas corpus, and would be entitled to a hearing under the standard set forth in *Townsend*. Given that his claim is properly before the District Court, I would not cut off his right to prove his claim at a hearing. I respectfully dissent.

JUSTICE KENNEDY, dissenting.

By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should think those cases will be few in number. *Townsend v. Sain*, 372 U.S. 293, 318 (1963), has been the law for almost 30 years and there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts. And in my view, the concept of factual inadequacy comprehends only those petitions with respect to which there is a realistic possibility that an evidentiary hearing will make a difference in the outcome.

This serves to narrow the number of cases in a further respect and to ensure that they are the ones, as Justice O'Connor points out, in which we have valid concerns with constitutional error So we consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts. For these reasons and all those set forth by Justice O'Connor, I dissent from the opinion and judgment of the Court.

Questions and Comments:

1. **The Court's new "Fact Bar":** *Keeney v. Tamayo-Reyes* established "fact bars" that can preclude federal consideration of evidence in the same way procedural bars preclude federal consideration of claims. It presents the anomalous situation in which a claim could be properly before a court which would be forced to deny it based on facts and evidence known to be unreliable or untrue. Justice Kennedy observed that the Court's decision applies only to those cases in which the prisoner invokes only *Townsend v. Sain*'s fifth circumstance—that the facts were not adequately developed in state court. All other circumstances in which *Townsend v. Sain* and repealed § 2254(d) required a hearing implicate factors outside the prisoner's control. Justice Kennedy contended that because *Keeney*'s holding is limited to the fifth circumstance, cases affected by the decision will be "few in number." Will that be true in a state that chronically underfunds indigent defense? If the state postconviction counsel is at fault for not developing the record, will petitioners ever be able to demonstrate "cause" for defaulting their facts?
2. **Cases affected by *Keeney*:** Justice O'Connor agreed with Justice Kennedy that *Keeney* is limited to cases falling under *Townsend*'s fifth circumstance, i.e., that the facts were not adequately developed in the state court. Justice Kennedy thought that such cases would be few in number, but Justice O'Connor observed, "For a case to fit within this *Townsend* circumstance but none of *Townsend*'s other circumstances, the case will very likely be like this one, where the material facts were not developed because of attorney error."⁷⁶⁹ What does this suggest about the number of cases likely to be affected? Similar to *McCleskey v. Zant*, *Keeney v. Tamayo-Reyes* elevates the prisoner's duty of diligence in state court proceedings. If a lawyer representing a client in state postconviction proceedings lacks adequate time and resources to investigate and develop the record, what could that lawyer do to protect the client's right to develop facts in federal court? Would *Keeney v. Tamayo-Reyes* have barred Alvin Ford from developing evidence of his competency to be executed in a federal habeas corpus proceeding? How would you argue on Ford's behalf that *Keeney* does not apply to him?

⁷⁶⁹ *Keeney v. Tamayo-Reyes*, supra, at 21-22.

3. **Exhausting new facts:** Suppose that the prisoner receives access to competent counsel for the first time on federal habeas corpus and new facts are uncovered which the prisoner “failed to develop” in state court within the meaning of *Keeney v. Tamayo-Reyes*. What options might be available to help the client obtain a truthful, reliable adjudication of his or her constitutional claims? A petitioner could obtain a hearing by tendering new evidence meeting *Schlup v. Delo*’s miscarriage of justice standard, but prisoners who can do so will be few. *Keeney v. Tamayo-Reyes* itself hints at ways to circumvent its harsh results. The Court disavowed an intent “to create a procedural hurdle on the path to federal habeas court.” *Id.* at 10. Instead, the purpose is “to channel claims into an appropriate forum,”—the State courts, as the exhaustion doctrine requires. As with any exhaustion issue, the prisoner may have an available State remedy. Consider *Thomas v. State*’s ordering of an evidentiary hearing on a second state postconviction action based on prior counsel’s failure to develop the record.⁷⁷⁰ Postconviction proceedings are an important protection against unjust convictions and sentences, especially in death penalty cases. The Mississippi Supreme Court held that “because this Court has recognized that PCR proceedings are a critical stage of the death penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel.”⁷⁷¹ Habeas petitioners in such states have a clear path to exhausting issues of fact left undeveloped by ineffective postconviction counsel.

C. Post-AEDPA Limits on Evidentiary Hearings: 28 U.S.C. § 2254(e)

The Antiterrorism and Effective Death Penalty Act places substantial new limits on a federal court’s power to grant habeas corpus relief. Most of those changes are discussed in Chapter 8, but the Court’s decisions on evidentiary hearings are discussed here because of the continued relevance of *Townsend v. Sain* regarding the interpretation of 28 U.S.C. § 2254(e). Under AEDPA, federal courts shall not hold a good-cause hearing on claims for which “the applicant has failed to develop the factual basis of a claim in State court proceedings” unless the claim is based on a retroactive decision of the Supreme Court, § 2254(e)(2)(A)(1), or the petitioner can show “factual predicate that could not have been previously discovered through the exercise of due diligence” *and* that the facts supporting the claim are “sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”⁷⁷²

The limitations on evidentiary hearings, if applicable, are difficult to overcome; the standard joins together the “cause” prong of the cause-and-prejudice standard and the clear-and-

⁷⁷⁰ 510 P.3d 754 (Nev. 2022).

⁷⁷¹ *Grayson v. State*, 118 So. 2d 118, 126 (2013).

⁷⁷² § 2254(e)(2)(B).

convincing-evidence standard of *Sawyer v. Whitley*.⁷⁷³ But those limitations only apply “if the applicant has failed to develop the factual basis of a claim.”⁷⁷⁴ *Williams v. Taylor*⁷⁷⁵ was the Court’s first opportunity to interpret AEDPA’s new limitation on federal evidentiary hearings.

A Virginia jury convicted Michael Wayne Williams of robbery, abduction, rape, and the capital murders of Morris and Elizabeth Keller in Virginia and sentenced him to death. At trial, the prosecution relied heavily on the testimony of Jeffrey Cruse, Williams' accomplice, who portrayed Williams as the mastermind. Cruse had initially entered a plea agreement to avoid the death penalty but failed to disclose his participation in the rape of Mrs. Keller, leading to the revocation of his deal. Despite this, Cruse provided critical testimony during Williams' trial, emphasizing Williams' dominant role.

Williams testified in his defense, admitting to some elements of the crime, such as initiating the robbery and firing the first shot at Mr. Keller, but denied other allegations, including the rape and additional shootings. The jury convicted him on all counts, including robbery, abduction, rape, and the capital murders of the Kellers. Based on findings of future dangerousness and the vile nature of the crimes, the jury recommended a death sentence, which the trial court imposed. Cruse pleaded guilty to the capital murder of Mrs. Keller and the first-degree murder of Mr. Keller, receiving life imprisonment after the prosecution sought leniency due to his cooperation.

The Virginia Supreme Court affirmed Williams’ conviction and sentence of death and affirmed the denial of postconviction relief. In his federal habeas corpus petition, Williams raised, for the first time, a claim that a juror deliberately withheld information relevant to her bias in the case—she was married to the sheriff, an important State’s witness. The Court granted certiorari to determine whether § 2254(e) precluded Williams from presenting evidence in federal court in support of his Sixth Amendment claim that he was convicted by a biased juror.

WILLIAMS V. TAYLOR

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Michael Wayne Williams received a capital sentence for the murders of Morris Keller, Jr., and Keller's wife, Mary Elizabeth. Petitioner later sought a writ of habeas corpus in federal court. Accompanying his petition was a request for an evidentiary hearing on constitutional claims which, he alleged, he had been unable to develop in state-court proceedings. The question in this case is whether 28 U.S.C. § 2254(e)(2) (1994 ed., Supp. III), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, bars the evidentiary hearing petitioner seeks. If petitioner "has failed to develop the factual basis of [his] claims in State court proceedings," his case is subject to § 2254(e)(2), and he may not receive a

⁷⁷³ 505 U.S. 333 (1992).

⁷⁷⁴ 28 USC § 2254(e)(2).

⁷⁷⁵ 529 U.S. 420 (2000).

hearing because he concedes his inability to satisfy the statute's further stringent conditions for excusing the deficiency.

* * * *

Petitioner filed a habeas petition in the United States District Court for the Eastern District of Virginia on November 20, 1996. In addition to his claim regarding the alleged undisclosed agreement between the Commonwealth and Cruse, the petition raised three claims relevant to questions now before us. First, petitioner claimed the prosecution had violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose a report of a confidential pretrial psychiatric examination of Cruse. Second, petitioner alleged his trial was rendered unfair by the seating of a juror who at *voir dire* had not revealed possible sources of bias. Finally, petitioner alleged one of the prosecutors committed misconduct in failing to reveal his knowledge of the juror's possible bias.

The District Court granted an evidentiary hearing on the undisclosed agreement and the allegations of juror bias and prosecutorial misconduct but denied a hearing on the psychiatric report. Before the evidentiary hearing could be held, the Commonwealth filed an application for an emergency stay and a petition for a writ of mandamus and prohibition in the Court of Appeals. The Commonwealth argued that petitioner's evidentiary hearing was prohibited by 28 U.S.C. § 2254(e)(2) (1994 ed., Supp. III). A divided panel of the Court of Appeals granted the emergency stay and remanded for the District Court to apply the statute to petitioner's request for an evidentiary hearing. On remand, the District Court vacated its order granting an evidentiary hearing and dismissed the petition, having determined petitioner could not satisfy § 2254(e)(2)'s requirements.

The Court of Appeals affirmed. . . . [It] concluded petitioner could not satisfy the statute's conditions for excusing his failure to develop the facts and held him barred from receiving an evidentiary hearing. The Court of Appeals ruled in the alternative that, even if § 2254(e)(2) did not apply, petitioner would be ineligible for an evidentiary hearing under the cause and prejudice standard of pre-AEDPA law. See 189 F.3d at 428.

Addressing petitioner's claim of an undisclosed informal agreement between the Commonwealth and Cruse, the Court of Appeals rejected it on the merits under 28 U.S.C. § 2254(d)(1) and, as a result, did not consider whether § 2254(e)(2) applied. See 189 F.3d at 429.

On October 18, 1999, petitioner filed an application for stay of execution and a petition for a writ of certiorari. On October 28, we stayed petitioner's execution and granted certiorari to decide whether § 2254(e)(2) precludes him from receiving an evidentiary hearing on his claims. We now affirm in part and reverse in part.

* * * *

Section 2254(e)(2), the provision which controls whether petitioner may receive an evidentiary hearing in federal district court on the claims that were not developed in the Virginia courts, becomes the central point of our analysis. It provides as follows:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

By the terms of its opening clause the statute applies only to prisoners who have “failed to develop the factual basis of a claim in State court proceedings.” If the prisoner has failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2). Here, petitioner concedes his case does not comply with § 2254(e)(2)(B), see Brief for Petitioner 25, so he may receive an evidentiary hearing only if his claims fall outside the opening clause.

There was no hearing in state court on any of the claims for which petitioner now seeks an evidentiary hearing. That, says the Commonwealth, is the end of the matter. In its view petitioner, whether or not through his own fault or neglect, still “failed to develop the factual basis of a claim in State court proceedings.” Petitioner, on the other hand, says the phrase “failed to develop” means lack of diligence in developing the claims, a defalcation he contends did not occur since he made adequate efforts during state-court proceedings to discover and present the underlying facts. The Court of Appeals agreed with petitioner's interpretation of § 2254(e)(2) but believed petitioner had not exercised enough diligence to avoid the statutory bar. See 189 F.3d at 426. We agree with petitioner and the Court of Appeals that “failed to develop” implies some lack of diligence; but, unlike the Court of Appeals, we find no lack of diligence on petitioner's part with regard to two of his three claims.

We start, as always, with the language of the statute. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Section 2254(e)(2) begins with a conditional clause, “if the applicant has failed to develop the factual basis of a claim in State court proceedings,” which directs attention to the prisoner's efforts in state court. We ask first whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer. Here the answer is no.

The Commonwealth would have the analysis begin and end there. Under its no-fault reading of the statute, if there is no factual development in the state court, the federal habeas court

may not inquire into the reasons for the default when determining whether the opening clause of § 2254(e)(2) applies. We do not agree with the Commonwealth's interpretation of the word "failed."

We do not deny "fail" is sometimes used in a neutral way, not importing fault or want of diligence. So the phrase "We fail to understand his argument" can mean simply "We cannot understand his argument." This is not the sense in which the word "failed" is used here, however.

We give the words of a statute their "ordinary, contemporary, common meaning," absent an indication Congress intended them to bear some different import. *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993)). See also *Bailey v. United States*, 516 U.S. 137, 141 (1995). In its customary and preferred sense, "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. See, e.g., Webster's New International Dictionary 910 (2d ed. 1939) (defining "fail" as "to be wanting; to fall short; to be or become deficient in any measure or degree," and "failure" as "a falling short," "a deficiency or lack," and an "omission to perform"); Webster's New International Dictionary 814 (3d ed. 1993) ("to leave some possible or expected action unperformed or some condition unachieved"). See also Black's Law Dictionary 594 (6th ed. 1990) (defining "fail" as "fault, negligence, or refusal"). To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all. We conclude Congress used the word "failed" in the sense just described. Had Congress intended a no-fault standard, it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase "has failed to," the phrase "did not."

Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. In this we agree with the Court of Appeals and with all other courts of appeals which have addressed the issue. See, e.g., *Baja v. Ducharme*, 187 F.3d 1075, 1078-1079 (CA9 1999); *Miller v. Champion*, 161 F.3d 1249, 1253 (CA10 1998); *Cardwell*, 152 F.3d at 337; *McDonald v. Johnson*, 139 F.3d 1056, 1059 (CA5 1998); *Burris v. Parke*, 116 F.3d 256, 258 (CA7 1997); *Love v. Morton*, 112 F.3d 131, 136 (CA3 1997).

Our interpretation of § 2254(e)(2)'s opening clause has support in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), a case decided four years before AEDPA's enactment. In *Keeney*, a prisoner with little knowledge of English sought an evidentiary hearing in federal court, alleging his *nolo contendere* plea to a manslaughter charge was not knowing and voluntary because of inaccuracies in the translation of the plea proceedings. The prisoner had not developed the facts of his claim in state collateral proceedings, an omission caused by the negligence of his state postconviction counsel. See *id.* at 4, 8-9. The Court characterized this as the "prisoner's failure to develop material facts in state court." *Id.*, at 8. We required the prisoner to demonstrate cause and prejudice excusing

the default before he could receive a hearing on his claim, *ibid.*, unless the prisoner could “show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing,” *id.*, at 12.

Section 2254(e)(2)'s initial inquiry into whether “the applicant has failed to develop the factual basis of a claim in State court proceedings” echoes *Keeney's* language regarding “the state prisoner's failure to develop material facts in state court.” In *Keeney*, the Court borrowed the cause and prejudice standard applied to procedurally defaulted claims, see *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977), deciding there was no reason “to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim.” *Keeney*, *supra*, at 8. As is evident from the similarity between the Court's phrasing in *Keeney* and the opening clause of § 2254(e)(2), Congress intended to preserve at least one aspect of *Keeney's* holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing. To be sure, in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, and in eliminating a freestanding “miscarriage of justice” exception, Congress raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings. Contrary to the Commonwealth's position, however, there is no basis in the text of § 2254(e)(2) to believe Congress used “fail” in a different sense than the Court did in *Keeney* or otherwise intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a broader class of cases than were covered by *Keeney's* cause and prejudice standard.

In sum, the opening clause of § 2254(e)(2) codifies *Keeney's* threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney's* test for excusing the deficiency in the state-court record prior to AEDPA are now controlled by § 2254(e)(2). When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“Where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”). See also *Cottage Savings Assn. v. Commissioner*, 499 U.S. 554, 562 (1991).

Interpreting § 2254(e)(2) so that “failed” requires lack of diligence or some other fault avoids putting it in needless tension with § 2254(d). A prisoner who developed his claim in state court and can prove the state court's decision was “contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States,” is not barred from obtaining relief by § 2254(d)(1). See *Williams v. Taylor*, [529 U.S. 362, 416 (2000)] (opinion of O'CONNOR, J.). If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d). See 28 U.S.C. § 2254(e)(2)(B). The “failed to develop” clause does not bear this harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings

for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court. We see no indication that Congress by this language intended to remove the distinction between a prisoner who is at fault and one who is not.

The Commonwealth argues a reading of “failed to develop” premised on fault empties § 2254(e)(2)(A)(ii) of its meaning. To treat the prisoner's lack of diligence in state court as a prerequisite for application of § 2254(e)(2), the Commonwealth contends, renders a nullity of the statute's own diligence provision requiring the prisoner to show “a factual predicate [of his claim] could not have been previously discovered through the exercise of due diligence.” § 2254(e)(2)(A)(ii). We disagree.

The Commonwealth misconceives the inquiry mandated by the opening clause of § 2254(e)(2). The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of “failed” is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful. Though lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain, see § 2254(e)(2)(A)(ii), and there is a convincing claim of innocence, see § 2254(e)(2)(B), only a prisoner who has neglected his rights in state court need satisfy these conditions. The statute's later reference to diligence pertains to cases in which the facts could not have been discovered, whether there was diligence or not. In this important respect § 2254(e)(2)(A)(ii) bears a close resemblance to (e)(2)(A)(i), which applies to a new rule that was not available at the time of the earlier proceedings. Cf. *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (“Words and people are known by their companions”). Cf. also *United States v. Locke*, 529 U.S. 89, 116 (2000). In these two parallel provisions Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or factual basis of the claims did not exist at the time of state-court proceedings.

We are not persuaded by the Commonwealth's further argument that anything less than a no-fault understanding of the opening clause is contrary to AEDPA's purpose to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus”); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (“The doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior,

appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments”).

It is consistent with these principles to give effect to Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus, while recognizing the statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not. Principles of exhaustion are premised upon recognition by Congress and the Court that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings. Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. “Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner “has failed to develop the factual basis of a claim” where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

Now we apply the statutory test. If there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not “failed to develop” the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements. We find lack of diligence as to one of the three claims but not as to the other two.

A [Analysis of Williams’ *Brady* Claim]

Petitioner did not exercise the diligence required to preserve the claim that nondisclosure of Cruse's psychiatric report was in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963). The report concluded Cruse “had little recollection of the [murders of the Kellers], other than vague memories, as he was intoxicated with alcohol and marijuana at the time.” The report had been prepared in September 1993, before petitioner was tried; yet it was not mentioned by petitioner until he filed his federal habeas petition and attached a copy of the report. Petitioner explained that an investigator for his federal habeas counsel discovered the report in Cruse's court file but state habeas counsel had not seen it when he had reviewed the same file. State habeas counsel averred as follows:

“Prior to filing [petitioner's] habeas corpus petition with the Virginia Supreme Court, I reviewed the Cumberland County court files of [petitioner] and of his co-defendant, Jeffrey Cruse. . . . I have reviewed the attached psychiatric evaluation of Jeffrey Cruse I have no recollection

of seeing this report in Mr. Cruse's court file when I examined the file. Given the contents of the report, I am confident that I would remember it.”

The trial court was not satisfied with this explanation for the late discovery. Nor are we.

The transcript put petitioner's state habeas counsel on notice of the report's existence and possible materiality. The sole indication that counsel made some effort to investigate the report is an October 30, 1995, letter to the prosecutor in which counsel requested “all reports of physical and mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense, including but not limited to: . . . all psychological test or polygraph examinations performed upon any prosecution witness and all documents referring or relating to such tests” *Id.* at 346-347. After the prosecution declined the requests absent a court order, *id.* at 353, it appears counsel made no further efforts to find the specific report mentioned by Cruse's attorney. Given knowledge of the report's existence and potential importance, a diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2).

As we hold there was a failure to develop the factual basis of this *Brady* claim in state court, we must determine if the requirements in the balance of § 2254(e)(2) are satisfied so that petitioner's failure is excused. Subparagraph (B) of § 2254(e)(2) conditions a hearing upon a showing, by clear and convincing evidence, that no reasonable factfinder would have found petitioner guilty of capital murder but for the alleged constitutional error. Petitioner concedes he cannot make this showing, and the case has been presented to us on that premise. For these reasons, we affirm the Court of Appeals' judgment barring an evidentiary hearing on this claim.

B [Analysis of Williams' Juror Claim]

We conclude petitioner has met the burden of showing he was diligent in efforts to develop the facts supporting his juror bias and prosecutorial misconduct claims in collateral proceedings before the Virginia Supreme Court.

Petitioner's claims are based on two of the questions posed to the jurors by the trial judge at *voir dire*. First, the judge asked prospective jurors, “Are any of you related to the following people who may be called as witnesses?” Then he read the jurors a list of names, one of which was “Deputy Sheriff Claude Meinhard.” Bonnie Stinnett, who would later become the jury foreperson, had divorced Meinhard in 1979, after a 17-year marriage with four children. Stinnett remained silent, indicating the answer was “no.” Meinhard, as the officer who investigated the crime scene and interrogated Cruse, would later become the prosecution's lead-off witness at trial.

After reading the names of the attorneys involved in the case, including one of the prosecutors, Robert Woodson, Jr., the judge asked, “Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?” Stinnett again said nothing, despite the fact Woodson had represented her during her divorce from Meinhard.

In an affidavit she provided in the federal habeas proceedings, Stinnett claimed “[she] did not respond to the judge's [first] question because [she] did not consider [herself] ‘related’ to

Claude Meinhard in 1994 [at *voir dire*] Once our marriage ended in 1979, I was no longer related to him.” As for Woodson's earlier representation of her, Stinnett explained as follows:

“When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson 'represented' either one of us.”

Woodson provided an affidavit in which he admitted “[he] was aware that Juror Bonnie Stinnett was the ex-wife of then Deputy Sheriff Claude Meinhard and [he] was aware that they had been divorced for some time.” Woodson stated, however, “to [his] mind, people who are related only by marriage are no longer ‘related’ once the marriage ends in divorce.” Woodson also “had no recollection of having been involved as a private attorney in the divorce proceedings between Claude Meinhard and Bonnie Stinnett.” He explained that “whatever [his] involvement was in the 1979 divorce, by the time of trial in 1994 [he] had completely forgotten about it.”

Even if Stinnett had been correct in her technical or literal interpretation of the question relating to Meinhard, her silence after the first question was asked could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that Woodson had been her attorney. Stinnett's failure to divulge material information in response to the second question was misleading as a matter of fact because, under any interpretation, Woodson had acted as counsel to her and Meinhard in their divorce. Coupled with Woodson's own reticence, these omissions as a whole disclose the need for an evidentiary hearing. It may be that petitioner could establish that Stinnett was not impartial, see *Smith v. Phillips*, 455 U.S. 209, 217, 219-221 (1982), or that Woodson's silence so infected the trial as to deny due process, see *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-648 (1974).

In ordering an evidentiary hearing on the juror bias and prosecutorial misconduct claims, the District Court concluded the factual basis of the claims was not reasonably available to petitioner's counsel during state habeas proceedings. After the Court of Appeals vacated this judgment, the District Court dismissed the petition and the Court of Appeals affirmed under the theory that state habeas counsel should have discovered Stinnett's relationship to Meinhard and Woodson. See 189 F.3d at 428.

We disagree with the Court of Appeals on this point. The trial record contains no evidence which would have put a reasonable attorney on notice that Stinnett's non-response was a deliberate omission of material information. State habeas counsel did attempt to investigate petitioner's jury, though prompted by concerns about a different juror. Counsel filed a motion for expert services with the Virginia Supreme Court, alleging “irregularities, improprieties and omissions existed with respect to the empaneling [*sic*] of the jury.” *Id.* at 358. Based on these suspicions, counsel requested funding for an investigator “to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case.” *Ibid.* The Commonwealth opposed the motion, and the Virginia Supreme Court denied it and dismissed the habeas petition, depriving petitioner of a further opportunity to investigate. The Virginia Supreme Court's denial of the motion is understandable in light of petitioner's vague allegations, but the vagueness was not the fault of

petitioner. Counsel had no reason to believe Stinnett had been married to Meinhard or been represented by Woodson. The underdevelopment of these matters was attributable to Stinnett and Woodson, if anyone. We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, § 2254(e)(2) will not bar him from developing them in federal court.

The Court of Appeals held state habeas counsel was not diligent because petitioner's investigator on federal habeas discovered the relationships upon interviewing two jurors who referred in passing to Stinnett as "Bonnie Meinhard." The investigator later confirmed Stinnett's prior marriage to Meinhard by checking Cumberland County's public records. See 189 F.3d at 426 ("The documents supporting [petitioner's] *Sixth Amendment* claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because [petitioner's] federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well"). We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror. Because of Stinnett and Woodson's silence, there was no basis for an investigation into Stinnett's marriage history. *Section 2254(e)(2)* does not apply to petitioner's related claims of juror bias and prosecutorial misconduct.

We further note the Commonwealth has not argued that petitioner could have sought relief in state court once he discovered the factual bases of these claims sometime between appointment of federal habeas counsel on July 2, 1996, and the filing of his federal habeas petition on November 20, 1996. As an indigent, petitioner had 120 days following appointment of state habeas counsel to file a petition with the Virginia Supreme Court. *Va. Code Ann. § 8.01-654.1* (1999). State habeas counsel was appointed on August 10, 1995, about a year before petitioner's investigator on federal habeas uncovered the information regarding Stinnett and Woodson. As state postconviction relief was no longer available at the time the facts came to light, it would have been futile for petitioner to return to the Virginia courts. In these circumstances, though the state courts did not have an opportunity to consider the new claims, petitioner cannot be said to have failed to develop them in state court by reason of having neglected to pursue remedies available under Virginia law.

Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance. Questions regarding the standard for determining the prejudice that petitioner must establish to obtain relief on these claims can be addressed by the Court of Appeals or the District Court in the course of further proceedings. These courts, in light of cases such as *Smith, supra*, at 215 ("The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"), will take due account of the District Court's earlier decision to grant an evidentiary hearing based in part on its belief that "Juror Stinnett deliberately failed to tell the truth on voir dire." *Williams v. Netherland*, Civ. Action No. 3:96CV529 (ED Va., Apr. 13, 1998), App. 529, 557.

* * * *

The decision of the Court of Appeals is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **AEDPA's intent:** Government lawyers arguing habeas cases before the Court consistently argue that the Court should interpret AEDPA to achieve the maximum restriction of habeas corpus jurisdiction. Justice Kennedy's reasoning in *Williams v. Taylor* follows that of *Keeney v. Tamayo-Reyes*—the intent of AEDPA was not to erect arbitrary barriers but to channel the litigation, including fact development, to State courts in the first instance. He noted the arbitrary, unfair impact of the State's proposed strict liability interpretation of § 2254(e): a prosecutor could get away with hiding exculpatory evidence as long as he didn't get caught before state postconviction proceedings had ended. In this sense, AEDPA can be viewed as retaining *Keeney's* rule, but elevating the standard of proof a habeas petitioner would have to satisfy in order to obtain a federal hearing. Although Justice Kennedy's opinion never mentioned *Townsend v. Sain*, is there evidence that his reasoning is faithful to the principles enunciated in *Townsend*? If one or more circumstances of repealed § 2254(d) could be established, would the petitioner be able to prove that he did not "fail" to develop the facts? The Court, without further analysis, concluded that the fact that Williams was at fault and had not "failed" to develop the facts supporting his biased juror claim in State court, he had also thereby demonstrated cause-and-prejudice entitling him to federal review of his claim.
2. **Diligent petitioners:** *Williams v. Taylor* offers a similar approach to the concept of diligence that was central to the Court's decision in *McCleskey v. Zant*. What triggered the petitioner's duty of diligence in each case? The prosecutor argued that because Michael Williams' federal habeas counsel discovered Juror Stinnett's divorce file, diligence required state postconviction counsel to take the same steps. What would be the effect of a no-fault rule such as this? Would it benefit the State or the judicial system to require all postconviction petitioners to conduct a scorched Earth investigation of every juror? Notice of evidence supporting the constitutional claim is essential to any semblance of fair application of § 2254(e)'s fact bar. Because Williams' state attorneys had notice of the circumstances supporting his *Brady* claim, and did not thoroughly investigate it, that failure disentitled him to a hearing in federal court unless he could meet the very high cause-innocence standard of § 2254(e)(2)(B).
3. **Does *Townsend v. Sain* find life in 28 U.S.C. § 2254(d)(2)?** The influence of *Townsend v. Sain's* reasoning can be seen in *Williams v. Taylor*, even if it was never mentioned. The Court's decision preserves access to federal hearings for state prisoners who have diligently pursued their claims and supporting evidence in State courts. The right to a fair State fact development process is also seen in 28 U.S.C. § 2254(d)(2), which authorizes federal courts to grant habeas corpus relief if the State court's "adjudication of the claim resulted in a

decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” The cases in which relief has been granted under this provision are instructive. In *Brumfield v. Cain*,⁷⁷⁶ a habeas petitioner alleged in Louisiana courts that he had intellectual disability, and therefore his death sentence was cruel and unusual punishment prohibited by *Atkins v. Virginia*.⁷⁷⁷ Brumfield submitted documents of previous mental health evaluations and school records showing that he had been in special education classes, had been assessed with learning disabilities, and one I.Q. test registered a score of 75. Brumfield was indigent, so he filed a motion requesting funding and resources, including expert witnesses, to do a proper assessment of his intellectual disability. The Louisiana court denied Brumfield’s *Atkins* claim without granting the funds or holding an evidentiary hearing.⁷⁷⁸ Brumfield petitioned for federal habeas corpus, alleging that habeas corpus relief was appropriated under 28 U.S.C. § 2254(d) because Louisiana’s adjudication of his claim was “contrary to, or an unreasonable application of, clearly established Federal law,” § 2254(d)(1), and “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁷⁷⁹ The federal district court granted Brumfield’s request for investigative and mental health expert resources, which enabled Brumfield to establish that he satisfied the diagnostic criteria for intellectual disability, and was therefore ineligible to be executed.⁷⁸⁰ The Fifth Circuit Court of Appeals reversed, and the Supreme Court granted certiorari. The Court reviewed the evidence that Brumfield had tendered in support of his funding motion and his state postconviction claim, and considered it in relation to the Louisiana court’s finding on each prong of the diagnosis for intellectual disability that would satisfy Brumfield’s *Atkins* claim. The Court noted that all of the I.Q. scores documented in Brumfield’s records were within the standard error of measurement of a score that would qualify as “significantly subaverage in intellectual functioning.”⁷⁸¹ The Court further pointed to substantial evidence that Brumfield met the “impairment . . . in adaptive skills” prong of the diagnostic criteria for intellectual disability. In an analysis that appeared to blend the criteria of § 2254(d)(1) and (d)(2), the Court found that Brumfield had established that the State court adjudication was contrary to and an unreasonable application of clearly established federal law, and also that the Louisiana courts’ findings were unreasonable in light of the State court record. In response to the State’s argument and Justice Thomas’ dissent that there was evidence in the record supporting a finding that Brumfield was *not* intellectually disabled, the Court said, “It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able

⁷⁷⁶ 576 U.S. 305 (2015).

⁷⁷⁷ 536 U.S. 304 (2002).

⁷⁷⁸ *Brumfield v. Cain*, *supra*, at 309-310.

⁷⁷⁹ § 2254(d)(2).

⁷⁸⁰ *Brumfield*, at 311-312.

⁷⁸¹ *Id.* at 314-315.

to prove as much. Rather, Brumfield needed only to raise a ‘reasonable doubt’ as to his intellectual disability to be entitled to an evidentiary hearing.”⁷⁸² The State court’s failure to conduct a hearing in light of Brumfield’s showing “resulted in an unreasonable determination of the facts.”⁷⁸³ What if Brumfield had not asked for resources in State court or had not requested a hearing? Would the Court’s analysis be the same? On the facts of this case, would the failure make such a request indicate a lack of diligence? Clearly, the process by which factual determinations are made as well as the petitioner’s evidentiary showing are relevant to both §§ 2254(d) and (e) standards.

4. **Diligence, time, and resources:** Both *Williams v. Taylor* and *Brumfield v. Cain* refer to funding motions the prisoner filed in State court. Williams’ lawyer asked for funding to investigate jurors, Brumfield’s lawyer asked for funding to do a proper assessment for intellectual disability. Both decisions stop short of saying that the state courts had to provide funding in state postconviction proceedings, but it is also clear that each petitioner’s indigence and need for funds to develop his claims for relief was significant enough to merit the Court’s attention. In *Williams v. Taylor*, the Court referenced the request for funds in its discussion of postconviction counsel’s diligence. In *Brumfield v. Cain*, the Court referenced the denial of resources in the context of the reasonableness of the Louisiana courts’ findings. Which of *Townsend v. Sain*’s criteria are affected by denial of funds?
5. **Arbitrary state processes under AEDPA:** Another informative post-AEDPA case is *Panetti v. Quarterman*, in which an Eighth Amendment claim of mental incompetence to be executed was asserted on behalf Scott Panetti, a prisoner on Texas’ death row.⁷⁸⁴ As in *Williams v. Taylor* and *Brumfield v. Cain*, the Court never referred to *Townsend v. Sain*, but the core principles of *Townsend* were applied in *Panetti* through *Ford v. Wainwright*.⁷⁸⁵ That Scott Panetti suffered from a long-standing mental disorder was undeniable. He “suffered from a fragmented personality, delusions, and hallucinations,” for which he had been medicated and repeatedly hospitalized.⁷⁸⁶ “During his trial [Panetti] engaged in behavior later described by his standby counsel as ‘bizarre,’ ‘scary,’ and ‘trance-like.’”⁷⁸⁷ It was “evident that he was suffering from ‘mental incompetence,’ . . . , and the net effect of this dynamic was to render the trial ‘truly a judicial farce, and a mockery of self-representation.’” Panetti wore “a Tom Mix-style purple cowboy costume and a 10-gallon

⁷⁸² *Id.* at 320.

⁷⁸³ *Id.* at 322.

⁷⁸⁴ 551 U.S. 930 (2007).

⁷⁸⁵ 477 U.S. 399 (1986).

⁷⁸⁶ *Panetti v. Quarterman*, *supra*, at 986.

⁷⁸⁷ *Id.* at 936.

hat” and tried to call President Kennedy, Pope John Paul II, and Jesus Christ to testify.⁷⁸⁸ After a round of unsuccessful State and federal postconviction petitions, Panetti was scheduled for execution on February 5, 2004. His counsel filed a motion under Texas statute challenging, for the first time, Panetti’s incompetence to be executed. The motion was denied without a hearing, and the Texas Court of Criminal Appeals ruled that it only had jurisdiction to hear cases in which the prisoner is found incompetent to be executed.⁷⁸⁹ Panetti’s counsel filed a renewed motion to determine competency to be executed in the Texas trial court, and he also filed a petition for writ of habeas corpus in the federal district court. Both were pending when the federal district judge stayed Panetti’s execution on February 4, 2004, to “allow the state court a reasonable period of time to consider the evidence of [petitioner’s] current mental state.”⁷⁹⁰ The Supreme Court gave a detailed description of the State court’s subsequent actions and decision denying Panetti’s renewed motion without a hearing. Panetti’s counsel had filed in State court motions to allow defense evaluations, motions to transcribe the relevant proceedings, motions for funds and resources, and objections to the findings of the experts appointed by the Texas trial judge after an ex parte meeting with the prosecution. All of those motions were pending when the trial court closed the case by an order that identified the report of the experts it had appointed, and stating only, “[b]ased on the aforesaid doctors’ reports, the Court finds that [petitioner] has failed to show, by a preponderance of the evidence, that he is incompetent to be executed.”⁷⁹¹ No mention was made of Panetti’s pending motions. Except for the fact that the competency determination was made by a judge, the procedures used to deny Panetti’s state motions were similar to those used by Florida’s Governor to deny Alvin Ford’s arguments that he was incompetent to be executed. Nevertheless, the federal district court and Fifth Circuit Court of Appeals denied Panetti habeas corpus relief, and the Supreme Court granted certiorari and addressed a number of issues, including federal jurisdiction, the standard for competence to be executed, and the State’s allegation of abuse of the writ, but this discussion focuses on the issue of fact development. The Court held, “The state court’s failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court.”⁷⁹² Panetti’s substantial threshold showing of incompetency “entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court.”⁷⁹³ The State court’s refusal to transcribe its proceedings “only constitutes further evidence of the inadequacy of the

⁷⁸⁸ Ron Honberg, *Op-Ed: Texas execution of a severely mentally ill man would be an outrage*, Los Angeles Times Nov. 29, 2014, available online at <https://www.latimes.com/opinion/op-ed/la-oe-1130-honberg-execution-texas-mentally-ill-20141130-story.html>. (last visited Jan. 16, 2025).

⁷⁸⁹ Panetti v. Quarterman, *supra*, at 938.

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.* at 941.

⁷⁹² *Id.* at 948.

⁷⁹³ *Id.*

proceedings.”⁷⁹⁴ The Court also noted that the trial court arguably violated Texas statute by failing to hold a hearing.⁷⁹⁵ An additional “impermissible” error was the failure “to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts.”⁷⁹⁶ The Court also noted that by promising to hold a hearing, then abruptly deciding the case without notice, it deprived Panetti’s counsel of the opportunity submit additional psychiatric evidence in support of Panetti’s competency motion. This process “failed to provide petitioner with a constitutionally adequate opportunity to be heard.”⁷⁹⁷ *Panetti* therefore found that the conclusions reached under Texas’ deficient fact-finding procedures “cannot be reconciled with any reasonable application of the controlling standard in *Ford*,” and that therefore “the requirement set forth in § 2254(d)(1) is satisfied.”⁷⁹⁸ Given the Court’s reasoning, it appears that an analysis under § 2254(d)(2) (unreasonable determination of fact), § 2254(e)(1) (presumption of correctness), or 2254(e)(2) (failure to develop) would have been superfluous. The case was remanded to the district court for a hearing, and at a fair hearing, Scott Panetti was found incompetent to be executed.⁷⁹⁹

6. **AEDPA’s deference clause and state court fact-finding procedures:** As Chapter 8 will discuss, the question of the federal court’s discretion to hold a hearing under 28 U.S.C. § 2254(e) and whether a state court’s adjudication of a claim qualifies for deference under 28 U.S.C. § 2254(e) are intertwined. The Court’s decisions in *Brumfield v. Cain* and *Panetti v. Quarterman* make clear that if the State’s adjudication of a claim does not qualify for deference under § 2254(d), the federal court can proceed to adjudicate the claim *de novo* and conduct an evidentiary hearing. *Cullen v. Pinholster* requires the § 2254(d) determination to be made first;⁸⁰⁰ if the state court adjudicated a claim reasonably based on the record before it, then a habeas petitioner who failed to develop evidence in state court will not be entitled to a hearing unless the claim is based on a retroactive Supreme Court decision, § 2254(e)(2)(A)(i), or the petitioner can satisfy the cause and innocence standard of § 2254(e)(2)(A)(ii) and (B). But once a habeas petitioner demonstrates that a state court unreasonably adjudicated a claim, the federal court may hold a hearing. The Ninth Circuit explained, “‘If we determine, considering only the evidence before the state court,’ the petitioner has satisfied § 2254(d), ‘we evaluate the claim *de novo*, and we may consider

⁷⁹⁴ *Id.* at 950.

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.* at 951.

⁷⁹⁷ *Id.* at 952.

⁷⁹⁸ *Id.* at 953.

⁷⁹⁹ *Panetti v. Lumpkin*, No. A-04-CA-042-RP, 2023 U.S. Dist. LEXIS 173754, | 2023 WL 6348877 (W.D. Tex. Sept. 27, 2023).

⁸⁰⁰ 563 U.S. 170 (2011).

evidence properly presented for the first time in federal court.”⁸⁰¹ Therefore, when a state court denied a petitioner’s ineffective assistance of counsel claim without holding a hearing at which he could have presented evidence, including trial counsel’s testimony, the state adjudication was not entitled to deference under § 2254(d), and the federal habeas court was free to conduct its own fact-finding.⁸⁰²

V. Plenary Review

The Court in *Townsend v. Sain* observed, “The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.”⁸⁰³ The Merriam-Webster Dictionary defines “plenary” as “complete in every respect; Absolute, unqualified.” It is derived from the Latin word *plenus* or *plenarius*, meaning “full.” *Plenus* is also the Latin root for the English words “plenty,” “replenish,” and “replete.”⁸⁰⁴ The *Townsend* decision illustrates what plenary review means in the context of habeas corpus. Even while presuming State court fact findings to be correct in deference to State court adjudication, the Court looks behind the fact-finding to make sure that they are the product of a fair and reliable process. Further, even when the State court findings of historical fact are presumed correct, “a federal habeas court *must* reexamine mixed constitutional questions “independently.”⁸⁰⁵ Prior to the Antiterrorism and Effective Death Penalty Act, the rule was settled that legal questions and mixed constitutional questions are ““subject to plenary federal review”” on habeas.⁸⁰⁶ Supreme Court Justice Clarence Thomas questioned this principle in *Wright v. West* which was reframed by a majority of the Court. Frank West was convicted of grand larceny in Virginia and challenged the sufficiency of the evidence to convict him. The Fourth Circuit Court of Appeals agreed with West and granted habeas corpus relief under the standard announced in *Jackson v. Virginia*.⁸⁰⁷ The Virginia Attorney General petitioned for certiorari, and the Supreme Court requested additional

⁸⁰¹ *Crittenden v. Chappell*, 804 F.3d 998 (9th Cir. 2015) (quoting *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014)).

⁸⁰² *Branch v. Sweeny*, 758 F.3d 226, 241 (3^d Cir. 2004) (“if the state courts unreasonably applied federal law in rejecting Branch's petition, the District Court should have reviewed Branch's ineffective assistance of counsel claim de novo.”); *see also* *Mosley v. Atchison*, 689 F.3d 838, 852-54 (7th Cir. 2012), and *Madison v. Comm’r*, 761 F.3d 1240, 1240-50 (11th Cir. 2014), holding that a federal evidentiary hearing was proper because the state court decision was unreasonable under § 2254(d).

⁸⁰³ 292 U.S. at 313.

⁸⁰⁴ *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/plenary>. (last visited Jan. 20, 2025).

⁸⁰⁵ *Townsend v. Sain*, *supra*, at 319).

⁸⁰⁶ *Wright v. West*, U.S. 277, 289 (1992) (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)).

⁸⁰⁷ 443 U.S. 307, 319 (1979), A claim that evidence is insufficient to support a conviction as a matter of due process depends on “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

briefing on “whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case.”⁸⁰⁸ The Court never reached this additional question because each justice agreed that the evidence *was* sufficient to convict West under the *Jackson v. Virginia* standard. Nevertheless, the decision is instructive, as it is the Court’s last comprehensive explanation of habeas corpus review before Congress enacted AEDPA. Further, Justice O’Connor’s concurring opinion remains an accurate description of the level of habeas corpus review that petitioners receive *if* they can satisfy the deference limitation of habeas relief established by 28 U.S.C. § 2254(d). There will be more discussion of this issue in Chapter 8.

Justice Thomas’ opinion in *Wright v. West*, joined only by Chief Justice Rehnquist and Justice Scalia, provided a history of the writ often used by conservative justices when seeking to curtail the Great Writ. He contended that for much of the Court’s history, the Court interpreted the statutory command to dispose of habeas corpus petitions “as law and justice require” to authorize petitioners to “challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody.”⁸⁰⁹ Ignoring the ratification of the Fourteenth Amendment and the subsequent amendment of the habeas corpus statute extending the protection of the writ to persons in State custody, Justice Thomas described the history of the writ through *Brown v. Allen*⁸¹⁰ as an undesirable judicial trend that “disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.”⁸¹¹ Justice Thomas made clear his sympathy to the state’s invitation to roll back plenary habeas corpus review of a state courts’ decision on claims presenting mixed constitutional questions of fact and law. However, because the full Court concluded that West could not prevail on a plenary standard of habeas review, Justice Thomas conceded, “We need not decide such far-reaching issues in this case.”⁸¹²

Justice O’Connor agreed that West could not prevail on his *Jackson v. Virginia* claim under any standard, but wrote separately to clarify the power and duty of federal habeas courts. Her opinion is a valuable synopsis of habeas corpus history and the scope of review that was required before the passage of AEDPA. It remains important because it is powerful authority explaining the habeas court’s duty when reviewing a claim in a case in which the State court’s adjudication “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;” or (2) resulted

⁸⁰⁸ *Wright v. West*, *supra*, at 284 (quoting *Wright v. West*, 502 U.S. 1021 (1991)).

⁸⁰⁹ *Wright v. West*, 505 U.S. at 285.

⁸¹⁰ 344 U.S. 443 (1953).

⁸¹¹ *Id.* at 293 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O’Connor, J., concurring)).

⁸¹² *Id.* at 295.

in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁸¹³

WRIGHT V. WEST

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment.

I agree that the evidence sufficiently supported respondent's conviction. I write separately only to express disagreement with certain statements in Justice Thomas' extended discussion of this Court's habeas corpus jurisprudence.

First, Justice Thomas errs in describing the pre-1953 law of habeas corpus. While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of other federal claims, because, with rare exceptions, there were no other federal claims available at the time. During the period Justice Thomas discusses, the guarantees of the Bill of Rights were not yet understood to apply in state criminal prosecutions. The only protections the Constitution afforded to state prisoners were those for which the text of the Constitution explicitly limited the authority of the States, most notably the Due Process Clause of the Fourteenth Amendment. And in the area of criminal procedure, the Due Process Clause was understood to guarantee no more than a full and fair hearing in the state courts. See, e. g., *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922) (“One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that”).

Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus. This is evident from the fact that the Court did not just apply this rule on habeas, but also in cases on direct review. See, e. g., *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934) (“The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only”). . . .

The cases cited by Justice Thomas -- *Moore v. Dempsey*, 261 U.S. 86 (1923), and *Frank v. Mangum*, 237 U.S. 309 (1915) -- demonstrate that the absence of a full and fair hearing in the state courts was itself the relevant violation of the Constitution; it was not a prerequisite to a federal court's consideration of some other federal claim. Both cases held that a trial dominated by an angry mob was inconsistent with due process. In both, the Court recognized that the State could nevertheless afford due process if the state appellate courts provided a fair opportunity to correct the error. The state courts had provided such an opportunity in *Frank*; in *Moore*, they had not. In

⁸¹³ 28 U.S.C. § 2254(d).

neither case is the “full and fair hearing” rule cited as a deferential standard of review applicable to habeas cases; the rule instead defines the constitutional claim itself, which was reviewed de novo. See *Moore*, 261 U.S. at 91-92.

Second, Justice Thomas quotes Justice Powell's opinion in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), out of context. Justice Powell said only that the judgment of a committing court of competent jurisdiction was accorded "absolute respect" on habeas in the 19th century, when the habeas inquiry was limited to the jurisdiction of the court. *Kuhlmann*, 477 U.S. at 446 (opinion of Powell, J.). Justice Powell was not expressing the erroneous view which Justice Thomas today ascribes to him, that state court judgments were entitled to complete deference before 1953.

Third, Justice Thomas errs in implying that *Brown v. Allen*, 344 U.S. 443 (1953), was the first case in which the Court held that the doctrine of *res judicata* is not strictly followed on federal habeas. In fact, the Court explicitly reached this holding for the first time in *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). Even *Salinger* did not break new ground: The *Salinger* Court observed that such had been the rule at common law, and that the Court had implicitly followed it in *Carter v. McClaghry*, 183 U.S. 365, 378 (1902), and *Ex parte Spencer*, 228 U.S. 652, 658 (1913). *Salinger*, 265 U.S. at 230. The Court reached the same conclusion in at least two other cases between *Salinger* and *Brown*. See *Waley v. Johnston*, 316 U.S. 101, 105 (1942); *Darr v. Burford*, 339 U.S. 200, 214 (1950). *Darr* and *Spencer*, like this case, involved the initial federal habeas filings of state prisoners.

Fourth, Justice Thomas understates the certainty with which *Brown v. Allen* rejected a deferential standard of review of issues of law. The passages in which the *Brown* Court stated that a district court should determine whether the state adjudication had resulted in a “satisfactory conclusion,” and that the federal courts had discretion to give some weight to state court determinations, were passages in which the Court was discussing how federal courts should resolve questions of fact, not issues of law. This becomes apparent from a reading of the relevant section of *Brown*, 344 U.S. at 460-465, a section entitled “Right to a Plenary Hearing.” When the Court then turned to the primary legal question presented -- whether the Fourteenth Amendment permitted the restriction of jury service to taxpayers -- the Court answered that question in the affirmative without any hint of deference to the state courts. *Id.*, at 467-474. The proper standard of review of issues of law was also discussed in Justice Frankfurter's opinion, which a majority of the Court endorsed. After recognizing that state court factfinding need not always be repeated in federal court, Justice Frankfurter turned to the quite different question of determining the law. He wrote: "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." *Id.*, at 507 (emphasis added; citation omitted). Justice Frankfurter concluded: "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.*, at 508.

Fifth, Justice Thomas incorrectly states that we have never considered the standard of review to apply to mixed questions of law and fact raised on federal habeas. On the contrary, we did so in the very cases cited by Justice Thomas. In *Irvin v. Dowd*, 366 U.S. 717 (1961), we stated quite clearly that “‘mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.’ It was, therefore, the duty of the Court of Appeals to independently evaluate [the issue of jury prejudice].” *Id.*, at 723 (quoting *Brown v. Allen*, 344 U.S. at 507 (opinion of Frankfurter, J.)). We then proceeded to employ precisely the same legal analysis as in cases on direct appeal. 366 U.S. at 723-728.

In *Townsend v. Sain*, 372 U.S. 293 (1963), we again said that “although the district judge may, where the state court has reliably found the relevant facts, defer to the state court’s findings of fact, he may not defer to its findings of law. It is the district judge’s duty to apply the applicable federal law to the state court fact findings independently.” *Id.*, at 318.

In *Neil v. Biggers*, 409 U.S. 188 (1972), we addressed de novo the question whether the state court pretrial identification procedures were unconstitutionally suggestive by using the same standard used in cases on direct appeal: “‘a very substantial likelihood of irreparable misidentification.’” *Id.*, at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

In *Brewer v. Williams*, 430 U.S. 387 (1977), we reviewed de novo a state court’s finding that a defendant had waived his right to counsel. We held that “the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires ‘application of constitutional principles to the facts as found’” *Id.*, at 403 (quoting *Brown v. Allen*, 344 U.S. at 507 (opinion of Frankfurter, J.)). We then employed the same legal analysis used on direct review. 430 U.S. at 404.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), we explicitly considered the question whether the Court of Appeals had exceeded the proper scope of review of the state court’s decision. *Id.*, at 341. We concluded that because the issue presented was not one of historical fact entitled to a presumption of correctness under 28 U. S. C. § 2254(d), the Court of Appeals was correct in reconsidering the state court’s “application of legal principles to the historical facts of this case.” 446 U.S. at 342. Although we held that the Court of Appeals had erred in stating the proper legal principle, we remanded to have it consider the case under the same legal principles as in cases on direct review. *Id.*, at 345-350.

In *Strickland v. Washington*, 466 U.S. 668 (1984), we held that “the principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. . . . No special standards ought to apply to ineffectiveness claims made in habeas proceedings.” *Id.*, at 697-698. We distinguished state court determinations of mixed questions of fact and law, to which federal courts should not defer, from state court findings of historical fact, to which federal courts should defer. *Id.*, at 698.

Finally, in *Miller v. Fenton*, 474 U.S. 104 (1985), we recognized that “an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals’ conclusion that the

‘voluntariness’ of a confession merits something less than independent federal consideration.” *Id.*, at 112. [Justice O’Connor’s extensive list of cases applying *de novo* review to issues presented in habeas corpus petitions is omitted].

Sixth, Justice Thomas misdescribes *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the respondents proposed a deferential standard of review, very much like the one Justice Thomas discusses today, that they thought appropriate for addressing constitutional claims of insufficient evidence. 443 U.S. at 323. We expressly rejected this proposal. *Ibid.* Instead, we adhered to the general rule of *de novo* review of constitutional claims on habeas. *Id.*, at 324.

Seventh, Justice Thomas mischaracterizes *Teague v. Lane*, 489 U.S. 288 (1989), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), as “question[ing] the standard [of *de novo* review] with respect to pure legal questions.” *Teague* did not establish a “deferential” standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. *Penry*, 492 U.S. at 314; *Teague*, 489 U.S. at 301. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules.

* * * *

So, while Justice Thomas says that we “defer” to state courts’ determinations of federal law, the statement is misleading. Although in practice, it may seem only “a matter of phrasing” whether one calls the *Teague* inquiry a standard of review or not, “phrasing mirrors thought, [and] it is important that the phrasing not obscure the true issue before a federal court.” *Brown v. Allen*, 344 U.S. at 501 (opinion of Frankfurter, J.). As Justice Thomas convincingly demonstrates, the duty of the federal court in evaluating whether a rule is “new” is not the same as deference; federal courts must make an independent evaluation of the precedent existing at the time the state conviction became final in order to determine whether the case under consideration is meaningfully distinguishable. *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly.

Eighth, though Justice Thomas suggests otherwise, *de novo* review is not incompatible with the maxim that federal courts should “give great weight to the considered conclusions of a coequal state judiciary,” *Miller v. Fenton*, 474 U.S. at 112, just as they do to persuasive, well-reasoned authority from district or circuit courts in other jurisdictions. A state court opinion concerning the legal implications of precisely the same set of facts is the closest one can get to a “case on point,” and is especially valuable for that reason. But this does not mean that we have held in the past that federal courts must presume the correctness of a state court’s legal conclusions on habeas, or that a state court’s incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Finally, in his one-sentence summary of respondent's arguments, Justice Thomas fails to mention that Congress has considered habeas corpus legislation during 27 of the past 37 years, and on 13 occasions has considered adopting a deferential standard of review along the lines suggested by Justice Thomas. Congress has rejected each proposal. In light of the case law and Congress' position, a move away from *de novo* review of mixed questions of law and fact would be a substantial change in our construction of the authority conferred by the habeas corpus statute. As Justice Thomas acknowledges, to change the standard of review would indeed be “far-reaching” and we need not decide whether to do so in order to resolve this case.

Questions and Comments:

1. **Setting the table for AEDPA:** Justice White wrote a separate, one-sentence concurrence noting only that the evidence was “certainly” sufficient to convict West.⁸¹⁴ Justices Blackmun and Stevens concurred with Justice O’Connor. Justice Kennedy wrote separately, also in response to Justice Thomas, explaining why he “would not interpret *Teague* as calling into question the settled principle that mixed questions are subject to plenary review on federal habeas corpus.”⁸¹⁵ He also wrote a single sentence stating that he agreed the evidence was sufficient to support a finding of guilt beyond a reasonable doubt. Finally, Justice Souter wrote separately to argue that West’s claim was *Teague*-barred because his theory required an expansion of *Jackson*’s sufficiency of the evidence standard. Since every member of the Court agreed that West was not entitled to relief on his *Jackson v. Virginia* claim under any standard, why did the Court engage in such an extensive discussion of whether federal courts should defer to State adjudications of mixed questions of law and fact? Both Justice O’Connor and Justice Thomas were appointed by Presidents Ronald Reagan and George Bush because of their solid conservative, law-and-order credentials. What do you think Justice Thomas attempted to accomplish?
2. **A conservative justice’s view of habeas:** Justice O’Connor’s opinion is valuable because it represents an authoritative mainstream conservative jurist’s view of the state of habeas corpus review of state court judgments just before the enactment of the Antiterrorism and Effective Death Penalty Act. This is important because the new statutory limitations on the standard of review apply to state adjudications that withstand scrutiny under § 2254(d). If there is no state court adjudication of a constitutional claim—like when a state court denies a claim on procedural grounds (see Chapter 4, Procedural Bars: Independent, Adequate State Grounds), or when petitioner presents a new claim and there is currently no non-futile state remedy and the prisoner can show cause-and-prejudice or a fundamental miscarriage of justice (see Chapter 3, Balancing the Roles of State and Federal Courts: Exhaustion of State Remedies), the petitioner is entitled to *de novo* review of his claims and evidence as

⁸¹⁴ *Wright v. West*, *supra*, at 297 (White, J., concurring).

⁸¹⁵ *Id.* at 309.

described in this chapter. *Wright v. West* solidifies that petitioner's right to *de novo* review of his constitutional claims.

3. ***Frank v. Mangum* is dead, but what remains of *Moore v. Dempsey*?** *Wright v. West* is an appropriate note on which to close the discussion of pre-AEDPA habeas corpus review. The history recounted in the prior chapters of this book lead to this point. AEDPA represents a fundamental change in federal habeas corpus review of state court judgments. However, as will be seen in Chapter 8, even though the Antiterrorism and Effective Death Penalty Act requires federal courts to defer to the state court's adjudication of constitutional claims, that deference may well depend on whether the state adjudication itself reflects a reliable, plenary consideration of the prisoner's claims, and federal habeas courts will conduct a thorough search of the state court record to determine the reasonableness of the adjudication. To resolve these questions, the Court will continue to draw on its pre-AEDPA jurisprudence, for better or worse.

CHAPTER 8: THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

I. Introduction to AEDPA

Capital punishment cases heighten the tension between the federal courts' constitutional duties to adjudicate cases "arising under this Constitution, the Laws of the United States, and Treaties"⁸¹⁶ and principles of finality, federalism, and comity, which militate against federal review of state court adjudications. This conflict is particularly acute when federal habeas review of a death sentence delays a condemned prisoner's execution because "unlike a term of years, a death sentence cannot begin to be carried out by the state while substantial legal issues remain outstanding."⁸¹⁷ Federal habeas corpus review of death sentences contributes to the delay between sentencing and the person's execution.⁸¹⁸ However, federal habeas review frequently uncovers prejudicial constitutional errors in a significant proportion of state-imposed death sentences.⁸¹⁹ The tension between finality and fairness is real, with one often achieved at the cost of the other. As the cases in this chapter illustrate, some conservative Supreme Court justices interpret AEDPA from the point of view that finality and comity alone are sufficient to justify an execution in spite of constitutional error. This struggle is reflected in Justice O'Connor's observation that Congress had considered habeas corpus reform proposals in twenty-seven of the thirty-seven years before 1992—and rejected them all.⁸²⁰

In November, 1994, a Republican Congress was elected on its *Contract with America* platform, which included as its first plank a so-called "Effective Death Penalty Act."⁸²¹ The Act narrowly failed by a four-vote margin in Congress in 1995, with Democrats solidly opposed.⁸²² However, Timothy McVeigh's bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, created the political conditions necessary for Congress to pass substantial new limitations on federal habeas corpus review.⁸²³ Despite continued Democratic resistance to

⁸¹⁶ U.S. Constitution, Art. III, § 2.

⁸¹⁷ See *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983).

⁸¹⁸ John Gramlich, *10 Facts about the Death Penalty in the U.S.*, Pew Research Center (July 19, 2021) (Hereafter "Gramlich, *10 Facts*").

⁸¹⁹ James S. Liebman, Jeffrey Fagan, Valerie West, and Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000), reporting that federal and state courts found prejudicial error in two-thirds of death penalty judgments reviewed in a twenty-two-year period.

⁸²⁰ *Wright v. West*, 505 U.S. 277, 306 (1997) (O'Connor, J., concurring).

⁸²¹ Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422-42 (1996).

⁸²² 141 CONG. REC. S7850 (daily ed. June 7, 1995).

⁸²³ *Id.* Also see James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOKLYN L. REV. 411 (2002).

habeas corpus reform in the 1996 Congress, pressure from President Bill Clinton pushed reluctant Democrats to vote for the bill, and he signed the bill into law on April 24, 1996.⁸²⁴

A. AEDPA's Origins

The intent behind AEDPA was to limit and expedite federal habeas corpus review of death penalty judgments. AEDPA's approach was based on a report of a judicial committee hand-picked by Chief Justice William Rehnquist and chaired by retired Justice Lewis F. Powell, Jr.⁸²⁵ The Chief Justice charged the committee with “inquir[ing] into ‘the necessity and desirability of legislation directed toward avoiding delay and the lack of finality’ in capital cases in which the prisoner had or had been offered counsel.”⁸²⁶ The Powell Committee conceded that “any system of review entails some delay. It is not suggested that the delay needed for review of constitutional claims is inappropriate.”⁸²⁷ The committee further emphasized that “much of the delay inherent in the present is not needed for fairness,” and that the problem is made worse by “the fact that prisoners often cannot obtain qualified counsel until execution is imminent.”⁸²⁸

The American Bar Association (“ABA”) appointed a task force to conduct public hearings, take testimony, and recommend solutions to mitigate the problems in the administration of the death penalty. In 1990, the ABA voted, by an overwhelming margin, to adopt the task force's report and recommendations, issuing a comprehensive policy statement urging legislative reform of habeas corpus procedures at both the state and federal levels to enhance efficiency while ensuring constitutionally meritorious claims were addressed.⁸²⁹

Two related issues emerged: the lack of access to counsel and the chaos caused by stay-of-execution litigation. The Powell Committee noted that repeated execution warrants during ongoing

⁸²⁴ Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners' Rights for Political Gain*, THE INTERCEPT (May 4, 2016), available online at <https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/#:~:text=%E2%80%9CCongress%20has%20the%20opportunity%20this,prosecutors%20nonetheless%20applauded%20Clinton's%20remarks>, (last visited Jan. 26, 2025).

⁸²⁵ *Committee Report and Proposal, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* (August 23, 1989), available at Washington & Lee Scholarly Commons, <https://scholarlycommons.law.wlu.edu/habeascorpus/> (Hereafter “Powell Committee Report”). The Washington & Lee site includes previous drafts of the Powell Committee's Report.

⁸²⁶ *Id.* at 2.

⁸²⁷ *Id.* An earlier draft of the report made no such concession; instead, the Committee's first draft argued that the appeal process “is always overlong,” and that the delay “hampers justice without improving the quality of adjudication.” Powell Committee Report, July 27, 1989, draft, p. 2. The findings of Liebman, et al., *Error Rates*, *supra* n. 4, prove otherwise.

⁸²⁸ Powell Committee Report, p. 2.

⁸²⁹ See American Bar Ass'n, Report No. 6, 115 REP. A.B.A. 591 (1990), and Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990).

appeals inevitably led to additional litigation over stay requests.⁸³⁰ The Committee recognized “the pressing need for qualified counsel to represent inmates in collateral review” given the “difficult and complex” process of capital habeas litigation and because capital prisoners “almost uniformly are indigent, and often illiterate or uneducated.”⁸³¹ It warned that “[j]ustice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an upcoming execution” and observed that “last-minute habeas corpus petitions have resulted from the unavailability of counsel at any earlier time.”⁸³² The Committee conceded, “The belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.”⁸³³ This latter observation, considered with Professor Liebman’s research, belies the Committee’s conclusion that “in most cases, successive petitions are meritless.”⁸³⁴

When the Powell Committee Report was written, the average duration between judgment and execution was eight years and two months,⁸³⁵ which is not unexpected given the nine stages of felony case litigation, each stage averaging about a year.⁸³⁶ The Powell Committee reported that the shortest interval between judgment and execution was two years and nine months, while the longest was fourteen years and six months.⁸³⁷ The Committee proposed a draft habeas corpus reform bill which later informed the Antiterrorism and Effective Death Penalty Act’s structure.

Although the ABA task force and the Powell Committee identified the same causes of delay and injustice—lack of access to qualified counsel and adequate resources, complex procedural technicalities, and chaotic litigation stemming from frequent execution warrants—they each proposed markedly different solutions. Both recommended appointment of counsel in every capital case and a required stay of execution upon filing a petition that would remain in effect until litigation concluded. However, the Powell Committee also recommended a statute of limitations on all habeas corpus petitions and procedural limitations on repeated habeas corpus petitions.⁸³⁸ Although lack of access to qualified counsel in state postconviction proceedings was

⁸³⁰ *Id.*, at 3.

⁸³¹ *Id.*, at 4.

⁸³² *Id.*, at 5.

⁸³³ *Id.* at 4.

⁸³⁴ *Id.* Cf. Liebman, et al., *Error Rates*, *supra* n. 4.

⁸³⁵ Powell Committee Report, p. 3. Also see John Gramlich, *10 Facts about the Death Penalty in the U.S.*, Pew Research Center (July 19, 2021) (Hereafter “Gramlich, *10 Facts*”).

⁸³⁶ See Stages of Postconviction Review, *infra*, Chapter 2, p. 78.

⁸³⁷ Powell Committee Report, p. 3.

⁸³⁸ See Powell Committee Report, Statutory Proposal, pp. 9 et seq.

acknowledged to be a significant source of unfairness and delay, the Powell Committee “did not recommend that Congress should compel the states to provide counsel at that stage.”⁸³⁹

The ABA, in contrast, recommended meaningful reforms in the delivery of indigent defense and an easing of the issue-precluding procedural technicalities.⁸⁴⁰ Along with the task force’s report and recommendation, the ABA adopted Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,⁸⁴¹ which “amplify previously adopted Association positions on effective assistance of counsel in capital cases” and “enumerate the minimal resources and practices necessary to provide effective assistance of counsel.”⁸⁴²

The Powell Committee’s recommendations provided the foundation for AEDPA. However, AEDPA’s Congressional sponsors capitalized on the political climate following Timothy McVeigh’s act of domestic terrorism and implemented reforms far more restrictive than those proposed by the Powell Committee. Legal scholars continue to debate whether Congress did (or could) dismantle the Great Writ.⁸⁴³ Professor Larry Yackle lamented that “[n]either the Supreme Court nor the 1996 Act embraces the ABA’s policy prescriptions for federal habeas corpus. By contrast, there appears to be a pattern in just the other direction.”⁸⁴⁴ The Court’s and Congress’ retreat from fairness ultimately prompted the ABA to call for a moratorium on capital punishment in America.⁸⁴⁵

⁸³⁹ Larry Yackle, *The New Habeas Corpus in Death Penalty Cases*, 63 Am. U. L. Rev. 1791, 1795 (2014).

⁸⁴⁰ See, e.g., *Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of John J. Curtin, Jr., President of the ABA, and of James S. Liebman, Professor of Law, Columbia University School of Law, and Member, ABA Task Force on Death Penalty Habeas Corpus); *Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

⁸⁴¹ Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989). The ABA Guidelines were updated in 2003 to reflect changes in the law and practice that had occurred since 1989. See *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).

⁸⁴² Resolution of the ABA House of Delegates (Feb. 1989).

⁸⁴³ Compare John H. Blume, *AEDPA: The Hype and the ‘Bite,’* 91 CORNELL L. REV. 259, 260 (2006), providing an empirical analysis of the first ten years of habeas litigation under AEDPA, and James Liebman, *An “Effective Death Penalty”?* *AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411 (2001), explaining how AEDPA’s key provisions “greatly diminish the reliability of the capital system’s review process and of the capital verdicts that the system produces.” *Id.* at 427. Amsterdam, Anthony and Liebman, James Steven, *Loper Bright and the Great Writ* (with Appendices) (October 17, 2024). Columbia Human Rights Law Review, February 2025, Available at SSRN: <https://ssrn.com/abstract=4991093> or <http://dx.doi.org/10.2139/ssrn.4991093>, questioning the constitutionality of AEDPA’s deference clause, 28 U.S.C. Sec. 2254(d).

⁸⁴⁴ Larry Yackle, *The ABA’s Proposed Moratorium on the Death Penalty: The American Bar Association and Federal Habeas Corpus* *American Bar Association and Federal Habeas Corpus*, 61 Law & Contemp. Prob. 171, 190-91 (1998).

⁸⁴⁵ *Id.*

The death penalty provides important context to the AEDPA debate; expediting executions was the primary motivation of AEDPA’s drafters. A former Chief Judge of the Alabama Court of Criminal Appeals acknowledged the political pressures generated by the death penalty:

The reality is that the death penalty is so political in Alabama that as a practical matter, if you are against the death penalty, you cannot get elected as a judge or any other public official. Once elected, your rulings must reflect your bias for death.⁸⁴⁶

The political pressure to impose the death penalty in some jurisdictions is so strong that judges purposely appoint unqualified counsel to represent defendants facing the death penalty.⁸⁴⁷ Texas, perhaps the most pro-capital punishment state in the country, repeatedly appointed a particular defense lawyer to defend capital cases in spite of his reputation for sleeping through capital trials.⁸⁴⁸ Although *Strickland v. Washington* theoretically requires a remedy for ineffective assistance of counsel, its requirement that defendants show that they were prejudiced by counsel’s deficient performance is subjective and facilitates state court affirmance of death sentences, even in some of the most egregious cases.⁸⁴⁹

Another important difference in death penalty cases is that mental illness is ubiquitous among death row prisoners.⁸⁵⁰ Mental illness is exacerbated by the fact that prisoners condemned to die are typically housed in isolation or semi-isolation around the clock in settings most closely aligned with solitary confinement.⁸⁵¹ While some prisons, after litigation, have integrated death

⁸⁴⁶ William M. Bowen, *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function*, 36 HOFSTRA L. REV. 805 (2008). Also see Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

⁸⁴⁷ Stephen Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 695 (1990); see also Williams, *supra* note 1, at 1459 (“Whether one ends up on death row is usually determined not by the heinousness of the crime, but by the quality of trial counsel.”).

⁸⁴⁸ Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, n. 3, and 1460 (2009), discussing *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) which found, and *Ex parte McFarland*, 163 S.W.3d 743, 748–49 (Tex. Crim. App. 2005), which found no ineffective assistance even though lead counsel slept through nearly entire trial. Williams observed, “Whether one ends up on death row is usually determined not by the heinousness of the crime, but by the quality of trial counsel.” 43 U. RICH. L. REV. at 1459.

⁸⁴⁹ See WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (Ann Arbor: University of Michigan Press. 2006). Also see Michael Perlman, “*A World of Steel-Eyed Death*”: *An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J. L. REFORM 261 (2019).

⁸⁵⁰ See MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* 131-34 (2013), collecting cases of severely mentally ill people condemned to death.

⁸⁵¹ “Solitary confinement” refers to “forms of prison isolation in which prisoners are housed involuntarily in their cells for upward of 23 hours per day and denied the opportunity to engage in normal and meaningful social interaction and congregate activities, including correctional programming.” Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, *Crime and Justice* 365, March 2018. In the patient’s prison records,

row with general population inmates, this is not the norm. “[S]olitary confinement is associated with severe harm to physical and mental health among both youth and adults, including: increased risk of self-mutilation, and suicidal ideation; greater anxiety, depression, sleep disturbance, paranoia, and aggression; exacerbation of the onset of pre-existing mental illness and trauma symptoms; [and] increased risk of cardiovascular problems.”⁸⁵² Evaluators should be familiar with this phenomenon and scrutinize patient history for solitary confinement and related symptoms.⁸⁵³ First-hand accounts of former prisoners who have survived solitary confinement are excruciating.⁸⁵⁴

Given the common deficiencies in systems of indigent defense, the odds that a prisoner will be represented by skilled, well-resourced counsel at all nine stages of criminal case litigation are slim. But even one incompetent, overworked, or under-resourced lawyer at any stage in the proceedings can create insurmountable procedural obstacles to relief in subsequent stages of review. Further, as the Court noted in *Atkins v. Virginia*, impaired clients are less able to understand, assert, and defend their rights throughout postconviction proceedings. As Professor Liebman’s research discovered, the rights of capital defendants are violated more often than not. AEDPA did nothing to address these underlying problems of unfairness and unreliability in the administration of capital punishment.

This chapter will analyze AEDPA’s key changes to federal habeas corpus review of state court judgments. Remember, however, that in the cracks of the statute, plenary *de novo* review of a prisoner’s constitutional claims continues to exist, so competent practitioners must be familiar with both pre- and post-AEDPA habeas corpus jurisprudence. While AEDPA places substantial

solitary confinement might be referred to as “administrative segregation,” or “ad seg,” the “Security Housing Unit,” or “SHU,” “Super Max,” “Close Management Unit.”

⁸⁵² American Psychological Association. 2016. Statement on the Solitary Confinement of Juvenile Offenders. Washington, DC: American Psychological Association, Public Information Government Relations Office. (Accessible online on The Wayback Machine, <http://web.archive.org/web/20170117072606/http://www.apa.org/about/gr/issues/cyf/solitary.pdf> (January 17, 2017, last visited May 31, 2023))

⁸⁵³ A study of 100 prisoners held in the Security Housing Unit at Pelican Bay State Prison in California revealed that “Every symptom of psychological stress and trauma but one (fainting) was experienced by more than half of the assessed prisoners; many were reported by two-thirds or more and some by nearly everyone.” Haney, *Solitary Confinement* (2018), p. 372. Nearly all reported “ruminations or intrusive thoughts, oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory, and a tendency to withdraw socially. . . . sizable minorities reported symptoms that are typically associated only with more extreme forms of psychopathology—hallucinations, perceptual distortions, and thoughts of suicide.” United Nations Special Rapporteur on Torture, Juan Mendez, states that “it is clear short-term solitary confinement can amount to torture or cruel, inhuman, or degrading treatment” and recommended that solitary confinement “in excess of 15 days should be subject to an absolute prohibition.” Mendez, Juan. 2011. *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. New York: United Nations.

⁸⁵⁴ See, e.g., Atul Gawande, *Hellhole*, *The New Yorker*, March 30, 2009. Gawande quotes the late Senator John McCain describing solitary confinement as a prisoner of war in North Vietnam as worse than any other form of mistreatment, including regular beatings, a broken leg, and two broken arms (one was broken twice), and chronic dysentery.

limitations on the habeas remedy, it also added layers of complexity. As a result, AEDPA has not delivered its central promise to expedite executions. Instead, AEDPA has the opposite effect. In 1996, the average time from verdict to execution was between ten and eleven years; by 2022, that timespan had more than doubled to twenty-two years.⁸⁵⁵ This increase partially reflects America's ambivalence toward capital punishment. It also underscores how Congress leveraged the political climate of the Oklahoma City Bombing to dismantle the Great Writ. AEDPA was hastily cobbled together using vague and novel language that "had no prior habeas history or pedigree."⁸⁵⁶ Justice William Souter commented that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."⁸⁵⁷ The most persuasive argument against AEDPA was that the Rehnquist Court had already done much to limit or expedite habeas corpus review of state judgments, and that AEDPA would generate a plethora of procedural questions that the Court would have to settle.⁸⁵⁸

Two decades after AEDPA was signed into law, Justice Breyer explained the inherent tension between shortening the interval between judgment and execution: "delay is in part a problem that the Constitution's own demands create."⁸⁵⁹ He highlighted the issue citing the case of Henry Lee McCollum, who was exonerated by DNA evidence thirty years after his conviction, even after the Supreme Court had previously "denied review of McCollum's claim over the public dissent of only one Justice."⁸⁶⁰ Justice Breyer identified similar cases of innocent condemned prisoners who would have been executed under the truncated review processes advocated by the Powell Committee, including "Nathson Fields, 23 years; Paul House, 23 years; Nicholas Yarris, 21 years; Anthony Graves, 16 years; Damon Thibodeaux, 15 years; Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu, all exonerated for the same crime 39 years after their convictions."⁸⁶¹ At the time of this writing, 200 people have been tried, convicted, sentenced to death, and exonerated by new evidence of innocence.⁸⁶²

⁸⁵⁵ Gramlich, *10 Facts*. Factors other than AEDPA undoubtedly contributed to the increased delay of carrying out executions, including limitations on the availability of execution drugs and waning public support for the death penalty, but the existence of other pressures against executions existed long before AEDPA. Also see *Glossip v. Gross*, 576 U.S. 863, 923-25 (2015) (Breyer, J., dissenting), discussing "Cruel and Excessive Delays."

⁸⁵⁶ Blume, *The Hype and the 'Bite'*, *supra* n. 23, p. 260.

⁸⁵⁷ *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

⁸⁵⁸ See Blume, *The Hype and the 'Bite'*, *supra* n. 25, 265-268, providing a bullet-point list of Rehnquist Court decisions elevating the standards for obtaining stays of execution and overcoming barriers of procedural default and abuse of the writ.

⁸⁵⁹ *Glossip v. Gross*, 576 U.S. 863, 923-24 (2015) (Breyer, J., dissenting).

⁸⁶⁰ *Id.* at 936, citing *McCollum v. North Carolina*, 512 U.S. 1254 (1994).

⁸⁶¹ *Glossip v. Gross*, *supra*, at 936, citing the Death Penalty Information Center's Innocence List, available at <https://deathpenaltyinfo.org/policy-issues/policy/innocence> (last visited Feb. 1, 2025).

⁸⁶² DPI Database: Innocence, the Death Penalty Information Center, available at <https://deathpenaltyinfo.org/policy-issues/policy/innocence>.

B. Cases Affected by AEDPA

One of the first questions the Supreme Court faced was the Act's applicability to cases pending on April 24, 1996, the day President Bill Clinton signed it into law. In *Lindh v. Murphy*, the Court found an answer to this issue in the language of the statute itself. The Court's reasoning stemmed from differences in statutory language: while Chapter 154 explicitly applied to pending cases, Chapter 153 had no such provision, which implies it only applies to new cases.⁸⁶³

The Court's decision to apply AEDPA to new cases filed after the statute was enacted somewhat delayed the Court's interpretation of specific provisions of the Act. A petition filed the day after AEDPA was enacted took months or years before reaching the Supreme Court. The first petitioners to fully experience the impact of AEDPA were those pending habeas litigation concluded after the statute's enactment and who attempted to file new second or successive petitions under 28 U.S.C. § 2244, Finality of Determination. This chapter will first examine AEDPA's new abuse of the writ standard and the application of § 2244, followed an analysis of how the remainder of the statute impacts (or does not impact) other procedural aspects, including exhaustion, procedural default, evidentiary hearings, and standards of review.⁸⁶⁴

II. AEDPA's Abuse of the Writ Standard

The most immediate and significant impact of the Antiterrorism and Effective Death Penalty Act on habeas litigation stemmed from its statute of limitations, 28 U.S.C. § 2244(d), and its revised abuse of the writ standard, 28 U.S.C. § 2244(b). Since AEDPA was enacted after three decades of death penalty litigation, a steady flow of habeas cases was already moving through the

⁸⁶³ *Lindh v. Murphy*, *supra*, p. 327, citing 110 Stat. 1226. Chapter 153 of Title 28 of the United State Code applied to all cases, capital and noncapital. However, Chapter 154 allows States to opt in to expedited habeas corpus procedures for death penalty cases if the State provides qualified lawyers to represent condemned prisoners in postconviction proceedings. Unlike Chapter 153, § 107(c), the Act states that "Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act." Because Chapter 153 had no similar provision, the Court concluded that Congress intended AEDPA to apply "to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* The Court noted that this interpretation is consistent with the presumption that unless Congress has expressly proscribed otherwise, a new statute enacted after the events at issue in the suit will be applied prospectively.; *Id.* at 324-325, (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)).

⁸⁶⁴ The authors will not attempt to address Chapter 154 providing for expedited habeas corpus procedures for states that meet the standards for providing counsel to death-sentenced prisoners in collateral review proceedings for the simple reason that thirty years later no State has satisfied the provisions of that section. To qualify for expedited review, a state must provide both a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal" and "standards of competency for the appointment of such counsel." 28 U.S.C. § 2261(b). If a state were to qualify [none has], then AEDPA would require a shorter statute of limitations (180 days instead of one year), 28 U.S.C. 2263(a), limitations on the right to amend a petition, §§ 2244(b) and 2266(b) (3) (B), and tight timelines for federal district courts and courts of appeals to decide cases. § 2266(b) (1)(A). To obtain these substantial procedural advantages, states must appoint competent counsel and pay reasonable fees and expenses of litigation. Professor Blume suggests it is "the states' refusal to pay the AEDPA freight that renders Chapter 154 powerless." Blume, *The Hype and the 'Bite,' supra* n. 25, 276.

federal judiciary the day the law took effect. The first prisoners to feel the impact of AEDPA were those seeking habeas relief after having previously been denied relief.

A. Abuse of the Writ Exception: Retroactive Supreme Court Decisions, 28 U.S.C. § 2244(b)(2)(A)

AEDPA altered both the procedure and the standard for filing a subsequent petition for writ of habeas corpus. For same-claim successive petitions, 28 U.S.C. § 2244(b)(1) mandates that they “shall be dismissed.” If a subsequent petition has claims that were “not presented” in a prior petition, those claims “shall be dismissed” except in very narrow circumstances. To proceed with a subsequent petition, an applicant must assert either (1) a claim based on a “new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court,” 28 U.S.C. § 2244(b)(2)(A), or (2) satisfy a stringent cause-plus-innocence requirement. Under this standard, the applicant must establish by “clear and convincing evidence” that “no reasonable juror would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B). New retroactive Supreme Court decisions are rare, but several such cases have been decided since AEDPA’s enactment, and application of this provision is relatively straightforward: it applies in cases where the Supreme Court explicitly says it does.

AEDPA did not alter the *Teague v. Lane* standard for determining whether a new Supreme Court decision applies retroactively. That standard is discussed in Chapter 6, Retroactivity. The Supreme Court has issued several decisions qualifying for retroactive application under *Teague*.⁸⁶⁵

B. Abuse of the Writ Exception: Cause-and-Innocence, 28 U.S.C. § 2244(b)(2)(B)

The second avenue for filing a subsequent petition for writ of habeas corpus combines the “cause” prong of the *Wainwright v. Sykes*⁸⁶⁶ cause-and-prejudice standard with the “clear and convincing” innocence standard of *Sawyer v. Whitley*,⁸⁶⁷ and limits review to guilt/innocence

⁸⁶⁵ See Chapter 5, *Retroactivity*. Cases that qualify under § 2244(b)(2)(A) include *Atkins v. Virginia*, 536 U.S. 304 (2002) (the execution of intellectually disabled persons is cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551 (2005) (the execution of juveniles is cruel and unusual punishment); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (executing a person convicted of a child sex offense is cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48 (2010) (it is cruel and unusual punishment to sentence a juvenile offender to life without parole in a non-homicide case); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life without parole for a juvenile convicted of murder is cruel and unusual punishment).

⁸⁶⁶ 433 U.S. 72 (1977). To obtain merits review of a defaulted claim, a habeas petitioner must show cause for the default and that the petitioner thereby suffered prejudice. “Cause” was defined as an “objective factor external to the defense” that impeded compliance with the state’s procedural rule. *Murray v. Carrier*, 477 U.S.478, 488 (1986).

⁸⁶⁷ 505 U.S. 333 (1992). *Sawyer* defined the “miscarriage of justice” of justice standard in the context of defendant seeking merits review of a procedurally defaulted sentencing claim. In *Smith v. Murray*, 477 U.S. 527, 537(1986), the Court suggested “that actual innocence could mean innocent of the death penalty.” *Sawyer* held that such a petitioner “must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” *Sawyer*, at 336.

claims only. By the express terms of the statute, sentencing claims are outside the scope of § 2244(b)(2)(B). This formidable burden has remained unsatisfied for three decades. The first attempt to meet this standard, *Felker v. Turpin*,⁸⁶⁸ arose just two weeks after AEDPA was signed into law. Ellis Wayne Felker’s case was the first in which the Supreme Court considered a prisoner’s attempt to invoke AEDPA’s new procedure for seeking habeas corpus relief after the denial of an earlier petition. Felker was sentenced to death for the 1981 murder of Joy Ludlam following a trial that relied on forensic evidence and his past conviction for sodomy. He pursued multiple appeals and postconviction challenges, raising claims of insufficient evidence, *Brady* violations, ineffective assistance of counsel, and improper use of hypnosis to refresh a witness’ memory. Felker consistently asserted his innocence and Amnesty International protested his execution, citing “grave doubts concerning his guilt” based on evidence that another suspect had confessed to the crime and untested DNA evidence could exonerate him.⁸⁶⁹ Less than two weeks after AEDPA was enacted, Felker filed an emergency application in the Eleventh Circuit under 28 U.S.C. § 2244(b)(3)(A) for permission to file a successive habeas petition and for a stay of execution, both of which were denied. Although § 2244(b)(3)(I) states that this denial “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari,” Felker petitioned for a writ of certiorari, arguing that AEDPA violated the Suspension Clause of the Constitution, Art. I, § 9.

FELKER V. TURPIN

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (Act) works substantial changes to chapter 153 of Title 28 of the United States Code, which authorizes federal courts to grant the writ of habeas corpus. Pub. L. 104-132, 110 Stat. 1217. We hold that the Act does not preclude this Court from entertaining an application for habeas corpus relief, although it does affect the standards governing the granting of such relief. We also conclude that the availability of such relief in this Court obviates any claim by petitioner under the Exceptions Clause of Article III, § 2, of the Constitution, and that the operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. I, § 9.

* * * *

⁸⁶⁸ 518 U.S. 651 (1996).

⁸⁶⁹ Amnesty International, *United States: Georgia to Execute Ellis Wayne Felker Despite Grave Doubts Concerning his Guilt*, Amnesty.org News, Nov. 12, 1996 (online at <https://www.amnesty.org/ar/wpcontent/uploads/2021/06/amr510911996en.pdf>, last visited February 10, 2025). Felker was executed November 15, 1996. Posthumous testing of DNA recovered from the victim’s body, including fingernail scrapings, found insufficient evidence to compare with Felker’s DNA. *Tests Shed No Light on Georgia Execution*, UPI, Dec. 12, 2000, (online at <https://www.upi.com/Archives/2000/12/12/Tests-shed-no-light-on-Georgia-execution/4370976597200/>) (last visited February 10, 2025).

On April 24, 1996, the President signed the Act into law. Title I of this Act contained a series of amendments to existing federal habeas corpus law. The provisions of the Act pertinent to this case concern second or successive habeas corpus applications by state prisoners. Section 106(b) specifies the conditions under which claims in second or successive applications must be dismissed, amending 28 U.S.C. § 2244(b) to read:

“(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.

“(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, no reasonable fact-finder would have found the applicant guilty of the underlying offense.”

Title 28 U.S.C. A. § 2244(b)(3) (July 1996 Supp.) creates a “gatekeeping” mechanism for the consideration of second or successive applications in district court. The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A). A three-judge panel has 30 days to determine whether “the application makes a prima facie showing that the application satisfies the requirements of” § 2244(b). § 2244(b)(3)(C); see §§ 2244(b)(3)(B), (D). Section 2244(b)(3)I specifies that “the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”

On May 2, 1996, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a motion for stay of execution and a motion for leave to file a second or successive federal habeas corpus petition under § 2254. Petitioner sought to raise two claims in his second petition, the first being that the state trial court violated due process by equating guilt “beyond a reasonable doubt” with “moral certainty” of guilt in voir dire and jury instructions. See *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*). He also alleged that qualified experts, reviewing the forensic evidence after his conviction, had established that Joy must have died during a period when petitioner was under police surveillance for Joy’s disappearance and thus had a valid alibi. He claimed that the testimony of the state’s forensic expert at trial was suspect because he is not a

licensed physician, and that the new expert testimony so discredited the state’s testimony at trial that petitioner had a colorable claim of factual innocence.

The Court of Appeals denied both motions the day they were filed, concluding that petitioner’s claims had not been presented in his first habeas petition, that they did not meet the standards of § 2244(b)(2), and that they would not have satisfied pre-Act standards for obtaining review on the merits of second or successive claims. 83 F.3d 1303 (CA11 1996). Petitioner filed in this Court a pleading styled a “Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution.” On May 3, we granted petitioner’s stay application and petition for certiorari. We ordered briefing on the extent to which the provisions of Title I of the Act apply to a petition for habeas corpus filed in this Court, whether application of the Act suspended the writ of habeas corpus in this case, and whether Title I of the Act, especially the provision to be codified at § 2244(b)(3)I, constitutes an unconstitutional restriction on the jurisdiction of this *Court*. 517 U.S. 1182 (1996).

II

We first consider to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. §§ 2241 and 2254. We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions.

A

Section 2244(b)(3)I prevents this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari. More than a century ago, we considered whether a statute barring review by appeal of the judgment of a circuit court in a habeas case also deprived this Court of power to entertain an original habeas petition. *Ex parte Yerger*, 75 U.S. 85 (1869). We consider the same question here with respect to § 2244(b)(3)I.

* * * *

In *Yerger*, we considered whether the Act of 1868 deprived us not only of power to hear an appeal from a inferior court’s decision on a habeas petition, but also of power to entertain a habeas petition to this Court under § 14 of the Act of 1789. We concluded that the 1868 Act did not affect our power to entertain such habeas petitions. We explained that the 1868 Act’s text addressed only jurisdiction over appeals conferred under the Act of 1867, not habeas jurisdiction conferred under the Acts of 1789 and 1867. We rejected the suggestion that the Act of 1867 had repealed our habeas power by implication. *Yerger*, 8 Wall., at 105. Repeals by implication are not favored, we said, and the continued exercise of original habeas jurisdiction was not “repugnant” to a prohibition on review by appeal of circuit court habeas judgments. *Ibid*.

Turning to the present case, we conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *Yerger*. No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103

amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. [Court’s fn. 3 omitted] Although § 2244(b)(3)I precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28 – its descendant, n. 1, *supra* – by implication now.

This conclusion obviates one of the constitutional challenges raised. The critical language of Article III, § 2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court’s original jurisdiction, “in all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” Previous decisions construing this clause have said that while our appellate powers “are given by the constitution,” “they are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject.” *Dourousseau v. United States*, 10 U.S. 307, 6 Cranch 307, 314 (1810); see also *United States v. More*, 7 U.S. 159 (1805). The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its “gatekeeping” function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

B

We consider next how Title I affects the requirements a state prisoner must satisfy to show he is entitled to a writ of habeas corpus from this Court. Title I of the Act has changed the standards governing our consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners. Our authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to “a person in custody pursuant to the judgment of a State court.” [Court’s fn. 4 omitted] § 2254(a). Several sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well.

Section 2244(b) addresses second or successive habeas petitions. Section 2244(b)(3)’s “gatekeeping” system for second petitions does not apply to our consideration of habeas petitions because it applies to applications “filed in the district court.” § 2244(b)(3)(A). There is no such limitation, however, on the restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2). These restrictions apply without qualification to any “second or successive habeas corpus application under section 2254.” §§ 2244(b)(1), (2). Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.

III

Next, we consider whether the Act suspends the writ of habeas corpus in violation of Article I, § 9, clause 2, of the Constitution. This clause provides that “the Privilege of the Writ of

Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

* * * *

The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court. But this requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U.S.C. § 2254 Rule 9(b). The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that “the power to award the writ by any of the courts of the United States, must be given by written law,” *Ex parte Bollman*, 8 U.S. 75, 4 Cranch 75, 94 (1807), and we have likewise recognized that judgments about the proper scope of the writ are “normally for Congress to make.” *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996).

The new restrictions on successive petitions constitute a modified *res judicata* rule, a restraint on what is called in habeas corpus practice “abuse of the writ.” In *McCleskey v. Zant*, 499 U.S. 467, (1991), we said that “the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.” *Id.*, at 489. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a “suspension” of the writ contrary to Article I, § 9.

IV

We have answered the questions presented by the petition for certiorari in this case, and we now dispose of the petition for an original writ of habeas corpus. Our Rule 20.4(a) delineates the standards under which we grant such writs:

“A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the ‘reasons for not making application to the district court of the district in which the applicant is held.’ If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court’s discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.”

Reviewing petitioner’s claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be “exceptional circumstances” justifying the issuance of the writ.

* * * *

The petition for writ of certiorari is dismissed for want of jurisdiction. The petition for an original writ of habeas corpus is denied.

It is so ordered.

Questions and Comments:

1. **The unresolved Suspension Clause issue:** Justices Stevens and Souter, joined by Justice Breyer, concurred in the judgment, but emphasized that AEDPA did not alter the Court's jurisdiction under 28 U.S.C. § 1254(1) "to review interlocutory orders in such cases, to limit our jurisdiction under § 1254(2), or to limit our jurisdiction under the All Writs Act, 28 U.S.C. § 1651."⁸⁷⁰ Justice Souter added, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress' Exceptions Clause power would be open. The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard."⁸⁷¹
2. **Avoiding the Suspension Clause issue:** The Suspension Clause issue was discussed in Chapter 1, Introduction to Habeas Corpus, where it was noted that the Court has sidestepped directly addressing the issue in nearly every case by interpreting statutes in a way that avoids the Suspension Clause issue. What specific provision of § 2244 did Felker claim effectively suspended the writ of habeas corpus? In past Suspension Clause cases, the Court has often avoided addressing the issue directly by invoking the Rule of Constitutional Avoidance, which assumes Congress did not intend to violate the Constitution, to interpret statutes. In *Boumediene v. Bush*, the Court addressed the Suspension Clause only after finding no plausible statutory interpretation to avoid it. In *Felker*, the Court found no suspension of the writ. How did the Court sidestep the Suspension Clause issue in this case? What did the Court mean when it stated that AEDPA standards would "inform our discretion" in considering original petitions under 28 U.S.C. § 2241? Is this a meaningful avenue of review? What must a habeas petitioner show to obtain relief through an original habeas petition?
3. **Jurisdiction under 28 U.S.C. § 2241:** When one door closes, another opens. Anticipating the Court's ruling, Felker filed an original petition for writ of habeas corpus in the Supreme Court, and the Court considered it before denying it. Identify the specific avenues the Court held were still available to challenge a court of appeals' decision to deny permission for a successive petition. What issues did the Court leave unresolved?

⁸⁷⁰ Felker v. Turpin, *supra*, at 666 (Stevens, J., concurring).

⁸⁷¹ Felker v. Turpin, *supra*, at 667 (Souter, J, concurring).

4. **Supreme Court ordered hearing § 2241 petition:** Since *Felker*, the Court has denied almost every original § 2241 petition presented. A notable exception is the case of Troy Anthony Davis, who was sentenced to death in Georgia for the murder of a police officer. His case generated substantial publicity, national and international, over new evidence of his innocence.⁸⁷² The Georgia Board of Pardons was split 3-2 on whether to grant clemency, and his execution was opposed by the NAACP, the Innocence Project, former President Jimmy Carter, fifty-one members of Congress, and former FBI Director William Sessions.⁸⁷³ In an unprecedented order, the Court without opinion transferred Davis' original petition for writ of habeas corpus to the United States District Court for the Southern District of Georgia "for hearing and determination."⁸⁷⁴ Justice Scalia dissented from the order, arguing that the district court lacked authority to grant the writ under 28 U.S.C. § 2254(d)(1) because, under *Herrera v. Collins*,⁸⁷⁵ there was no "clearly established federal law" giving him a right to habeas relief recognizing a freestanding innocence claim as grounds for habeas relief.⁸⁷⁶ He described the Court's order as sending the district court on "a fool's errand."⁸⁷⁷ Justice Stevens, joined by Justices Ginsberg and Breyer, responded by highlighting that seven of the state's witnesses had recanted their trial testimony, several others had implicated the state's primary witness as the shooter, and no court had conducted an evidentiary hearing to assess Davis' claim of actual innocence.⁸⁷⁸ He argued that "substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."⁸⁷⁹ In Justice Stevens' view, this rendered the case "sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and our original habeas jurisdiction."⁸⁸⁰ However, the issue was ultimately avoided when the district court rejected Davis' evidence.⁸⁸¹ The Supreme Court later dismissed Davis' original petition for writ of habeas corpus.⁸⁸²

⁸⁷² *Troy Davis Executed in Georgia Amid Innocence Protests*, BBC News, Sept. 22, 2011, available at <https://www.bbc.com/news/world-us-canada-15013860>. (last visited Feb. 10, 2025). See also *Troy Davis Put to Death in Georgia*, CNN-U.S., Sept. 11, 2011, available at <https://www.cnn.com/2011/09/22/justice/georgia-execution/index.html> (last visited Feb. 10, 2025).

⁸⁷³ Kim Severson, *Davis is Executed in Georgia*, New York Times, Sept. 21, 2011; See Chapter 9, discussing innocence and habeas corpus.

⁸⁷⁴ *In re Davis*, 557 U.S. 952 (2009).

⁸⁷⁵ 506 U.S. 390 (1993).

⁸⁷⁶ *In re Davis*, 557 U.S. at 955 (Scalia, J., dissenting).

⁸⁷⁷ *Id.* at 957.

⁸⁷⁸ *Id.* at 953 (Stevens, J., concurring).

⁸⁷⁹ *Id.*

⁸⁸⁰ *Id.* (citing *Byrnes v. Walker*, 371 U.S. 937 (1962), and *Chaapel v. Cochran*, 369 U.S. 869 (1962)).

⁸⁸¹ *In re Davis*, 2010 U.S. Dist. LEXIS 157445. No. CV409-130 (S.D. Ga., Aug. 12, 2010).

⁸⁸² *In re Davis*, 563 U.S. 903 (2011).

5. **Second and successive petitions are rare:** Decisions permitting subsequent habeas petitions are rare. The cause-plus-innocence standard of 28 U.S.C. § 2244(b)(2)(B), which requires proof of innocence by clear and convincing evidence, has permitted successor petitions to proceed in only a handful of cases. One such case was *Johnson v. Wynder*,⁸⁸³ in which the Third Circuit granted permission for a habeas petitioner whose claim was based on a newly enacted Pennsylvania statute that rendered Johnson’s assertion of innocence “unquestionably meritorious.”

C. “Second or Successive Habeas Corpus Application” Defined

A more effective strategy for habeas petitioners has been to focus on the language in AEDPA that triggers the abuse of the writ provisions under 28 U.S.C. § 2244(b), specifically the phrase “a second or successive habeas corpus application.” In habeas corpus jurisprudence, “second or successive” is a term of art with a distinct meaning, which might encompass a second, third, or even a fourth petition for writ of habeas corpus. The Supreme Court revisited the interpretation of this term in *Stewart v. Martinez-Villareal* when addressing a post-AEDPA claim raised in the prisoner’s fourth habeas petition.⁸⁸⁴

STEWART V. MARTINEZ-VILLAREAL

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Ford v. Wainwright*, 477 U.S. 399 (1986) we held that “the Eighth Amendment prohibits a State from inflicting the penalty of death upon a prisoner who is insane.” In this case, we must decide whether respondent Martinez-Villareal’s *Ford* claim is subject to the restrictions on “second or successive” applications for federal habeas relief found in the newly revised 28 U.S.C. A. § 2244 (Supp. 1997). We conclude that it is not.

Respondent was convicted on two counts of first-degree murder and sentenced to death. He unsuccessfully challenged his conviction and sentence on direct appeal in the Arizona state courts. *Arizona v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, cert. denied, 474 U.S. 975, 88 L. Ed. 2d 324, 106 S. Ct. 339 (1985). He then filed a series of petitions for habeas relief in state court, all of which were denied. He also filed three petitions for habeas relief in federal court, all of which were dismissed on the ground that they contained claims on which the state remedies had not yet been exhausted.

In March 1993 respondent filed a fourth habeas petition in federal court. In addition to raising other claims, respondent also asserted that he was incompetent to be executed. Counsel for

⁸⁸³ See, e.g., *Johnson v. Wynder*, 408 Fed. Appx. 616, 619 (3rd Cir. 2010), allowing a habeas petitioner to file a second habeas corpus petition because his argument that his conduct that an intervening Pennsylvania decision made his innocence claim “unquestionably meritorious.”

⁸⁸⁴ 523 U.S. 637 (1998).

the State urged the District Court to dismiss respondent's *Ford* claim as premature. The court did so but granted the writ on other grounds. The Court of Appeals for the Ninth Circuit reversed the District Court's granting of the writ but explained that its instruction to enter judgment denying the petition was not intended to affect any later litigation of the *Ford* claim. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309, n. 1 (CA9 1996).

On remand to the District Court, respondent, fearing that the newly enacted Antiterrorism and Effective Death Penalty Act (AEDPA) might foreclose review of his *Ford* claim, moved the court to reopen his earlier petition. In March 1997 the District Court denied the motion and reassured respondent that it had "no intention of treating the [*Ford*] claim as a successive petition." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (CA9 1997). Shortly thereafter, the State obtained a warrant for respondent's execution. Proceedings were then held in the Arizona Superior Court on respondent's mental condition. That court concluded that respondent was fit to be executed. The Arizona Supreme Court rejected his appeal of that decision.

Respondent then moved in the Federal District Court to reopen his *Ford* claim. He challenged both the conclusions reached and the procedures employed by the Arizona state courts. Petitioner responded that under AEDPA, the court lacked jurisdiction. The District Court agreed with petitioner, ruling on May 16, 1997, that it did not have jurisdiction over the claim. Respondent then moved in the Court of Appeals for permission to file a successive habeas corpus application. § 2244(b)(3).

The Court of Appeals stayed respondent's execution so that it could consider his request. It later held that § 2244(b) did not apply to a petition that raises only a competency to be executed claim and that respondent did not, therefore, need authorization to file the petition in the District Court. It accordingly transferred the petition that had been presented to a member of that court back to the District Court. *Martinez-Villareal*, 118 F.3d at 634-635.

We granted certiorari to resolve an apparent conflict between the Ninth Circuit and the Eleventh Circuit on this important question of federal law. See, e.g., *In re Medina*, 109 F.3d 1556 (CA11 1996).

Before reaching the question presented, however, we must first decide whether we have jurisdiction over this case. In AEDPA, Congress established a "gatekeeping" mechanism for the consideration of "second or successive habeas corpus applications" in the federal courts. *Felker v. Turpin*, 518 U.S. 65; § 2244(b). An individual seeking to file a "second or successive" application must move in the appropriate court of appeals for an order directing the district court to consider his application. § 2244(b)(3)(A). The court of appeals then has 30 days to decide whether to grant the authorization to file. § 2244(b)(3)(D). A court of appeals' decision whether to grant authorization "to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for writ of certiorari." § 2244(b)(3)(E).

If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider the Petitioner's petition and would have to dismiss the writ. This is not, however, what the Court of Appeals did. The Court

of Appeals held that the § 2244(b) restrictions simply do not apply to respondent's *Ford* claim, and that there was accordingly no need for him to apply for authorization to file a second or successive petition. We conclude today that the Court of Appeals reached the correct result in this case, and that we therefore have jurisdiction to consider the Petitioners petition.

If respondent's current request for relief is a "second or successive" application, then it plainly should have been dismissed. The *Ford* claim had previously been presented in the 1993 petition and would therefore be subject to dismissal under (b)(1)(A). Even if we were to consider the *Ford* claim to be newly presented in the 1997 petition, it does not fit within either of (b)(2)(B)'s exceptions, and dismissal would still be required.

The State contends that because respondent has already had one "fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive." Brief for Petitioner 12. Under that reading of the statute, respondent is entitled to only one merits judgment on his federal habeas claims. Because respondent has already presented a petition to the District Court, and the District Court and the Court of Appeals have acted on that petition, § 2244(b) must apply to any subsequent request for federal habeas relief.

But the only claim on which respondent now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in 1993. The District Court, acting for the first time on the merits of any of respondent's claims for federal habeas relief, dismissed the *Ford* claim as premature, but resolved all of respondent's other claims, granting relief on one. The Court of Appeals subsequently reversed the District Court's grant of relief. At that point it became clear that respondent would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution. His claim then unquestionably ripe, respondent moved in the state courts for a determination of his competency to be executed. Those courts concluded that he was competent, and respondent moved in the federal district court for review of the state court's determination.

This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. The Court of Appeals was therefore correct in holding that respondent was not required to get authorization to file a "second or successive" application before his *Ford* claim could be heard.

If the State's interpretation of "second or successive" were correct, the implications for habeas practice would be far-reaching and seemingly perverse. In *Picard v. Connor*, 404 U.S. 270, 275 (1971), we said:

It has been settled since *Ex Parte Royall*, 117 U.S. 24 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for *habeas corpus*. . . . The exhaustion-of-state-remedies doctrine, now codified in the federal

habeas statute, 28 U.S.C. §§ 2254(b) and (c), reflects a policy of federal-state comity. . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

Later, in *Rose v. Lundy*, 455 U.S. 509, 522 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

We believe that respondent's *Ford* claim here -- previously dismissed as premature -- should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review. See, e.g., *United States ex rel. Barnes v. Gilmore*, 968 F. Supp. 384, 385 (ND Ill. 1997) ("If Barnes continues in his nonpayment of the required \$5 filing fee . . . this Court will be constrained to dismiss his petition"); *Marsh v. United States District Court for the Northern District of California*, 1995 U.S. Dist. LEXIS 687, 1995 WL 23942 (ND Cal., Jan. 9, 1995) ("Because petitioner has since not paid the filing fee nor submitted a signed affidavit of poverty, the petition for writ of habeas corpus is dismissed without prejudice"); *Taylor v. Mendoza*, 1994 U.S. Dist. LEXIS 17717, 1994 WL 698493 (ND Ill., Dec. 12, 1994). [Footnote omitted]

The State places great reliance on our decision in *Felker v. Turpin*, 518 U.S. 651 (1996), but we think that reliance is misplaced. In *Felker* we stated that the "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice 'abuse of the writ.'" 518 U.S. at 664. It is certain that respondent's *Ford* claim would not be barred under any form of res judicata. Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now.

Thus, respondent's *Ford* claim was not a "second or successive" petition under § 2244(b) and we have jurisdiction to review the judgment of the Court of Appeals on the State's petition for certiorari. But for the same reasons that we find we have jurisdiction, we hold that the Court of Appeals was correct in deciding that respondent was entitled to a hearing on the merits of his *Ford* claim in the District Court. The judgment of the Court of Appeals is therefore

Affirmed.

Questions and Comments:

1. **Second or successive claims:** The Court resolved the § 2244(b) issue by holding that Martinez-Villareal’s claim was not “second or successive,” it was the same claim that was presented on his previous petition and denied without prejudice. The Court did not cite directly to *Salinger v. Loisel*, but it stated, “It is certain that respondent’s Ford claim would not be barred under any form of res judicata.” Since the claim was dismissed as not ripe for review, it was not adjudicated on the merits, nor could it have been. What does this suggest about the definition of “second or successive” petitions? How much of *Sallinger*’s reasoning survives under AEDPA? Martinez-Villareal did not default his competency claim; he asserted it at every opportunity, and the Arizona courts denied his claim on the merits. Through no fault of his own, he had not yet received a ruling on the merits of his claim. What if after the conclusion of all postconviction and federal habeas litigation a prisoner discovered by happenstance that the state had withheld evidence proving that he was not the trigger-man, and therefore not eligible for the death penalty under state law, and that it would have been impossible to discover the evidence earlier. Would that prisoner’s claim be treated as a first petition, or barred as second or successive?
2. **Is a faultless petitioner entitled to adjudication on the merits?** Consider the dissenting opinion of Justice Thomas, joined by Justice Scalia, which argued that the plain language of the statute precluded the outcome in *Martinez-Villareal*. The dissent pointed out that AEDPA’s language bars a “claim *presented* in a second or successive habeas corpus application . . . that was *presented* in a prior application shall be dismissed.”⁸⁸⁵ What is the effect of this interpretation? A claim for relief is not abusive if the claim was not adjudicated on the merits in an earlier petition and the prisoner presents an adequate case for revisiting an earlier procedural denial. See *Muniz v. United States*,⁸⁸⁶ where the petitioner’s first petition was wrongly dismissed on statute-of-limitations grounds. Also see *Gonzalez v. Crosby*, permitting prior procedural denials to be challenged under Federal Rule of civil Procedure 60(b).⁸⁸⁷
3. **Undiscoverable claims?** Consider the case of *Williams v. Taylor*,⁸⁸⁸ in which a habeas petitioner discovered by happenstance that a juror withheld information material to her qualifications to serve—she had been married to the sheriff, but during *voir dire*, she denied being related to any witness. The Supreme Court held that for purposes of § 2254(e), Williams had not “failed to develop” his juror bias claim because he was not on notice of any facts that would have given rise to a duty to investigate. Thus, he could show cause-and-prejudice for failing to raise the claim previously.⁸⁸⁹ Would this same reasoning apply if Williams had not discovered the juror’s lie about her qualifications until after Williams

⁸⁸⁵ 523 U.S. at 648 (Thomas, J., dissenting) (quoting 28 U.S.C. A. § 2244(b)(1)).

⁸⁸⁶ 236 F.3d 122 (2nd Cir. 2001).

⁸⁸⁷ 545 U.S. 524 (2005), discussed in this chapter at p. 19.

⁸⁸⁸ 529 U.S. 429 (2000).

⁸⁸⁹ *Id.* at 444.

had litigated his first petition? Would a second petition raising the juror claim be “second or successive”?

4. **Successive but “new” Ford claims?** A constitutional claim consists of both a legal and a factual component. The legal basis for a *Ford* claim is that executing an insane person is cruel and unusual punishment. The factual basis of the claim is that the prisoner suffers from a mental illness that prevents them from rationally understanding that they are being executed as punishment for murder. Because symptoms of mental illness wax and wane over time, the Eighth Circuit in *Shaw v. Delo*⁸⁹⁰ held that a habeas petitioner’s claim of competency-to-be-executed in 1992 was distinct from the competency-to-be-executed claim denied in 1989. As a result, his habeas petition was dismissed as unexhausted. Does this reasoning also apply to the abuse of the writ doctrine? After remand of *Stewart v. Martinez-Villareal*, in an unpublished order, the Ninth Circuit Court of Appeals remanded the case to state court for a new competency-to-be executed hearing in light of changes in Martinez-Villareal’s condition. The *Ford* issue was never resolved; when the competency case was pending, the Supreme Court decided *Atkins v. Virginia*,⁸⁹¹ declaring execution of intellectually disabled persons unconstitutional, and Martinez-Villareal was removed from death row pursuant to that decision.

D. “First” Claims Arising After Conviction

The Court in *Stewart v. Martinez-Villareal* side-stepped whether *any* competency-to-be-executed claim falls outside of § 2244(b)’s abuse of the writ standard, noting that Martinez-Villareal’s original competency claim, which had been dismissed without prejudice as unripe, was still pending when it became ripe. The Court answered that question later in *Panetti v. Quarterman*.⁸⁹² Adhering to its reasoning in *Martinez-Villareal*, the Court concluded “that Congress did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a Ford-based incompetency claim filed as soon as that claim is ripe.”⁸⁹³ Unlike Martinez-Villareal, Scott Panetti had not filed an unripe competency claim in his first habeas petition, but the Court reasoned that requiring unripe competency claims to be raised “as a mere formality” would be “to the benefit of no party.”⁸⁹⁴

Both *Martinez-Villareal* and *Panetti v. Quarterman* involved claims that the petitioner was not mentally fit for execution, and that their executions would be cruel and unusual under the

⁸⁹⁰ 971 F.3d 181 (8th Cir. 1992).

⁸⁹¹ 536 U. S. 304 (2002).

⁸⁹² 551 U.S. 930 (2007).

⁸⁹³ *Id.* at 945.

⁸⁹⁴ *Id.* at 947.

Court's decision in *Ford v. Wainwright*.⁸⁹⁵ This claim does not challenge the constitutionality of the trial or the original sentence but rather the execution of the sentence, based on facts that can only be determined near the time of the execution. Does the Court's ruling in *Panetti* also mean that a habeas petitioner raising a previously unadjudicated *Ford* claim need not invoke permission of the Court of Appeals under § 2244(b)(3), commonly called AEDPA's "Mother-May-I" clause? In *Muniz v. United States*,⁸⁹⁶ the Second Circuit Court of Appeals held that permission from the Court of Appeals is unnecessary and that the district court may proceed to adjudicate a claim that is not "second or successive" without the appellate court's permission even if an earlier petition was filed and denied.

What other claims might arise during the service of a sentence, capital or otherwise, that might qualify for exemption from § 2244? Martinez-Villareal's competency-to-be-executed claim could not have been presented in earlier proceedings because it was not ripe; it was impossible for him to obtain a ruling—no matter how diligent he was. Lower federal courts agree that this ruling is not limited to competency-to-be-executed claims, but they have struggled with the details. "It is generally acknowledged that the interpretation of 'second or successive' involves the application of pre-AEDPA abuse of the writ principles."⁸⁹⁷ Because Crouch's parole denial came after his first federal habeas petition, his claim that he was unconstitutionally denied release was not "second or successive."⁸⁹⁸ The same is true of other habeas challenges to the administration of a sentence. See, e.g., *James v. Walsh*,⁸⁹⁹ holding that a claim challenging the incorrect application of the prisoner's credit for time served was not second or successive. Thus, a subsequent petition that challenges the administration of a sentence is not a "second or successive" petition within the meaning of § 2244 if the claim had not arisen or could not have been raised at the time of the prior petition.⁹⁰⁰ It would be a mistake, however, to suggest that new claims challenging the imposition of the judgment and sentence are always successive while claims challenging the execution of the sentence are not—exceptions can be found in both circumstances. Compare *Johnson v. Wynder*,⁹⁰¹ finding that a claim challenging conviction was not "second or successive," and *Benchoff v. Collieran*, finding that a claim challenging the denial of parole was "second or successive" because he "knew of all the facts necessary to raise his [parole] claim before he filed his initial federal

⁸⁹⁵ 477 U.S. 399 (1989).

⁸⁹⁶ 236 F.3d 122 (2nd Cir. 2001).

⁸⁹⁷ *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001).

⁸⁹⁸ *Id.* at 724.

⁸⁹⁹ 308 F.3d 162 (2^d Cir. 2002).

⁹⁰⁰ See *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003); *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003); *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002); *In re Cain*, 137 F.3d at 236.

⁹⁰¹ 408 Fed. Appx. 616, 619 (3rd Cir. 2010); See also *Price v. Arce*, 2025 U.S. App. LEXIS 3104, No. 23-55324 (9th Cir. 2025), holding that a new claim based on California's statutory modification to its accessory liability statute was not "second or successive."

petition.”⁹⁰²

A subsequent petition for writ of habeas corpus is not “second or successive” when the prisoner is resentenced after previously litigating a habeas petition. In *Magwood v. Patterson*,⁹⁰³ the Court reasoned that because a § 2254 petition “seeks invalidation (in whole or in part) of the judgment authorizing the prisoner’s confinement,”⁹⁰⁴ a petition challenging a new sentence “under the 1986 judgment is not ‘second or successive’ under § 2244(b).”⁹⁰⁵ Also see *United States v. Hill*,⁹⁰⁶ holding that a second motion pursuant to 28 U.S.C. § 2255 filed after Hill was resentenced was not “second or successive” under § 2244. Similar reasoning that prevailed in *Martinez-Villareal* applies: a claim cannot be “second or successive” if it would not have been adjudicated in a prior petition because it was not ripe.⁹⁰⁷

E. Post-Decision Motions and the Abuse of the Writ Doctrine

The Supreme Court in *United States v. Morgan*⁹⁰⁸ ruled that the common law writ of error coram nobis could be used where habeas corpus was not available because the petitioner had completed his sentence and was not in custody. Morgan was seeking to reopen a prior judgment denying habeas relief so that he could challenge a conviction that was being used to expose him to an extended term of imprisonment as a repeat offender. Morgan alleged the conviction should be vacated because he was without counsel and had not been advised on his rights, and the record of the case did not refute his allegations. Morgan could no longer challenge the judgment on habeas because he had served his sentence and was not “in custody,” and therefore not subject to habeas corpus jurisdiction. The Court found that although Morgan had served his sentence, “the results of the conviction may persist.”⁹⁰⁹ Therefore, the Court concluded, Morgan was “entitled to an opportunity to attempt to show that this conviction was invalid.”⁹¹⁰ A writ of error coram nobis was the appropriate procedural mechanism for doing so, and its use is authorized by the All Writs

⁹⁰² 404 F. 3d 812, 818 (3rd Cir. 2005) (quoting *Crone v. Cockrell*, 324 F.3d 833, 837 (5th Cir. 2003)).

⁹⁰³ 561 U.S. 320 (2010).

⁹⁰⁴ *Id.* at 332 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005)).

⁹⁰⁵ *Id.* at 342.

⁹⁰⁶ 98 F.4th 473, 480-82 (3rd Cir. 2024).

⁹⁰⁷ *Brown v. Atchley*, 76 F.4th 862 (9th Cir. 2023).

⁹⁰⁸ 346 U.S. 502, 504-505 (1954).

⁹⁰⁹ *Id.* at 512.

⁹¹⁰ *Id.* at 513.

Act.⁹¹¹ Although allowed by courts under limited circumstances,⁹¹² more recently, a Circuit Court of Appeals likened the writ of coram nobis in a habeas case to “[a] hail Mary pass in American football [which] is a long forward pass made in desperation at the end of a game, with only a small chance of success.”⁹¹³

Federal Rule of Civil Procedure 60(b) has become the more common procedure invoked to reopen judgments in federal habeas corpus cases. It allows judgments to be reopened in limited circumstances:

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court’s leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

⁹¹¹ The All Writs Act, 28 U.S.C. § 1651(a), empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

⁹¹² See, e.g., *United States v. Denedo*, 556 U.S. 904 (2009) (writ of error coram nobis can be used to correct technical errors in a judgment); and *Trenkler v. United States*, 536 F.3d 85, 93 (1st Cir. 2008) (in criminal cases, writ of error coram nobis is a remedy of last resort .to correct fundamental errors of fact or law.).

⁹¹³ *United States v. George*, 676 F.3d 249, 251 (1st Cir. 2012).

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment’s finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court’s power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Some federal courts treated motions under Fed. R. Civ. Pro. 60 as “the functional equivalent of a second or successive habeas corpus petition, and that if such petition would be dismissed as abusive of the writ, the motion to remand should also be denied.”⁹¹⁴ Under this standard, an attempt to use the rule to raise claims that appointed counsel omitted from the prisoner’s first habeas petition would be dismissed as an abuse of the writ.⁹¹⁵ Other courts suggest that Rule 60(b) would be an appropriate procedure to review the previous denial of relief in limited circumstances, such as newly discovered evidence,⁹¹⁶ where a prior counsel’s omission of claims was alleged to be a fraud on the court,⁹¹⁷ or where a prior petition was dismissed without reaching the merits because petitioner did not pay a filing fee.⁹¹⁸ A motion to alter or amend a judgment or to grant a new trial is also authorized under Federal Rule of Civil Procedure 59, but the timing and

⁹¹⁴ Blair v. Armontrout, 976 F.2d 1130, 1143 (8th Cir. 1992), citing Smith v. Armontrout, 888 F.2d 530, 540 (8th Cir. 1989). Also see Lindsey v. Thigpen, 875 F.2d 1509, 1511-12, 1515 (11th Cir. 1989). Post-AEDPA, the Eleventh Circuit Court of Appeals reaffirmed its position that a Rule 60 motion must be able to overcome the abuse of the writ standard of 28 U.S.C. § 2244(b), “unless the motion is a Rule 60(b)(3) motion, that is, one made to prevent fraud upon the court.” Boone v. Sec’y, Dep’t. of Corr., 377 F.3d 1315, 1317 (11th Cir. 2004).

⁹¹⁵ Hunt v. Nuth, 57 F.3d 1327, 1338-1339 (4th Cir. 1995).

⁹¹⁶ United States v. Taglia, 922 F.2d 413, 415 (7th Cir. 1991).

⁹¹⁷ Zakrzewski v. McDonough, 490 F.3d 1264 (11th Cir. 2007).

⁹¹⁸ Butz v. Mendoza-Powers, 474 F.3d 1193 (9th Cir. 2007).

disposition of such a motion is more akin to a motion for new trial, and do not generally present the same abuse-of-the-writ issues raised by a motion pursuant to Rule 60.⁹¹⁹

In *Gonzalez v. Crosby*,⁹²⁰ the Court granted certiorari to address whether and under what circumstances a prisoner could use Rule 60(b) to reopen a habeas petition which had previously been denied. Lower federal courts were split on the issue of whether such motions were barred by the abuse of the writ doctrine.

GONZALEZ V. CROSBY

JUSTICE SCALIA delivered the opinion of the Court.

After the federal courts denied petitioner habeas corpus relief from his state conviction, he filed a motion for relief from that judgment, pursuant to *Federal Rule of Civil Procedure 60(b)*. The question presented is whether, in a habeas case, such motions are subject to the additional restrictions that apply to “second or successive” habeas corpus petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U.S.C. § 2244(b).

I

Petitioner Aurelio Gonzalez pleaded guilty in Florida Circuit Court to one count of robbery with a firearm. He filed no appeal and began serving his 99-year sentence in 1982. Some 12 years later, petitioner began to seek relief from his conviction. He filed two motions for state postconviction relief, which the Florida courts denied. Thereafter, in June 1997, petitioner filed a federal habeas petition in the United States District Court for the Southern District of Florida, alleging that his guilty plea had not been entered knowingly and voluntarily.

Upon the State's motion, the District Court dismissed petitioner's habeas petition as barred by AEDPA's statute of limitations, 28 U.S.C. § 2244(d). Under Eleventh Circuit precedent, petitioner's filing deadline, absent tolling, was April 23, 1997, one year after AEDPA's statute of limitations took effect. *Wilcox v. Florida Dep't of Corrs.*, 158 F.3d 1209, 1211 (CA11 1998) (*per curiam*). Adopting a Magistrate Judge's recommendation, the District Court concluded that the limitations period was not tolled during the 163-day period while petitioner's second motion for state postconviction relief was pending. Section 2244(d)(2) tolls the statute of limitations during the pendency of “properly filed” applications only, and the District Court thought petitioner's motion was not “properly filed” because it was both untimely and successive. Without tolling, petitioner's federal habeas petition was two months late, so the District Court dismissed it as time barred. A judge of the Eleventh Circuit denied a certificate of appealability (COA) on April 6, 2000, and petitioner did not file for rehearing or review of that decision.

⁹¹⁹ *Banister v. Davis*, 590 U.S. 504 (2020), holding that a motion under Fed. R. Civ.Pro. 59(e) does not qualify as a successive petition because “[a] Rule 59(e) motion is instead part and parcel of the first habeas proceeding.”

⁹²⁰ 545 U.S. 524 (2005).

On November 7, 2000, we held in *Artuz v. Bennett*, 531 U.S. 4, that an application for state postconviction relief can be “properly filed” even if the state courts dismiss it as procedurally barred. See *id.*, at, 531 U.S. 4. Almost nine months later, petitioner filed in the District Court a *pro se* “Motion to Amend or Alter Judgment,” contending that the District Court’s time-bar ruling was incorrect under *Artuz*’s construction of § 2244(d), and invoking Federal Rule of Civil Procedure 60(b)(6), which permits a court to relieve a party from the effect of a final judgment. The District Court denied the motion, and petitioner appealed.

A judge of the Court of Appeals for the Eleventh Circuit granted petitioner a COA. . . . The en banc majority determined that petitioner’s motion--indeed, any post judgment motion under Rule 60(b) save one alleging fraud on the court under Rule 60(b)(3) --was in substance a second or successive habeas corpus petition. 366 F.3d 1253, 1278, 1281-1282 (2004). A state prisoner may not file such a petition without precertification by the court of appeals that the petition meets certain stringent criteria. § 2244(b). Because petitioner’s motion did not satisfy these requirements, the Eleventh Circuit affirmed its denial. *Id.*, at 1282.

We granted certiorari. 543 U.S. 1086 (2005).

II

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.⁹²¹ [Court’s fn 2] Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows “any . . . reason justifying relief from the operation of the judgment” other than the more specific circumstances set out in Rules 60(b)(1)-(5). See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n 11 (1988); *Klapprott v. United States*, 335 U.S. 601, 613 (1949) (opinion of Black, J.). The mere recitation of these provisions shows why we give little weight to respondent’s appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality. The issue here is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner relevant to the case before us.

* * * *

⁹²¹ [Court’s footnote 2] Rule 60(b) provides in relevant part: “On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.”

"As a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's 'application'" for a writ of habeas corpus. *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). We therefore must decide whether a Rule 60(b) motion filed by a habeas petitioner is a "habeas corpus application" as the statute uses that term.

Under § 2244(b), the first step of analysis is to determine whether a "claim presented in a second or successive habeas corpus application" was also "presented in a prior application." If so, the claim must be dismissed; if not, the analysis proceeds to whether the claim satisfies one of two narrow exceptions. In either event, it is clear that for purposes of § 2244(b) an "application" for habeas relief is a filing that contains one or more "claims." That definition is consistent with the use of the term "application" in the other habeas statutes in chapter 153 of title 28. See, e.g., *Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks "an adjudication on the *merits* of the petitioner's claims"). These statutes, and our own decisions, make clear that a "claim" as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction.

In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. Cf. *Harris v. United States*, 367 F.3d 74, 80-81 (CA2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a *Sixth Amendment* claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. E.g., *Rodwell v. Pepe*, 324 F.3d 66, 69 (CA1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. E.g., *Dunlap v. Litscher*, 301 F.3d 873, 876 (CA7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. E.g., *Rodwell, supra*, at 71-72; *Dunlap, supra*, at 876.

We think those holdings are correct. . . .

In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris, supra*, will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*,⁹²² [Court's fn 4] since alleging that the court erred in

⁹²² [Court's footnote 4] The term "on the merits" has multiple usages. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-503 (2001). We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error--for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.

denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.⁹²³ [Court's fn 5]

When no "claim" is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application. If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.

* * * *

Rule 60(b) has an unquestionably valid role to play in habeas cases. . . . Moreover, several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA, ensuring that our harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions. First, Rule 60(b) contains its own limitations, such as the requirement that the motion "be made within a reasonable time" and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud). Second, our cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment. *Ackermann v. United States*, 340 U.S. 193, 199 (1950). . . . Such circumstances will rarely occur in the habeas context. Third, Rule 60(b) proceedings are subject to only limited and deferential appellate review. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263, n 7 (1978). Many Courts of Appeals have construed 28 U.S.C. § 2253 to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion.

Because petitioner's Rule 60(b) motion challenges only the District Court's previous ruling on the AEDPA statute of limitations, it is not the equivalent of a successive habeas petition. The Eleventh Circuit therefore erred in holding that petitioner did not qualify even to seek Rule 60(b) relief.

⁹²³ [Court's footnote 5] Fraud on the federal habeas court is one example of such a defect. See generally *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (CA2 2001) (a witness's allegedly fraudulent basis for refusing to appear at a federal habeas hearing "relate[d] to the integrity of the federal habeas proceeding, not to the integrity of the state criminal trial"). We note that an attack based on the movant's own conduct, or his habeas counsel's omissions, see, e.g., *supra*, at 530-31, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.

Questions and Comments:

1. **Gonzalez won the point, but lost the case:** Although Gonzalez prevailed on the procedural issue regarding the district court's power to decide on his Rule 60(b) motion, the Court ultimately affirmed the lower courts' decisions denying his Rule 60(b) motion because he did not appeal the district court's order dismissing his petition. Gonzalez's failure to appeal proved fatal—despite the fact that the district court incorrectly interpreted AEDPA's statute of limitations tolling provisions and had wrongly dismissed Gonzalez's petition as untimely. Because Gonzalez did not diligently pursue his rights, he was unable to benefit from the court's recognition of its earlier mistake. Counsel for habeas petitioners must carefully watch for procedural decisions that might justify a motion under Rule 60(b) seeking to revisit a previously raised constitutional claim that was incorrectly dismissed for procedural reasons.
2. **Rule 60(b) and unauthorized acts of counsel:** Courts have allowed habeas petitioners to challenge prior denials of habeas corpus petitions under Rule 60(b) in multiple circumstances. One notable case is *Zakrzewski v. McDonough*,⁹²⁴ which applied *Gonzalez v. Crosby* to let a habeas petitioner file a Rule 60(b) motion alleging that his counsel committed fraud on the court. The petitioner had hired one attorney in a firm, but that lawyer's partner did all the work and signed the pleadings, allegedly without Zakrzewski's permission—and after Zakrzewski expressed his disapproval of the arrangement. Although the unauthorized lawyer entered an appearance in the case, he later withdrew. Zakrzewski then moved to proceed *pro se*, but the district court denied the petition. While that dismissal was pending on appeal, Zakrzewski obtained new counsel, who filed a motion under Rule 60(b) alleging that “the district court ‘should have realized that Nall was not thoroughly familiar with Zakrzewski’s case, that he did not know Zakrzewski, [and] that he was not acting on Zakrzewski's behalf.’”⁹²⁵ The district court mistakenly believed it lacked jurisdiction to consider Zakrzewski's motion, but the Court of Appeals ruled otherwise and remanded the case because the motion was not a “second or successive petition.” As a result, the district court did not need the appellate court's permission to move forward. Zakrzewski sought relief allowing his new counsel to file a new petition raising additional claims that his previous counsel had neglected. However, this did not disqualify him from relief under *Gonzalez* because the Rule 60(b) motion itself “does not assert or reassert allegations of error in his state convictions.”⁹²⁶ Other circumstances in which courts have granted motions under Rule 60(b) include: concealed misconduct by the state,⁹²⁷ an incomplete record which caused the federal court to default a claim which had been

⁹²⁴ 490 F.3d 1264 (9th Cir. 2007).

⁹²⁵ *Id.* at 1266.

⁹²⁶ *Id.* at 1267.

⁹²⁷ *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio 2010).

properly appealed,⁹²⁸ and where the habeas petitioner hired an attorney who “took no action, failing even to file an appearance.”⁹²⁹

III. Statute of Limitations

AEDPA’s statute of limitations introduced concepts previously foreign to federal habeas corpus jurisprudence. Before AEDPA, it was not clear that a warden could invoke the equitable doctrine of *laches* to bar a petition or an argument.⁹³⁰ The notion that an unconstitutional incarceration could become tolerable merely by the passage of time was almost unknown before AEDPA was enacted. A form of *laches* had been applied in last-minute applications for stays of execution.⁹³¹ The American Bar Association Standards firmly rejected the rigid deadlines on postconviction relief, stating: “A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound.”⁹³² The time limitations fail to recognize factors such as: prisoners’ lack of access to competent legal representation and resources, the complexity of postconviction review processes, and hidden but systemic issues that undermine the reliability of criminal judgments.⁹³³ AEDPA’s statute of limitations prioritizes finality concerns at the expense of fairness, placing significant pressure on state and federal practitioners to be acutely aware of filing deadlines.

AEDPA’s statute of limitations provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

⁹²⁸ *Sanders v. McCaughtry*, 333 F. Supp. 2d 797 (E.D. Wisc. 2004).

⁹²⁹ *Butz v. Mendoza-Powers*, 474 F.3d 1193 (9th Cir. 2007).

⁹³⁰ See *Heflin v. United States*, 358 U.S. 415 (1959), holding that *laches* did not apply to a petition challenging a conviction twenty-five years after the fact, and *Spalding v. Aiken*, 460 U.S. 1093 (1983) (Burger, CJ, concurring in denial of certiorari), arguing that “the doctrine of *laches* should apply to habeas actions as it applies to other actions for relief.”

⁹³¹ See, e.g., *Delo v. Stokes*, 495 U.S. 320 (1990).

⁹³² American Bar Association Criminal Justice Standards, *Postconviction Remedies* (1980).

⁹³³ See Samuel Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So*

Little, and New Data on Capital Cases, 5 *Journal of Empirical Legal Studies* 927 (2008), pointing out the tendency of factors causing wrongful convictions to remain hidden from view.

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(b). When calculating the time limit for filing a habeas corpus petition, one must start with the triggering event. For most claims, the clock begins when the judgment becomes final on direct review. The statute adopted language from *Allen v. Hardy*⁹³⁴ which defines finality as the date on which certiorari is denied, or if certiorari review is not sought, the last date on which a timely petition for certiorari could have been filed.⁹³⁵ Other statutory triggering events depend on the facts of individual claims; practitioners should be aware that further investigation may reveal facts that trigger a new one-year limitation period *regarding that claim only*.⁹³⁶

AEDPA also specifies events that toll the statute of limitations; tolling events typically occur during the running of the limitation period, but that is not always the case. Missouri, for example, imposes a deadline for filing a post-decision motion that runs from filing the mandate on direct appeal, but issuing the mandate is irrelevant to the time limit for a petition for writ of

⁹³⁴ 478 U.S. 255 (1986).

⁹³⁵ In calculating this date, note the relationship between the time for filing a petition for writ of certiorari and the last action in the state court proceedings sought to be reviewed. The 90-day time limit to file a petition for writ of certiorari “runs from the date of entry of the judgment or order sought to be reviewed,” or, if post-judgment motions are permitted, the time “runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.” U.S.S.Ct. Rule 13.3. Also note that certiorari proceedings are not included in calculating the finality date from an intermediate State appellate court unless review is sought in the highest court of the state. *Gonzales v. Thaler*, 565 U.S. 134 (2012).

⁹³⁶ *See, e.g., Sweger v. Chesney*, 294 F.3d 506 (3d Cir. 2002), cert. denied, 538 U.S. 1002 (2003), explaining that the statute of limitations triggered by 2244(d)(1) applies to the timeliness of a federal habeas petition, while the statute of limitations triggered by 2244(d)(2) applies to that claim only; it does not “reboot” or extend the limitation period with respect to other claims.

certiorari.⁹³⁷ In states that have longer deadlines or no deadlines for filing postconviction actions, state practitioners must know the federal clock is ticking as they investigate and draft the client's state postconviction petition for relief.

The number of cases and claims that are subject to 2244(d)'s time bar has generated substantial litigation over statutory and equitable tolling events. This chapter will analyze the most common circumstances courts have faced in the application of AEDPA's statute of limitations.

A. The Operation of the Statute of Limitations—Triggering and Tolling Events

AEDPA's new statute of limitations immediately effected habeas litigation, which resulted in the dismissal of untimely habeas petitions without federal review of constitutional claims. This poses a significant risk in states that do not systemically provide prisoners with competent counsel. Two years after AEDPA was enacted, Professor James Liebman identified "more than thirty prisoners on death row in Alabama who have not yet received-and now may be time-barred from receiving-any state or federal post-conviction review of their death sentences due to the lack of any lawyers to represent them."⁹³⁸

Tony Bennett exemplifies a prisoner ensnared in AEDPA's statute of limitations. He believed he had a properly filed postconviction action pending when AEDPA was enacted. However, while the state court had orally denied Bennett's petition and made a docket entry in November 1995, it had not entered a formal judgment, rendering the order unappealable. Bennett, acting *pro se*, filed a federal habeas petition in February 1998, more than one year after AEDPA's statute of limitations took effect.⁹³⁹ The warden argued that Bennett's petition was not "pending" because Bennett had not appealed the denial of postconviction relief and that his petition was not "properly filed" because his claims were now procedurally defaulted. The Court of Appeals rejected both arguments, concluding that Bennett's *pro se* postconviction motion was still "pending" because he could still file a notice appeal if the State court filed its judgment.⁹⁴⁰ The Supreme Court granted certiorari to clarify the tolling provision of 28 U.S.C. § 2244(d)(2) during the pendency of "properly filed" state proceedings.

⁹³⁷ Missouri Rule 29.15(b) requires the motion to be filed "within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." The time for filing a petition for writ of certiorari runs from the opinion or an order denying a timely filed motion for rehearing, and the issuance of the mandate is irrelevant. U.S.S.Ct. Rule 13.3. Thus practitioners must be cognizant of the possibility that a few days may have run off the 2244(d) clock before the state postconviction action was filed.

⁹³⁸ James Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOKLYN L. REV. 411, 417 (2001).

⁹³⁹ *Artuz v. Bennett*, 531 U.S. 4, 6-7 (2000).

⁹⁴⁰ *Bennett v. Artuz*, 199 F.3d 116, 120 (2nd Cir. 1999).

JUSTICE SCALIA delivered the opinion of the Court.

Section 2244(d)(2) of Title 28 U.S.C. (1994 ed., Supp. IV) provides that “the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” This case presents the question whether an application for state postconviction relief containing claims that are procedurally barred is “properly filed” within the meaning of this provision.

* * * *

Petitioner contends here, as he did below, that an application for state postconviction or other collateral review is not “properly filed” for purposes of § 2244(d)(2) unless it complies with all mandatory state-law procedural requirements that would bar review of the merits of the application. We disagree.

An application is “filed,” as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. See, *e.g.*, *United States v. Lombardo*, 241 U.S. 73, 76 (1916) (“A paper is filed when it is delivered to the proper official and by him received and filed”); Black’s Law Dictionary 642 (7th ed. 1999) (defining “file” as “to deliver a legal document to the court clerk or record custodian for placement into the official record”). And an application is “*properly* filed” when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. [citations omitted] In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers, . . . or on all filers generally, cf. 28 U.S.C. § 2253(c) (1994 ed., Supp. IV) (conditioning the taking of an appeal on the issuance of a “certificate of appealability”). But in common usage, the question whether an application has been “properly filed” is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar.

Petitioner contends that such an interpretation of the statutory phrase renders the word “properly,” and possibly both words (“properly filed”), surplusage, since if the provision omitted those words, and tolled simply for “the time during which an . . . application for State post-conviction [relief] is pending,” it would necessarily condition tolling on compliance with filing requirements of the sort described above. That is not so. If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be *pending*, but not *properly filed*.

⁹⁴¹ 531 U.S. 4 (2000).

Petitioner's interpretation is flawed for a more fundamental reason. By construing "properly filed application" to mean "application raising claims that are not mandatorily procedurally barred," petitioner elides the difference between an "application" and a "claim." Only individual *claims*, and not the application containing those claims, can be procedurally defaulted under state law pursuant to our holdings in *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), which establish the sort of procedural bar on which petitioner relies. Compare § 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") with § 2244(b)(3)(A) ("Before a second or successive *application* permitted by this section is *filed* in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application" (emphases added)). See also *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-840 (1999) ("In this case, we are asked to decide whether a state prisoner must *present* his *claims* to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement" (emphases added)). Ignoring this distinction would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" *as to* the nonbarred claims, and not "properly filed" *as to* the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed." Ordinary English would refer to certain *claims* as having been properly *presented* or *raised*, irrespective of whether the application containing those claims was properly filed.

Petitioner's remaining arguments are beside the point. He argues, for example, that tolling for applications that raise procedurally barred claims does nothing to enable the exhaustion of available state remedies -- which is the object of § 2244(d)(2). Respondent counters that petitioner's view would trigger a flood of protective filings in federal courts, absorbing their resources in threshold interpretations of state procedural rules. Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. We hold as we do because respondent's view seems to us the only permissible interpretation of the text -- which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.

The state procedural bars at issue in this case -- N. Y. Crim. Proc. Law §§ 440.10(2)(a) and (c) (McKinney 1994) -- simply prescribe a rule of decision for a court confronted with claims that were "previously determined on the merits upon an appeal from the judgment" of conviction or that could have been raised on direct appeal but were not: "The court must deny" such claims for relief. Neither provision purports to set forth a condition to filing, as opposed to a condition to obtaining relief. Motions to vacate that violate these provisions will not be successful, but they have been properly delivered and accepted so long as the filing conditions have been met. Consequently, the alleged failure of respondent's application to comply with §§ 440.10(2)(a) and (c) does not render it "improperly filed" for purposes of § 2244(d)(2). The judgment of the Court of Appeals must therefore be affirmed.

It is so ordered.

Questions and Comments:

1. **Are claims “properly filed” and “pending” even if the state court rejects them as procedurally barred?** In *Bennett*, the Court of Appeals determined that Bennett’s state postconviction action remained “pending” because the deadline for filing a notice of appeal had not yet begun when he filed his federal habeas. The court remanded the case for further proceedings. What should the district court do if Bennett’s state petition is still pending? Is there a relationship between § 2244(d)(2)’s tolling provision and the requirement that habeas petitioners exhaust state remedies? The Court rejected the argument that a procedurally defaulted claim is not “properly filed” and therefore was never “pending” for tolling purposes. What would be the impact of a decision that considers issues procedurally avoided by State courts as not “properly filed”? This decision could incentivize petitioners to bypass state remedies, thereby depriving state courts the opportunity to address claims. As discussed in Chapter 3, Balancing the Roles of State and Federal Courts: Exhaustion of State Remedies, a state may choose to excuse a prisoner’s procedural default or interpret its procedural rules in a manner that permits a decision on the merits of the prisoner’s claims. A state court might order an evidentiary hearing and make fact-findings that the federal court must presume to be correct. What interests of the federal court are served by the Court’s interpretation of § 2244(d)(2)?
2. **Counting the time:** How does *Artuz v. Bennett* impact how days are counted during the pendency of state postconviction actions? The standard answer is that the clock starts when the decision becomes “final” on direct review,⁹⁴² stops upon the proper filing of a state postconviction action, and resumes when that action is finally concluded in state court.⁹⁴³ The statute of limitations is *not* tolled during certiorari proceedings after the conclusion of state postconviction proceedings. Bennett’s petition was denied without judgment in the trial court, but under the Court’s reasoning, the clock had not yet begun because the case was still “pending” even though an appeal had not been filed. In the ordinary course of postconviction review, the Court does not count time that lapses between judgments and post-decision motions or between lower court judgments and routine appeals to higher courts. In *Carey v. Saffold*, the Court ruled that the time remains tolled between a lower court’s denial of postconviction relief and filing a notice of appeal *if the notice of appeal*

⁹⁴² See *Teague v. Lane*, 489 U.S. 288, 295 (1989), quoting *Allen v. Hardy*, 478 U.S. 255, 258, n. 1 (1986) (per curiam) (a conviction is final “where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed” or certiorari is denied.)

⁹⁴³ *Artuz v. Bennett* does not apply to successive state petitions; the time between the first and second or later state petitions is not tolled. *Rowe v. Lemaster*, 225 F.3d 1173 (10th Cir. 2000); *Stafford v. Thompson*, 328 F.3d 1302 (11th Cir. 2003).

is timely filed.⁹⁴⁴ *Cary* involved a state court rule that did not specify a time limit for filing this notice but required that it be filed within a “reasonable time.” The Court ruled that only “unreasonable delays” are excluded from the tolling period. *Cary* said the delay was based on lack of notice of the trial court’s ruling and the Court remanded the case to the Ninth Circuit to determine whether the delay was unreasonable. Similarly, in *Evans v. Chavis*, the petitioner waited three years before petitioning a California appellate court for review.⁹⁴⁵ Although the Ninth Circuit deemed the delay reasonable because the appellate court denied the petitioner’s claims on the merits, the Supreme Court remanded the case to determine whether the delay was, in fact, unreasonable. The Court implied that a clearer statement from the California Supreme Court about “the meaning of the term ‘reasonable time’ in the present context” would be helpful.⁹⁴⁶ Even though the California Supreme Court had held in other cases that a four-year delay was reasonable, the Court directed the Ninth Circuit to assess the reasonableness of the delay.

3. **The filing of the federal habeas petition is not a “tolling” event:** The filing of a federal petition for writ of habeas corpus complies with the statute of limitations, but the clock continues to run on both pled and unpled claims. As long as the federal petition remains on file, the statute of limitations does not bar claims pled in a petition. In *Rhines v. Weber*,⁹⁴⁷ for example, the Court acknowledged that if *Rhines* were forced to dismiss his mixed petition for writ of habeas corpus to exhaust state remedies, the statute of limitations would bar him from ever returning to federal court because more than a year had lapsed. Letting the district court hold its proceedings in abeyance and maintaining a stay of execution while *Rhines* returned to State court with his unexhausted claims avoided this problem.

B. Amended Federal Habeas Claims and the Statute of Limitations

What happens if the petitioner acquires new information through investigation or discovery that strengthens the case for habeas corpus relief when a habeas petition is pending? This new evidence might trigger 28 U.S.C. § 2244(b)(1)(D) and begin a new one-year statute of limitations regarding that claim.⁹⁴⁸ If the new evidence relates to an already pled claim, courts may apply Federal Rule of Civil Procedure 15(c)(1)(B), which allows an amendment to a pleading to relate back to a timely-filed pleading when “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original

⁹⁴⁴ 536 U.S. 214 (2002).

⁹⁴⁵ 546 U.S. 189 (2006).

⁹⁴⁶ *Id.* at 197.

⁹⁴⁷ 544 U.S. 269 (2009).

⁹⁴⁸ Also note that the new evidence may require exhaustion of state remedies, see Chapter 3, and may also have to run the gauntlet of AEDPA’s evidentiary hearing restrictions, 28 U.S.C. § 2254(e), discussed later in this chapter.

pleading.” In *Mayle v. Felix*,⁹⁴⁹ the district court-appointed counsel to represent Felix, and three months after the statute of limitations had run, counsel sought to amend the petition to include a claim that his pretrial statements had been excluded. The original petition raised a claim that the admission of videotaped witness statements violated his Sixth Amendment right to cross-examine witnesses. Felix argued that his new claim “arose out of the conduct, transaction, or occurrence” set out in the original pleading—his original prosecution and trial. The Court disagreed and held that Rule 15 will not let amendment of a habeas petition include a time-barred claim that raises a “new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.”⁹⁵⁰

The Court contrasted Felix’s case with *Mandacina v. United States*⁹⁵¹ in which relation-back was appropriate. Mandacina’s timely-filed petition alleged a *Brady v. Maryland* claim for the Government’s failure to disclose exculpatory evidence—and his changed petition simply identified *more* evidence that the Government failed to disclose. Thus, his amended *Brady* claim related to his original petition and was not deemed untimely. Justice Souter, joined by Justice Stevens, dissented, suggesting that it is appropriate “to regard a single trial lasting days or weeks as one transaction or occurrence.”⁹⁵² He also noted that “the Court’s view creates an unfair disparity between indigent habeas petitioners and those able to afford their own counsel.”⁹⁵³

Lower courts have allowed amendments to relate back when new evidence or new allegations relate to a timely-pled claim. For example, in *Cowan v. Stovall*,⁹⁵⁴ the petitioner was convicted of various drug offenses because of her presence in a drug house. She alleged in her timely petition that trial counsel was ineffective for failing to interview witnesses in the drug house. After the statute of limitations had run, she tried to change her petition with more information naming and describing witnesses and what they would have said.⁹⁵⁵ Because Ms. Cowan’s amended claim shared “a common core of operative facts with her original petition,”⁹⁵⁶ the court ruled that it related to her original petition and was not barred by the statute of limitations. But in

⁹⁴⁹ 545 U.S. 644 (2005).

⁹⁵⁰ *Id.* at 650.

⁹⁵¹ 328 F.3d 995 (8th Cir. 2003).

⁹⁵² *Mayle v. Felix*, *supra*, at 668, n. 2 (Souter, J., dissenting).

⁹⁵³ *Id.* at 665.

⁹⁵⁴ 645 F.3d 815 (6th Cir. 2011).

⁹⁵⁵ *Id.* at 819.

⁹⁵⁶ *Id.* Although Ms. Cowan was allowed to amend her petition to expand her claim of ineffective assistance of counsel, she nevertheless lost her claim because it was procedurally barred.

Hebner v. McGrath,⁹⁵⁷ the petitioner’s new claim alleging constitutionally defective jury instructions did not relate to his original complaint because it was “separated in time and type.”⁹⁵⁸

A final caution: certiorari proceedings are not a tolling event—the one-year statute of limitations begins when certiorari is denied on direct review or on the last day that a timely petition for writ of certiorari could have been filed. A state postconviction proceeding is no longer “pending” when it is finally denied in the state court. Therefore, a petition for writ of certiorari from the denial of a state postconviction decision does not toll the statute of limitations.⁹⁵⁹ Mark Christeson was executed in Missouri with no habeas corpus review because his federal habeas attorneys incorrectly thought otherwise. See *Christeson v. Roper*.⁹⁶⁰

C. Equitable Tolling

The Supreme Court has acknowledged that the doctrine of equitable tolling may allow exceptions to AEDPA’s time bar, though it has interpreted those exceptions narrowly. This section will examine circumstances in which courts have allowed—and disallowed—equitable tolling. Inept lawyering is a frequent reason cited by habeas petitioners seeking equitable tolling to file an untimely petition. How egregiously deficient must a lawyer’s representation be to let a prisoner file an untimely petition? The Supreme Court’s first attempt to answer this question is highlighted in the case of Albert Holland,⁹⁶¹ whose politely careful attempts to communicate with his lawyer and the Florida Supreme Court about the status of his case showed his entitlement to equitable tolling.

Justice Breyer’s opinion for the Court detailed eleven pages demonstrating Holland’s persistent efforts to spur his appointed counsel to file a timely habeas petition.⁹⁶² That summary provides an important perspective to the issue, and Holland’s deferential, polite but persistent inquiries of counsel and the Florida courts call into question any attempt to characterize him as a difficult or recalcitrant client.⁹⁶³ Holland was convicted of first-degree murder in 1997 and

⁹⁵⁷ 543 F.3d 1133 (9th Cir. 2008).

⁹⁵⁸ *Id.* at 1138.

⁹⁵⁹ *Coates v. Byrd*, 211 F.3d 1225 (CA11 2000) (*per curiam*) (AEDPA clock restarts when state court completes postconviction review).

⁹⁶⁰ 574 U.S. 373 (2015).

⁹⁶¹ 560 U.S. 631 (2020).

⁹⁶² *Id.* at 634-635.

⁹⁶³ The Court quoted verbatim many of Holland’s letters, all of them similar in tone to this March 3, 2005, letter to Mr. Collins:

Dear Mr. Collins, P. A.:

“How are you? Fine I hope.

sentenced to death. The U.S. Supreme Court denied certiorari on direct review of his conviction on October 1, 2001, triggering AEDPA's one-year limitations period. Thirty-seven days later, Florida appointed attorney Bradley Collins to represent Holland in both state and federal postconviction proceedings. With only 12 days remaining on the AEDPA clock, Collins filed a state postconviction motion, which tolled the limitations period. In the three years that followed, Collins' communication with Holland dwindled. Despite Holland's persistent letters urging Collins to ensure his federal habeas claims were preserved, Collins provided little substantive reassurance.

Frustrated by the lack of communication, Holland twice petitioned the Florida Supreme Court to remove Collins, citing a "complete breakdown in communication." The Florida Supreme Court denied his requests, ruling that because Holland was represented by counsel, he could not file motions *pro se*.

Holland's concerns proved prescient. After the Florida Supreme Court denied his state postconviction relief in November 2005 and issued its mandate on December 1, the AEDPA clock resumed, leaving only 12 days for filing a federal habeas petition. Despite past warnings from Holland, Collins did not act. By the time Holland learned—on January 18, 2006—that the state court had issued its ruling weeks earlier, his AEDPA deadline had ended. He immediately filed his own *pro se* federal habeas petition.

The case ultimately turned on whether the doctrine of equitable tolling—permitting extensions in extraordinary circumstances—should apply to habeas cases generally, and to Mr. Holland's case.

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JUSTICE BREYER delivered the opinion of the Court.

We have not decided whether AEDPA's statutory limitations period may be tolled for equitable reasons. . . . Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases. [citations omitted].

"I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida.

"If the Florida Supreme Court denies my [postconviction] and State Habeas Corpus appeals, please file my 28 U.S.C. 2254 writ of Habeas Corpus petition, before my deadline to file it runs out (expires).

"Thank you very much.

"Please have a nice day." (emphasis added).

Collins did not answer this letter. *Id.* at 637-38.

We base our conclusion on the following considerations. First, the AEDPA “statute of limitations defense . . . is not ‘jurisdictional.’” *Day v. McDonough*, 547 U.S. 198, 205 (2006). It does not set forth “an inflexible rule requiring dismissal whenever” its “clock has run.” *Id.*, at 208. See also *id.*, at 213 (Scalia, J., dissenting) (“We have repeatedly stated that the enactment of time-limitation periods such as that in § 2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture” (citing cases)).

We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a “rebuttable presumption” in favor “of equitable tolling.” *Irwin*, 498 U.S., at 95-96; see also *Young v. United States*, 535 U.S. 43, 49 (2002) (“It is hornbook law that limitations periods are ‘customarily subject to ‘equitable tolling’” (quoting [*Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (2007)])).

In the case of AEDPA, the presumption's strength is reinforced by the fact that “‘equitable principles’” have traditionally “‘governed’” the substantive law of habeas corpus, *Munaf v. Geren*, 553 U.S. 674, 69 (2008), for we will “not construe a statute to displace courts' traditional equitable authority absent the ‘clearest command,’” *Miller v. French*, 530 U.S. 327, 340 (2000) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)). The presumption's strength is yet further reinforced by the fact that Congress enacted AEDPA after this Court decided *Irwin* and therefore was likely aware that courts, when interpreting AEDPA's timing provisions, would apply the presumption. See, e.g., *Merck & Co. v. Reynolds*, [559 U.S.633 (2010)].

* * * *

Respondent, citing [*United States v. Brockamp*, 519 U.S. 347 (1997)], argues that AEDPA should be interpreted to foreclose equitable tolling because the statute sets forth “explicit exceptions to its basic time limits” that do “not include ‘equitable tolling.’” 519 U.S., at 351. The statute does contain multiple provisions relating to the events that *trigger* its running. See § 2244(d)(1); . . . see also *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (CA7 1990) (“We must . . . distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations . . .”). And we concede that it is silent as to equitable tolling while containing one provision that expressly refers to a different kind of tolling. See § 2244(d)(2). . . . But the fact that Congress *expressly* referred to tolling during state collateral review proceedings is easily explained without rebutting the presumption in favor of equitable tolling. A petitioner cannot bring a federal habeas claim without first exhausting state remedies -- a process that frequently takes longer than one year. See *Rose v. Lundy*, 455 U.S. 509 (1982); § 2254(b)(1)(A). Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive maxim *inclusio unius est exclusio alterius* (to include one item (*i.e.*, suspension during state-court collateral review) is to exclude other similar items (*i.e.*, equitable tolling)). See [*Young v. United States*, 535 U.S. 43, 53 (2002)] (rejecting claim that an “express tolling provision, appearing in the same subsection as the [limitations] period, demonstrates a statutory intent *not* to toll the [limitations] period”).

Third, and finally, we disagree with respondent that equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. See *Day*, 547 U.S., at 205-206; *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (“AEDPA's present provisions . . . incorporate earlier habeas corpus principles”). . . . When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the “writ of habeas corpus plays a vital role in protecting constitutional rights.” *Slack*, 529 U.S., at 483. It did not seek to end every possible delay at all costs. Cf. *id.*, at 483-488. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

For these reasons we conclude that neither AEDPA's textual characteristics nor the statute's basic purposes "rebut" the basic presumption set forth in *Irwin*. And we therefore join the Courts of Appeals in holding that § 2244(d) is subject to equitable tolling.

III

We have previously made clear that a “petitioner” is “entitled to equitable tolling” only if he shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented timely filing. [*Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)] (emphasis deleted). In this case, the “extraordinary circumstances” at issue involve an attorney's failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is “grossly negligent” can never warrant tolling absent “bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.” 539 F.3d at 1339. But in our view, the Court of Appeals' standard is too rigid.

We have said that courts of equity “must be governed by rules and precedents no less than the courts of law.” *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (internal quotation marks omitted). But we have also made clear that often the “exercise of a court's equity powers . . . must be made on a case-by-case basis.” *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). In emphasizing the need for “flexibility,” for avoiding “mechanical rules,” *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946), we have followed a tradition in which courts of equity have sought to “relieve hardships which, from time to time, arise from a hard and fast adherence” to more absolute legal rules, which, if strictly applied, threaten the “evils of archaic rigidity,” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944). The “flexibility” inherent in “equitable procedure” enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.” *Ibid.* (permitting post deadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior

precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

We recognize that, in the context of procedural default, we have previously stated, without qualification, that a petitioner “must “bear the risk of attorney error.” *Coleman v. Thompson*, 501 U.S. 722, 752-753 (1991). But *Coleman* was “a case about federalism,” *id.*, at 726, in that it asked whether *federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, notwithstanding the state court’s determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner’s failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law. . . . Holland does not argue that his attorney's misconduct provides a substantive ground for relief, cf. § 2254(i), nor is this a case that asks whether AEDPA's statute of limitations should be recognized at all, cf. *Day, supra*, at 209. Rather, this case asks how equity should be applied once the statute is recognized. And given equity's resistance to rigid rules, we cannot read *Coleman* as requiring a *per se* approach in this context.

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove “egregious” and can be “extraordinary” even though the conduct in question may not satisfy the Eleventh Circuit’s rule. See, e.g., *Nara v. Frank*, 264 F.3d 310, 320 (CA3 2001) (ordering hearing as to whether client who was “effectively abandoned” by lawyer merited tolling); [*Calderon v. United States Dist. Ct. for Central Dist. of Cal.*, 128 F.3d 1283, 1289 (CA9 1997)] (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); [*Baldayaque v. United States*, 338 F.3d 145, 152-153 (CA2 2003)] (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, tolling could, under the circumstances, be warranted); [*Spitsyn v. Moore*, 345 F.3d 796, 800-802 (CA9 2003)] (finding that “extraordinary circumstances” may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to his client's communications); *United States v. Martin*, 408 F.3d 1089, 1096 (CA8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct).

We have previously held that “a garden variety claim of excusable neglect,” *Irwin*, 498 U.S., at 96, such as a simple “miscalculation” that leads a lawyer to miss a filing deadline, *Lawrence, supra*, at 336, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a “garden variety claim” of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be “extraordinary” before equitable tolling can be

applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case.

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an “extraordinary” instance in which petitioner's attorney's conduct constituted far more than “garden variety” or “excusable neglect.” To be sure, Collins failed to file Holland's petition on time and appears to have been unaware of the date on which the limitations period expired -- two facts that, alone, might suggest simple negligence. But, in these circumstances, the record facts we have elucidated suggest that the failure amounted to more: Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

A group of teachers of legal ethics tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. See Brief for Legal Ethics Professors et al. as *Amici Curiae* (describing ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and in the ABA Model Rules of Professional Conduct (2009)). And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.

We do not state our conclusion in absolute form, however, because more proceedings may be necessary. The District Court rested its ruling not on a lack of extraordinary circumstances, but rather on a lack of diligence -- a ruling that respondent does not defend. We think that the District Court's conclusion was incorrect. The diligence required for equitable tolling purposes is “reasonable diligence,” see, e.g., *Lonchar*, 517 U.S., at 326, not “maximum feasible diligence,” *Starns v. Andrews*, 524 F.3d 612, 618 (CA5 2008) (quoting *Moore v. Knight*, 368 F.3d 936, 940 (CA7 2004)). Here, Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have Collins -- the central impediment to the pursuit of his legal remedy -- removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court.

Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief. We are “[m]indful that this is a court of final

review and not first view.” *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*) (internal quotation marks omitted). And we also recognize the prudence, when faced with an “equitable, often fact-intensive” inquiry, of allowing the lower courts “to undertake it in the first instance.” *Gonzalez v. Crosby*, 545 U.S. 524, 540 (2005) (STEVENS, J., dissenting). Thus, because we conclude that the District Court's determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Precedence for equitable tolling:** Holland’s polite persistence and Collins’ gross neglect were pivotal in convincing the Courts that extraordinary circumstances justified tolling the AEDPA deadline. The Court distinguished Holland’s case from other cases in which counsel negligently miscalculated the time deadline for filing, citing *Irwin v. Department of Veterans Affairs*.⁹⁶⁴ Writing for the Court, Justice Breyer said, “given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments.”⁹⁶⁵ He then cited several cases in which lower courts granted equitable tolling based on attorney malfeasance:
 - *Nara v. Frank*, in which equitable tolling was allowed where a lawyer “effectively abandoned” the client;⁹⁶⁶
 - *Calderon v. United States Dist. Ct. for Cent. Dist. of Cal.*, which allowed tolling because of a last-minute change in representation that was beyond his control;⁹⁶⁷
 - *Baldayaque v. United States*, which allowed tolling because the attorney “failed to perform an essential service, to communicate with the client, and to do basic legal research;”⁹⁶⁸

⁹⁶⁴ 498 U.S. 89, 95 (2007).

⁹⁶⁵ *Holland v. Florida*, *supra*, at 651.

⁹⁶⁶ 264 F.3d 310, 320 (CA3 2001).

⁹⁶⁷ 128 F.3d 1283, 1289 (CA9 1997).

⁹⁶⁸ 338 F.3d 145, 152-153 (CA2 2003).

- *Spitsyn v. Moore*, which allowed tolling when the lawyer denied client access to files, did not prepare a petition, and did not respond to his client's communications;⁹⁶⁹ and
- *United States v. Martin*,⁹⁷⁰ which allowed equitable tolling when his attorney hid files and made misleading statements.

In each of these cases, the failure to file a timely petition rested exclusively with counsel, and the petitioner was without fault. Consider *Coleman v. Thompson*'s agency theory—these lawyers were not acting as the clients' agents when their conduct created the circumstances calling for equitable tolling. What if the lawyers had simply miscalculated the running of the clock, or were simply negligent in failing to prepare a timely petition? What other events might qualify as equitable tolling of AEDPA's statute of limitations?

2. **Adequate inquiry into impediments to filing:** Many cases discussed in this section involve the adequacy of the district court's inquiry into a prisoner's request for equitable tolling. Justice Breyer's eleven-page summary of facts in *Holland* is a good example of the level of inquiry that may be appropriate in this case. A disturbing example of an equitable tolling claim based on attorney error is *Christeson v. Roper*,⁹⁷¹ where attorneys—without ever meeting the client who was sentenced to death—missed the statute of limitations. When Christeson's petition was dismissed as time barred, he asked for substitute counsel, which the district court denied, and the Court of Appeals for the Eighth Circuit summarily affirmed. The Court noted that “Horwitz and Butts, as they have subsequently acknowledged, failed to meet with Christeson until more than six weeks after his petition was due.”⁹⁷² The Court was clearly skeptical of their claim that they had simply miscalculated the statute of limitations. A legal ethics expert provided an affidavit to the district court stating, “[I]f this was not abandonment, I am not sure what would be.”⁹⁷³ Christeson suffered severe cognitive disabilities and may not have known that his petition had been dismissed. After the Eighth Circuit denied a certificate of appealability, new counsel sought appointment on the case and filed a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen the judgment because the statute of limitations should have been equitably tolled. The district court and the Eighth Circuit again denied the motion, and the Supreme Court granted certiorari and summarily reversed and remanded, stating, “The court's principal error was its failure to acknowledge Horwitz and Butts' conflict of interest.”⁹⁷⁴ As the Court observed, “Horwitz and Butts' contentions here were directly and concededly contrary to their client's interest, and manifestly served their own

⁹⁶⁹ 345 F.3d 796, 800-802 (CA9 2003).

⁹⁷⁰ 408 F.3d 1089, 1096 (CA8 2005).

⁹⁷¹ 574 U.S. 373 (2015).

⁹⁷² *Id.* at 374.

⁹⁷³ *Id.* at 375.

⁹⁷⁴ *Id.* at 378.

professional and reputational interests.”⁹⁷⁵ Therefore, the district court should have substituted counsel for the hearing on Christeson’s application for equitable tolling.

3. **Actual innocence and equitable tolling:** In *Schlup v. Delo*, the Court called actual innocence “the ultimate equity on the prisoner’s side.”⁹⁷⁶ It would be anomalous not to conclude that a prisoner who can show actual innocence could not obtain equitable tolling. In *McQuiggin v. Perkins*,⁹⁷⁷ the prisoner filed his habeas corpus petition eleven years out of time, and six years after obtaining affidavits supporting his innocence. The Sixth Circuit reversed the district court’s denial of habeas relief and remanded the case with instructions to consider Perkins’ claim of actual innocence. The warden’s petition for writ of certiorari was granted, arguing that Perkins’ lack of diligence should prevent equitable tolling. The Court disagreed, noting that “Perkins, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA’s one-year statute of limitations.”⁹⁷⁸ The Court rejected the warden’s argument that the cause-innocence standard of Sections 2244(b)(2)(B) and 2254(e)(2) implicitly overruled *Schlup*. The Court concluded, “In a case not governed by those provisions, i.e., a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA’s passage intact and unrestricted.”⁹⁷⁹ However, while a person asserting actual innocence to overcome a time bar need not also prove diligence, it held that “the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner’s proof of innocence,”⁹⁸⁰ and “[a] court may consider how the timing of the submission and the likely credibility of [a petitioner’s] affiants bear on the probable reliability of . . . evidence [of actual innocence].”⁹⁸¹ In *Munchinski v. Wilson*, the court ruled that the petitioner’s diligence and extraordinary circumstances, in addition to his claim of actual innocence, entitled him to equitable tolling.⁹⁸²
4. **Misleading advice or change in the law:** In *Riddle v. Kemna*, Riddle’s public defender advised him that under AEDPA’s statute of limitations he had one year from the conclusion of his postconviction proceedings to file a federal habeas petition.⁹⁸³ This was wrong, and Riddle filed his petition after the statute had run. However, the court remanded the case to the district court to allow Riddle to establish that he had been pursuing his rights diligently

⁹⁷⁵ *Id.* at 379.

⁹⁷⁶ 513 U.S. 298, 342 (1995) (quoting *Withrow v. Williams*, 507 U.S. 680, 700 (1993)).

⁹⁷⁷ 569 U.S. 383 (2013).

⁹⁷⁸ *Id.* at 392.

⁹⁷⁹ *Id.* at 397.

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.* (quoting *Schlup* at 332); see also *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), and *Cleveland v. Bradshaw*, 693 F.3d 626 (6th Cir. 2012), letting actual innocence toll the statute of limitations.

⁹⁸² 694 F.3d 308 (3rd Cir. 2012).

⁹⁸³ 523 F.3d 850 (8th Cir. 2008).

but was lulled into inaction. If he could do so, this would justify equitable tolling of the statute of limitations. The court cautioned that Riddle would have to satisfy two elements for equitable tolling: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”⁹⁸⁴ Further, “such extraordinary circumstances must not be attributable to the petitioner.”⁹⁸⁵ The Court noted that ineffectiveness of counsel rarely warrants equitable tolling. In Riddle’s case, however, there was some case law supporting counsel’s misleading advice. Under these limited circumstances, “Riddle may receive the benefit of equitable tolling if he can establish that a court’s conduct ‘lulled the movant into inaction through reliance on that conduct.’”⁹⁸⁶ *Riddle*’s outcome differs from many other cases where attorney negligence is not adequate to justify equitable tolling, maybe because the misleading advice was based on an incorrect decision of the Eighth Circuit in *Nichols v. Bowersox*,⁹⁸⁷ which incorrectly counted the time for seeking certiorari from an intermediate appellate court in the prisoner’s statute of limitations period. The court noted other cases in which habeas petitioners relied on statements by *courts*, not counsel, misleading them about the steps that must be taken to preserve a claim. For example, in *Spottsville v. Terry*,⁹⁸⁸ equitable tolling was allowed where the state habeas court “affirmatively misled” the petitioner about his deadline. The Eighth Circuit concluded that reliance on an incorrect court of appeals decision satisfies the “extraordinary circumstance” requirement for equitable tolling,⁹⁸⁹ while an attorney’s or petitioner’s misunderstanding of the law generally do not.⁹⁹⁰

5. **Delay in receiving notice:** Albert Holland’s case may have had a different outcome if the Florida courts had given him adequate notice of the ruling on his case. His letters asking the court clerk information which the clerk declined to provide were powerful evidence of his diligence. Therefore, substantial delay in receiving notice may constitute exceptional circumstances warranting equitable tolling of the statute of limitations.⁹⁹¹ Put simply, the petitioner’s lack of knowledge that the state court has reached a final resolution of his case can provide grounds for equitable tolling of AEDPA’s statute of limitations.⁹⁹² It is important to note, as did the *Holland* Court, whether the petitioner acted promptly on

⁹⁸⁴ *Riddle v. Kemna*, *supra* at 857 (quoting *Walker v. Norris*, 436 F.3d 1026, 1032 (8th Cir. 2006)).

⁹⁸⁵ *Id.* (citing *Maghee v. Ault*, 410 F.3d 473, 476 (8th Cir. 2005)).

⁹⁸⁶ *Riddle v. Kemna*, *supra* at 857.

⁹⁸⁷ 172 F.3d 1068 (8th Cir. 1999)

⁹⁸⁸ 476 F.3d 1241, 1245-46 (11th Cir. 2007); *see also* *Brinson v. Vaughn*, 398 F.3d 225, 230-31 (3d Cir. 2005), *Alexander v. Cockrell*, 294 F.3d 626, 629-30 (5th Cir. 2002), and *Pliler v. Ford*, 542 U.S. 225, 234, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004).

⁹⁸⁹ *Burns v. Prudden*, 588 F.3d 1148 (8th Cir. 2009).

⁹⁹⁰ *Shoemate v. Norris*, 390 F.3d 595, 598 (8th Cir. 2004); *Cross-Bey v. Gammon*, 322 F.3d 1012, 1016 (8th Cir. 2003).

⁹⁹¹ *Phillips v. Donnelly*, 216 F.3d 508(5th Cir. 2000).

⁹⁹² *See* *Miller v. Collins*, 305 F.3d 491(6th Cir. 2002); *Ramirez v. Yates*, 571 F.3d 993 (9th Cir. 2009).

learning that his state court case had concluded. For example, in *Hardy v. Quarterman*,⁹⁹³ the fact that the petitioner filed his federal habeas petition only seven days after obtaining notice that the Texas Court of Criminal Appeals denied his state habeas corpus petition was persuasive evidence of his diligence.

6. **Improper dismissal of mixed petition:** In *Rhines v. Weber*,⁹⁹⁴ the Court considered Rhines' problem with the statute of limitations clock to be good cause to allow the district court to hold the petitioner's petition in abeyance while he exhausted state remedies. Otherwise, his claims would be time barred the instant they were dismissed. A district court's dismissal of a petition for writ of habeas corpus without offering the petitioner the option to withdraw his unexhausted claims or apply for an abeyance procedure entitled the petitioner to equitable tolling of the statute of limitations.⁹⁹⁵
7. **Interference by prison officials:** Courts have considered the conduct of prison officials and conditions of confinement in determining whether they have been diligent in the face of extraordinary circumstances. For example, equitable tolling was allowed in *Stillman v. Lamarque*,⁹⁹⁶ where a prison official's broken promise to provide counsel with the prisoner's signed petition in time for filing was extraordinary circumstances beyond appellant's control which caused the petition to be late. Similarly, prisoners had the right to equitable tolling where they were placed in protective custody without access to their legal papers,⁹⁹⁷ and where prison officials confiscated a prisoner's draft of his habeas petition and related papers.⁹⁹⁸
8. **Denial of meaningful access to the courts:** In *Bounds v. Smith*, 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."⁹⁹⁹ A prison's refusal to provide the minimal resources required to assure a prisoner's meaningful access to the courts can qualify as an extraordinary circumstance requiring equitable tolling. In *Simmons v. United States*,¹⁰⁰⁰ RonRico Simmons, Jr., alleged that he could not file a timely habeas petition because the prison officials did not provide materials about federal habeas law. The lower court found his allegation insufficient, and the Supreme

⁹⁹³ 577 F.3d 596 (5th Cir. 2009).

⁹⁹⁴ 544 U.S. 269 (2005).

⁹⁹⁵ See *Smith v. Ratelle*, 323 F.3d 813(9th Cir. 2003), cert. denied, 542 U.S. 945 (2004); see also *Corbin v. Straub*, 156 F. Supp. 2d 833 (E.D. Mich. 2001), finding that the petitioner's request to hold his petition in abeyance while he exhausted state remedies was adequate evidence of diligence on petitioner's part.

⁹⁹⁶ 319 F.3d 1199(9th Cir. 2003).

⁹⁹⁷ *Espinoza-Matthews v. California*, 432 F.3d 1021 (9th Cir. 2005).

⁹⁹⁸ *Valverde v. Stinson*, 224 F.3d 129 (2d Cir. 2000).

⁹⁹⁹ 430 U.S. 817, 828 (1976).

¹⁰⁰⁰ 142 S. Ct. 23 (2021).

Court denied certiorari. Justice Sotomayor wrote separately “to stress that the Sixth Circuit’s parsimonious reading of Simmons’ pro se motion appears contrary to our longstanding instruction that pro se filings must be ‘liberally construed.’”¹⁰⁰¹ She argued that because prisons are constitutionally required to “provide the legal materials and ‘tools . . . that the inmates need to attack their sentences, directly or collaterally,’” then “a prison’s failure to provide these ‘tools’ may constitute an unconstitutional government impairment that tolls the 1-year statutory filing deadline for seeking habeas relief under §2255 or §2244.”¹⁰⁰² In *Egerton v. Cockrell*,¹⁰⁰³ a Texas prisoner sought equitable tolling because he was incarcerated in a prison that did not have AEDPA in its law library, and he was unaware that AEDPA existed. The Fifth Circuit Court of Appeals held,

The State’s failure to make available to a prisoner the AEDPA, which sets forth the basic procedural rules the prisoner must follow in order to avoid having his habeas petition summarily thrown out of court, including the newly imposed statute of limitations, is just as much of an impediment as if the State were to take ‘affirmative steps’ to prevent the petitioner from filing the application.¹⁰⁰⁴

Egerton argued that his one-year statute of limitations should not have begun until he was transferred to a different prison with an adequate law library. The court agreed that if the lack of an adequate law library were an impediment to his filing, that the statute of limitations would begin upon the removal of that impediment as provided in 28 U.S.C. § 2244(d)(1).¹⁰⁰⁵ The court distinguished cases in which prisoners were denied equitable tolling because they could not show a causal connection between the unavailability of library resources and filing their habeas petitions.¹⁰⁰⁶

9. **Mental incompetence:** California inmate Brian Laws was unquestionably mentally ill. His competency was a contested issue at which he was convicted and sentenced to life without parole. Records of psychiatric treatment after his conviction were submitted to the courts. Laws’ direct appeal had concluded before AEDPA was signed into law, but he did not petition for state habeas corpus relief until May 2000, three years and one month after his statute of limitations had run. California courts denied his petition as untimely, and in February 2002, he filed a federal petition for writ of habeas corpus. The state moved to dismiss his petition as untimely, and with the help of a jailhouse lawyer Laws alleged that

¹⁰⁰¹ *Id.* at 24.

¹⁰⁰² *Id.* (citing *Lewis v. Casey*, 518 U. S. 343, 355 (1996)).

¹⁰⁰³ 334 F.3d 433 (2003).

¹⁰⁰⁴ *Id.* at 438.

¹⁰⁰⁵ *Id.* at 439.

¹⁰⁰⁶ *Id.* at 437 (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000), and *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000)).

his impaired psychiatric condition “deprived [Laws] of any kind of consciousness.”¹⁰⁰⁷ The district court adopted the magistrate judge’s finding that Laws’ did not show that his mental illness made it “impossible” for him to file his habeas, and his petition was denied.¹⁰⁰⁸ The court had held that because mental incompetency is a condition “that is, obviously, an extraordinary circumstance beyond the prisoner’s control,” it would justify equitable tolling of AEDPA’s statute of limitations.¹⁰⁰⁹ Construing Laws’ *pro se* filing liberally, the court found that it was enough that Laws alleged “mental incompetency” in a verified pleading.¹⁰¹⁰ Therefore, “the district court should then have allowed discovery or ordered expansion of the factual record.”¹⁰¹¹

IV. Deference to State Court Adjudications

Before AEDPA was enacted, the primary procedural struggle in habeas corpus litigation was procedural default. If both the facts and legal basis of the prisoner’s claim were fairly presented to the state courts, a federal court could review the prisoner’s claims *de novo*, subject only to the rebuttable and limited presumption that state court fact findings are presumed correct. A prisoner who procedurally defaulted a constitutional claim—either by violating or bypassing a clearly announced and regularly followed procedure—was not entitled to federal review unless the petitioner could demonstrate cause-and-prejudice or show that the ends of justice would be served by reaching the merits of the claim. As discussed in previous chapters, these exceptions are narrowly crafted to ensure that they do not undermine the general rule that procedurally defaulted claims are barred from federal review. This framework remains in place—and, in some respects, strengthened—under AEDPA. Before AEDPA, petitioners sought to establish that their claims had been adjudicated on the merits in state court to ensure federal review.

Section 2254(d) inverts this scenario. In 2011, the Court briefly explained AEDPA’s Catch-22 for prisoners seeking habeas relief:

If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in

¹⁰⁰⁷ *Laws v. Lamarque*, 351 F.3d 919, 921 (9th Cir. 2003).

¹⁰⁰⁸ *Id.* at 922.

¹⁰⁰⁹ *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc).

¹⁰¹⁰ *Laws v. Lamarque*, *supra*, at 923.

¹⁰¹¹ *Id.* The court noted that in a similar case, *Nara v. Frank*, 264 F.3d 310, 319-20 (3^d Cir. 2001), overruled in part on other grounds by *Carey v. Saffold*, 536 U.S. 214 (2002), there was “no evidence in the record that Nara’s current mental status affected his ability to present his habeas petition,” but there was evidence “of ongoing, if not consecutive, periods of mental incompetency.” *Id.* at 320. This was sufficient to entitle petitioner to further fact development and a hearing. *Laws v. Lamarque*, *supra*, at 924.

federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies.¹⁰¹²

Thus, if a claim was adjudicated on the merits in state court, AEDPA prohibits the federal courts from adjudicating those claims unless they fall within narrow exceptions. The deference provision of 28 U.S.C. § 2254(d) has posed a substantial barrier for prisoners who have been unjustly convicted and sentenced:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--*
 - (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or*
 - (2) resulted in a decision that was based on an *unreasonable determination of the facts in light of the evidence presented in the State court proceeding.*¹⁰¹³

This language has no roots in previous habeas corpus jurisprudence and was not based on any previous habeas corpus reform proposal.¹⁰¹⁴ The absence of historical grounding for this language is one reason that AEDPA has been widely criticized for its poor drafting.”¹⁰¹⁵

Sharp criticism has been directed at the deference clause, which one jurist has called among “the worst aspects of AEDPA.”¹⁰¹⁶ The only cases in which § 2254(d) will make a difference are those in which a state court refuses to remedy a constitutional violation. Could Congress have

¹⁰¹² Harrington v. Richter, 562 U.S. 86, 103 (2011).

¹⁰¹³ 28 U.S.C. § 2254(d).

¹⁰¹⁴ See Blume, *The Hype and the 'Bite'*, *supra* n. 28, p. 272.

¹⁰¹⁵ LARRY YACKLE, FEDERAL COURTS: HABEAS CORPUS 57 (2003). Professor Yackle does not pull punches: “The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar.” Professor James Liebman agrees, stating, “AEDPA complicates review.., because of its poor drafting.” James S. Liebman, *An “Effective Death Penalty”?* AEDPA and Error Detection in Capital Cases, 67 BROOK. L. REV. 411, 426 (2001).

¹⁰¹⁶ Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1225 (2015).

intended by this language to prohibit a federal court from granting habeas relief to a prisoner who was convicted in violation of the Constitution? AEDPA’s authors and sponsors denied such intent. Senator Arlen Specter said that AEDPA would continue to allow the “detached, objective review that federal courts give.”¹⁰¹⁷ Henry Hyde assured opponents that a federal judge “always reviews the State court decision to see if it is in conformity with established Supreme Court precedence, or if it has been misapplied.”¹⁰¹⁸ In his statement upon signing the bill, President Bill Clinton stated, “[AEDPA] would be subject to serious constitutional challenge if it were read to preclude the Federal courts from making an independent determination about ‘what the law is’ in cases within their jurisdiction.”¹⁰¹⁹ Clinton believed any alternative approach would contravene Article III of the U.S. Constitution.¹⁰²⁰ Presidential opinions on the meaning of law carry no weight in Supreme Court analyses of legislative intent, and Clinton’s attempt to shape AEDPA’s interpretation did little to enhance his legacy.¹⁰²¹

A. Section 2254(d)(1): “Contrary to or an unreasonable application of clearly established Federal Law.”

The Court’s first decision interpreting § 2254(d), *Williams v. Taylor*,¹⁰²² involved a death penalty case in which defense lawyers waited until the week before trial to investigate and plan their presentation in the sentencing phase of trial. Williams had been convicted of a residential robbery in which he killed an elderly man, Harris Stone, with a mattock and stole money from his wallet. He had a history of armed robbery, and after the Stone homicide, he committed separate violent assaults on two women, leaving one in a vegetative state. In the penalty stage of Williams’ trial, the prosecution presented evidence of Williams’ extensive criminal record. In response, the defense called Williams’ mother and two neighbors who described him as “a nice boy” and played a recording of a psychiatrist’s testimony that in one robbery, Williams used an empty gun so he would not hurt anyone.¹⁰²³ The main defense argument was that Williams had turned himself in and confessed, but Justice Stevens noted that “[t]he weight of defense counsel’s closing... was

¹⁰¹⁷ Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act’s Restrictions on Habeas Corpus Are Wrong*, 37 Seattle U. L. Rev. 55, 74-75 (2013) (alteration in original) (quoting 142 Cong. Rec. S3472 (daily ed. Apr. 17, 1996) (statements of Sen. Specter)).

¹⁰¹⁸ *Id.* (quoting 42 Cong. Rec. H3602 (daily ed. Apr. 18, 1996) (statements of Rep. Hyde)).

¹⁰¹⁹ President William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), available at <http://www.presidency.ucsb.edu/ws/?pid=52713>.

¹⁰²⁰ *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803)).

¹⁰²¹ See, e.g., Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners’ Rights for Political Gain*, THE INTERCEPT, May 4, 2016, <https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/> (last visited Feb. 21, 2025).

¹⁰²² 529 U.S. 362 (2000).

¹⁰²³ *Id.* at 367-68.

devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life." Not surprisingly, the jury returned a sentence of death.¹⁰²⁴

Williams had more robust representation in his state habeas corpus proceedings. New counsel alleged that Williams' trial counsel was ineffective for failing to conduct a reasonable investigation into his life history and presented compelling mitigating evidence of what such an investigation would have uncovered. Justice Stevens detailed Williams' "nightmarish childhood" including maltreatment, abuse, and neglect, and discussed his borderline intellectual disability by repeated head injuries and organic mental impairments.¹⁰²⁵ State habeas counsel also presented testimony through the same psychiatrist who testified at trial that in a structured prison environment, Williams posed no danger to society.¹⁰²⁶ The Virginia habeas judge—the same judge who presided over Williams' trial—heard two days of mitigating evidence, and found that trial counsel's performance was "below the range expected of reasonable, professional competent assistance of counsel," which violated *Strickland v. Washington*.¹⁰²⁷ The habeas judge further stated that if counsel had performed effectively, "there is a reasonable probability that the result of the sentencing phase would have been different."¹⁰²⁸

The Virginia Supreme Court rejected the trial court's decision, ruling that it placed undue "emphasis on mere outcome determination."¹⁰²⁹ The Court ruled that Williams' claim was governed by *Lockhart v. Fretwell*,¹⁰³⁰ which had overturned the grant of habeas corpus relief based on a *Strickland* claim, grounded on the Arkansas state trial attorney's failure to object to aggravating evidence based on an Eighth Circuit's decision that was subsequently overruled by the Supreme Court. The Virginia Supreme Court wrote that in light of Williams' criminal history, the new mitigating evidence "barely would have altered the profile of this defendant that was presented to the jury."¹⁰³¹ The court did not address the trial court's finding that counsel's performance fell below the minimum standard of performance for attorneys in criminal cases.¹⁰³²

The federal district court agreed with the trial court and granted habeas relief, applying *Strickland's* familiar two-pronged deficient performance and prejudice standard.¹⁰³³ The Fourth

¹⁰²⁴ *Id.* at 369 and n.2.

¹⁰²⁵ *Id.* at 395. Also see *Id.* at 370.

¹⁰²⁶ *Id.* at 370-71.

¹⁰²⁷ 466 U.S. 668 (1984).

¹⁰²⁸ *Williams v. Taylor*, *supra*, at 371.

¹⁰²⁹ *Id.* at 397 (quoting *Williams v. Warden*, 254 Va. 16, 26-27, 487 S.E.2d 194, 200 (1997)).

¹⁰³⁰ 506 U.S. 364 (1993).

¹⁰³¹ *Williams v. Taylor*, *supra*, at 371-72.

¹⁰³² *Id.* at 372.

¹⁰³³ *Id.* at 373.

Circuit reversed, holding that § 2254(d)(1) prohibited relief unless the state court “decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.”¹⁰³⁴ Like the Virginia Supreme Court, the Court of Appeals assumed, without deciding, that trial counsel’s performance was deficient.

The Supreme Court granted certiorari to address the §2254(d) question. Only four justices agreed with Justice Stevens’ decision that interpreted § 2254(d) as a legislative enactment of *Teague v. Lane*’s retroactivity standard. On the meaning of § 2254(d), Justice O’Connor’s opinion—joined by four other justices—represents the opinion of the Court. However, Part IV of Justice Stevens’ opinion reversing the Court of Appeals garnered the vote of six justices—Justice O’Connor and Justice Kennedy agreed that Terry Williams should receive a new trial, even under the new § 2254(d) standard.

Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, argued persuasively that § 2254(d) simply intended to codify *Teague v. Lane*’s¹⁰³⁵ standard for the retroactivity of Supreme Court decisions announcing new rules. In their view, “it is ‘emphatically the province and duty’” of judges appointed pursuant to Article III of the Constitution to “‘say what the law is.’”¹⁰³⁶ According to the minority opinion, “A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.”¹⁰³⁷ Justice Stevens reasoned that if Congress had intended to cede that power to the states, “we believe it would have spoken with much greater clarity than is found in the text of AEDPA.”¹⁰³⁸ The fact that the word “deference” never appears in the statute is evidence that Congress did not intend to require federal courts to defer to the legal conclusions of state courts. According to Justice Stevens, AEDPA has plenty of other provisions that give effect to its mood that federal habeas corpus cases proceed more rapidly and with appropriate respect to state adjudication.¹⁰³⁹ Justice Stevens argued that Congress did not intend to create a system in which federal law “might be applied by the federal courts one way in Virginia and another way in California.”¹⁰⁴⁰ Although five justices disagreed with Justice Stevens, the Court’s recent decision in *Loper-Bright Enterprises v. Raimondo*¹⁰⁴¹ used nearly identical analysis to declare that it is

¹⁰³⁴ *Id.* at 374, quoting *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998).

¹⁰³⁵ 489 U.S. 288 (1989).

¹⁰³⁶ *Williams v. Taylor*, 529 U.S. 362, 377 (2000), quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803).

¹⁰³⁷ *Id.*

¹⁰³⁸ *Id.*

¹⁰³⁹ *Id.* at 386-387.

¹⁰⁴⁰ *Id.* at 389.

¹⁰⁴¹ *Loper-Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024)

unconstitutional to require federal courts to defer to decisions of federal regulatory agencies. Prominent legal scholars suggest that the Court’s approach to § 2254(d) should be modified accordingly.¹⁰⁴²

Because Parts III and IV of Justice Stevens’ opinion represent the majority view of the Court with respect to the merits of Williams’ ineffective-assistance-of-counsel claim, those are set out first, followed by the portions of Justice O’Connor’s opinion which represent the majority view of the Court on the interpretation of § 2254(d).

WILLIAMS V. TAYLOR

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Parts II and V. ^{*1043}

I

The questions presented are whether Terry Williams’ constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” within the meaning of 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III). We answer both questions affirmatively.

* * * *

II

The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; the amendment does not alter the underlying grant of jurisdiction in § 2254(a). When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). At the core of this power is the federal courts' independent responsibility -- independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States -- to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the states would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important

¹⁰⁴² Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 COLUM. HUM. RTS. L. REV. 54 (2025) (forthcoming; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093)

¹⁰⁴³ * JUSTICE SOUTER, JUSTICE GINSBURG and JUSTICE BREYER join Justice Stevens’ opinion in its entirety. JUSTICE O’CONNOR and JUSTICE KENNEDY join Parts I, III, and IV of this opinion.

change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.

The "clearly established law" requirement

In *Teague v. Lane*, 489 U.S. 288 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague* -- which remains the law -- and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind.¹⁰⁴⁴ [Court's n. 11] It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

* * * *

Our disagreement with Justice O'Connor about the precise meaning of the phrase "contrary to," and the word "unreasonable," is, of course, important, but should affect only a narrow category of cases. The simplest and first definition of "contrary to" as a phrase is "in conflict with." Webster's Ninth New Collegiate Dictionary 285 (1983). In this sense, we think the phrase surely capacious enough to include a finding that the state-court "decision" is simply "erroneous" or wrong. (We hasten to add that even "diametrically different" from, or "opposite" to, an established federal law would seem to include "decisions" that are wrong in light of that law.) And there is nothing in the phrase "contrary to" -- as Justice O'Connor appears to agree -- that implies anything less than independent review by the federal courts. Moreover, state-court decisions that do not "conflict" with federal law will rarely be "unreasonable" under either her reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated. Our difference is as to the cases in which, at first-blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is "unreasonable" within the meaning of the act even though that conclusion was not immediately apparent.

¹⁰⁴⁴ [Court's note 11] It is not unusual for Congress to codify earlier precedent in the habeas context. Thus, for example, the exhaustion rule applied in *Ex parte Hawk*, 321 U.S. 114 (1944) (*per curiam*), and the abuse of the writ doctrine applied in *Sanders v. United States*, 373 U.S. 1 (1963), were later codified. See 28 U.S.C. § 2254(b) (1994 ed., Supp. III) (exhaustion requirement); 28 U.S.C. § 2254, Rule 9(b), Rules Governing § 2254 Cases in the United States District Courts. A previous version of § 2254, as we stated in *Miller v. Fenton*, 474 U.S. 104 (1985), "was an almost verbatim codification of the standards delineated in *Townsend v. Sain*, 372 U.S. 293 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition."

In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody -- or, as in this case, his sentence of death -- violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.

* * * *

The "contrary to, or an unreasonable application of," requirement

The message that Congress intended to convey by using the phrases, "contrary to" and "unreasonable application of" is not entirely clear. The prevailing view in the Circuits is that the former phrase requires de novo review of 'pure' questions of law and the latter requires some sort of "reasonability" review of so-called mixed questions of law and fact. [citations omitted]

We are not persuaded that the phrases define two mutually exclusive categories of questions. Most constitutional questions that arise in habeas corpus proceedings -- and therefore most "decisions" to be made -- require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed. For example, an erroneous conclusion that particular circumstances established the voluntariness of a confession, or that there exists a conflict of interest when one attorney represents multiple defendants, may well be described either as "contrary to" or as an "unreasonable application of" the governing rule of law. Cf. *Miller v. Fenton*, 474 U.S. 104 (1985); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980). In constitutional adjudication, as in the common law, rules of law often develop incrementally as earlier decisions are applied to new factual situations. See *Wright*, 505 U.S. at 307 (Kennedy, J., concurring). But rules that depend upon such elaboration are hardly less lawlike than those that establish a bright-line test.

* * * *

The statutory text likewise does not obviously prescribe a specific, recognizable standard of review for dealing with either phrase. Significantly, it does not use any term, such as "de novo" or "plain error," that would easily identify a familiar standard of review. Rather, the text is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case. The suggestion that a wrong state-court "decision" -- a legal judgment rendered "after consideration of *facts, and . . . law*," Black's Law Dictionary 407 (6th ed. 1990) (emphasis added) -- may no longer be redressed through habeas (because it is unreachable under the "unreasonable application" phrase) is based on a mistaken insistence that the § 2254(d)(1) phrases have not only independent, but mutually exclusive, meanings. Whether or not a federal court can issue the writ "under [the] 'unreasonable application' clause," the statute is clear that habeas may issue under § 2254(d)(1) if

a state court "decision" is "contrary to . . . clearly established Federal law." We thus anticipate that there will be a variety of cases, like this one, in which both phrases may be implicated.

* * * *

On the other hand, it is significant that the word "deference" does not appear in the text of the statute itself. Neither the legislative history, nor the statutory text suggests any difference in the so-called "deference" depending on which of the two phrases is implicated.¹⁰⁴⁵ [Court's n. 13] Whatever "deference" Congress had in mind with respect to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error. As Judge Easterbrook noted with respect to the phrase "contrary to":

"Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." Lindh, 96 F.3d at 869.

* * * *

In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody -- or, as in this case, his sentence of death -- violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.

III

* * * *

It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S. at 308

¹⁰⁴⁵ [Court's n. 13] As Judge Easterbrook has noted, the statute surely does not require the kind of "deference" appropriate in other contexts: "It does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), depends on delegation. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). Congress did not delegate interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. 'Deference' to the jurisdictions bound by those constraints is not sensible." *Lindh v. Murphy*, 96 F.3d 856, 868 (CA7 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997).

(Kennedy, J., concurring), obviates neither the clarity of the rule nor the extent to which the rule must be seen as “established” by this Court. This Court’s precedent “dictated” that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams’ ineffective-assistance claim. *Teague*, 489 U.S. at 301. And it can hardly be said that recognizing the right to effective counsel “breaks new ground or imposes a new obligation on the States,” *ibid*. Williams is therefore entitled to relief if the Virginia Supreme Court’s decision rejecting his ineffective-assistance claim was either “contrary to, or involved an unreasonable application of,” that established law. It was both.

IV

* * * *

We are . . . persuaded that the Virginia trial judge correctly applied both components of [the *Strickland*] standard to Williams’ ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards -- a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.* at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings,¹⁰⁴⁶ that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.

Counsel failed to introduce available evidence that Williams was “borderline mentally retarded” and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams’ commendations for helping to crack a prison drug ring and for returning a guard’s missing wallet, or the testimony of prison officials who described Williams as among the inmates “least likely to act in a violent, dangerous or provocative way.” Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that

¹⁰⁴⁶ [Court’s footnote 19] Juvenile records contained the following description of his home:

“The home was a complete wreck There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.”

Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system -- for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980).

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland*. After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a *per se* approach to the prejudice element" that placed undue "emphasis on mere outcome determination." Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

The Virginia Supreme Court's own analysis of prejudice reaching the contrary conclusion was thus unreasonable in at least two respects. First, as we have already explained, the State Supreme Court mischaracterized at best the appropriate rule, made clear by this Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution. While it may also have conducted an "outcome determinative" analysis of its own, it is evident to us that the court's decision turned on its erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel. Its analysis in this respect was thus not only "contrary to," but also, inasmuch as the Virginia Supreme Court relied on the inapplicable exception recognized in *Lockhart*, an "unreasonable application of" the clear law as established by this Court.

Second, the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation. See *Clemons v. Mississippi*, 494 U.S. 738, 751-752 (1990). This error is apparent in its consideration of the additional mitigation evidence developed in the postconviction proceedings. The court correctly found that as to "the factual part of the mixed question," there

was “really . . . no . . . dispute” that available mitigation evidence was not presented at trial. As to the prejudice determination comprising the “legal part” of its analysis, it correctly emphasized the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance.

But the state court failed even to mention the sole argument in mitigation that trial counsel did advance -- Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. See *Boyde v. California*, 494 U.S. 370, 387 (1990). The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

V

In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence. It follows that the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Williams' constitutional right to the effective assistance of counsel as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), was violated.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Part II (except as to the footnote), concurred in part, and concurred in the judgment.¹⁰⁴⁷

* * * *

¹⁰⁴⁷ JUSTICE KENNEDY joins this opinion in its entirety. THE CHIEF JUSTICE and JUSTICE THOMAS join this opinion with respect to Part II. JUSTICE SCALIA joins this opinion with respect to Part II, except as to the footnote.

Justice Stevens arrives at his erroneous interpretation [of § 2254(d)] by means of one critical misstep. He fails to give independent meaning to both the "contrary to" and "unreasonable application" clauses of the statute. See, *e.g.*, *ante*, at 19 ("We are not persuaded that the phrases define two mutually exclusive categories of questions"). By reading § 2254(d)(1) as one general restriction on the power of the federal habeas court, Justice Stevens manages to avoid confronting the specific meaning of the statute's "unreasonable application" clause and its ramifications for the independent-review rule. It is, however, a cardinal principle of statutory construction that we must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,*" or (2) "*involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.*" (Emphases added.)

* * * *

The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit's interpretation of the "contrary to" clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.* at 694. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-

assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as “diametrically different” from, “opposite in character or nature” from, or “mutually opposed” to *Strickland*, our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not “mutually opposed” to *Strickland* itself.

Justice Stevens would instead construe § 2254(d)(1)'s “contrary to” clause to encompass such a routine state-court decision. That construction, however, saps the “unreasonable application” clause of any meaning. If a federal habeas court can, under the “contrary to” clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the “unreasonable application” clause becomes a nullity. We must, however, if possible, give meaning to every clause of the statute. Justice Stevens not only makes no attempt to do so, but also construes the “contrary to” clause in a manner that ensures that the “unreasonable application” clause will have no independent meaning. See *ante*, at 21, 24-25. We reject that expansive interpretation of the statute. Reading § 2254(d)(1)'s “contrary to” clause to permit a federal court to grant relief in cases where a state court's error is limited to the manner in which it *applies* Supreme Court precedent is suspect given the logical and natural fit of the neighboring “unreasonable application” clause to such cases.

The Fourth Circuit's interpretation of the “unreasonable application” clause of § 2254(d)(1) is generally correct. That court held in *Green* that a state-court decision can involve an “unreasonable application” of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision “involving an unreasonable application of . . . clearly established Federal law.” Indeed, we used the almost identical phrase “application of law” to describe a state court's application of law to fact in the certiorari question we posed to the parties in *Wright [v. West]*, 505 U.S. 277 (1992).

* * * *

B

There remains the task of defining what exactly qualifies as an “unreasonable application” of law under § 2254(d)(1). The Fourth Circuit held in *Green* that a state-court decision involves an “unreasonable application of . . . clearly established Federal law” only if the state court has applied federal law “in a manner that reasonable jurists would all agree is unreasonable.” The

placement of this additional overlay on the “unreasonable application” clause was erroneous. It is difficult to fault the Fourth Circuit for using this language given the fact that we have employed nearly identical terminology to describe the related inquiry undertaken by federal courts in applying the nonretroactivity rule of *Teague*. . . . Defining an “unreasonable application” by reference to a “reasonable jurist,” however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation’s jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner’s case. The “all reasonable jurists” standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its “reasonable jurist” standard in just such a subjective manner. See *Drinkard v. Johnson*, 97 F.3d 751, 769 (1996) (holding that state court’s application of federal law was not unreasonable because the Fifth Circuit panel split 2-1 on the underlying mixed constitutional question), cert. denied, 520 U.S. 1107 (1997). As I explained in *Wright* with respect to the “reasonable jurist” standard in the *Teague* context, “even though we have characterized the new rule inquiry as whether “reasonable jurists” could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is ‘objective,’ and the mere existence of conflicting authority does not necessarily mean a rule is new.” 505 U.S. at 304 (citation omitted).

The term “unreasonable” is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today’s opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Our opinions in *Wright*, for example, make that difference clear. Justice Thomas’ criticism of this Court’s subsequent reliance on *Brown* turned on that distinction. The Court in *Brown*, Justice Thomas contended, held only that a federal habeas court must determine whether the relevant state-court adjudication resulted in a “‘satisfactory conclusion.’” 505 U.S. at 287 (quoting *Brown*, 344 U.S. at 463). In Justice Thomas’ view, *Brown* did not answer “the question whether a ‘satisfactory’ conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*.” 505 U.S. at 287 (emphases in original). In my separate opinion in *Wright*, I made the same distinction, maintaining that “a state court’s *incorrect* legal determination has [never] been allowed to stand because it was *reasonable*. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.” *Id.* at 305 (emphases added). In § 2254(d)(1), Congress specifically used the word “unreasonable,” and not a term like “erroneous” or “incorrect.” Under § 2254(d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied -- the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

III

Although I disagree with Justice Stevens concerning the standard we must apply under § 2254(d)(1) in evaluating Terry Williams' claims on habeas, I agree with the Court that the Virginia Supreme Court's adjudication of Williams' claim of ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. Specifically, I believe that the Court's discussion in Parts III and IV is correct and that it demonstrates the reasons that the Virginia Supreme Court's decision in Williams' case, even under the interpretation of § 2254(d)(1) I have set forth above, was both contrary to and involved an unreasonable application of our precedent.

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). Second, I agree that the Virginia Supreme Court's decision was contrary to that clearly established federal law to the extent it held that our decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), somehow modified or supplanted the rule set forth in *Strickland*. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. See *Williams v. Warden of Mecklenburg Correctional Center*, 254 Va. 16, 25, 27, 487 S.E.2d 194, 199, 200 (1997). *Lockhart* does not support that broad proposition. As I explained in my concurring opinion in that case, "in the vast majority of cases . . . the determinative question -- whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' -- remains unchanged." 506 U.S. at 373 (quoting *Strickland*, 466 U.S. at 694). In his attempt to demonstrate prejudice, Williams did not rely on any "considerations that, as a matter of law, ought not inform the [prejudice] inquiry." *Lockhart*, *supra*, at 373 (O'Connor, J., concurring). Accordingly, as the Court ably explains, the Virginia Supreme Court's decision was contrary to *Strickland*.

To be sure, as the Chief Justice notes, the Virginia Supreme Court did also inquire whether Williams had demonstrated a reasonable probability that, but for his trial counsel's unprofessional errors, the result of his sentencing would have been different. It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice. For example, at the conclusion of its discussion of whether Williams had demonstrated a reasonable probability of a different outcome at sentencing, the Virginia Supreme Court faulted the Virginia Circuit Court for its "emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable." As the Court explains, however, Williams' case did not implicate the unusual circumstances present in cases like *Lockhart* or *Nix v. Whiteside*, 475 U.S. 157 (1986). Accordingly, for the very reasons I set forth in my *Lockhart* concurrence, the emphasis on outcome was entirely appropriate in Williams' case.

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. As the Court correctly recounts, Williams' trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation evidence. [Justice O'Connor revisited the evidence of Williams' "nightmarish childhood," parental maltreatment, borderline intellectual disability, good conduct in structured settings, and redeeming qualities described by friends and neighbors.] Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence "justified and warranted," *id.* at 155, concluded that trial counsel's deficient performance prejudiced Williams, *id.* at 424, and accordingly recommended that Williams be granted a new sentencing hearing, *ibid.* The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. . . . For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, although I disagree with the interpretation of § 2254(d)(1) set forth in Part II of Justice Stevens' opinion, I join Parts I, III, and IV of the Court's opinion and concur in the judgment of reversal.

Questions and Comments:

1. **Is lip service to the federal standard enough?** *Williams v. Taylor* makes clear that AEDPA limits the habeas remedy in significant ways. The petitioner is between a rock and a hard place; defaulted claims will be remedied except in the exceptional circumstances discussed in Chapter 4, Procedural Bars: Independent Adequate State Grounds. But the federal courts must also deny a remedy for claims adjudicated on the merits in state court, even if the state decided the issue incorrectly, unless the state court's decision is also unreasonable. The Chief Justice's dissent, joined by Justices Thomas and Scalia, argued

that because the Virginia Supreme Court at one point in its opinion correctly recited the *Strickland* holding, it was not “contrary to” firmly established federal law.¹⁰⁴⁸ Is lip service to the controlling Supreme Court case enough? Justice O’Connor’s opinion describes a federal review that is both plenary and deferential, but a string of ineffective assistance of counsel cases show the court in a tug of war over § 2254(d) and the *Strickland* standard. It is important to note that *Williams* represents the first time that the Court granted relief to a death row inmate under the *Strickland* standard, and it did so under § 2254(d). It has since rejected state court decisions denying *Strickland* claims in several other cases, while adhering to *Williams*’ interpretation of § 2254(d).¹⁰⁴⁹

2. **What is “clearly established” Federal law?** Lower courts have struggled to find the line between a state court decision that reaches an incorrect conclusion on a question of federal law, and one that reaches an unreasonably wrong conclusion. In *Lockyer v. Andrade*,¹⁰⁵⁰ the Court rejected the approach of the Ninth Circuit Court of Appeals to first review the state court decision *de novo* before applying § 2254(d). Instead, the “threshold matter” is “what constitutes ‘clearly established Federal law, as determined by the Supreme Court of the United States.’”¹⁰⁵¹ In *Williams*, the clearly established Federal law was *Strickland v. Washington*. Andrade presented an Eighth Amendment challenge to his two sentences of twenty-five years to life imprisonment for two misdemeanor stealing convictions under California’s three-strikes law. He alleged that such severe sentences for petty crimes violated the “gross disproportionality” principle of *Rummel v. Estelle*¹⁰⁵² and *Solem v. Helm*.¹⁰⁵³ The Ninth Circuit agreed, but a five-justice majority concluded that because “we have not established a clear or consistent path for courts to follow” in determining proportionality, Andrade could not point to “clearly established precedent” that was violated by California’s decision.¹⁰⁵⁴ Dissenting, Justice Souter argued that Andrade’s facts were “on all fours” with *Solem v. Helm* because Solem’s crime and conviction record were comparable to Andrade’s; Solem had six prior felonies and was sentenced to life without parole for 50 years for writing a “no account” check for \$100. Justice Souter argued, “If Andrade’s sentence is not grossly disproportionate, the principle has no meaning.”¹⁰⁵⁵ Compare *Lockyer v. Andrade* with the more recent decision in *Andrew v. White*,¹⁰⁵⁶

¹⁰⁴⁸ *Williams v. Taylor*, *supra*, at 419 (Rehnquist, C.J., dissenting).

¹⁰⁴⁹ See *Andrus v. Texas*, 590 U.S. 806 (2020), *Sears v. Upton*, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹⁰⁵⁰ 538 U.S. 63 (2003).

¹⁰⁵¹ *Id.* at 71, quoting 28 U.S.C. § 2254(d)(1).

¹⁰⁵² 445 U.S. 263 (1980).

¹⁰⁵³ 436 U.S. 277 (1983).

¹⁰⁵⁴ *Id.* at 72-73.

¹⁰⁵⁵ *Id.*, at 83 (Souter, J., dissenting).

¹⁰⁵⁶ 145 S. Ct. 75 (2025).

reversing the Tenth Circuit Court of Appeals for ruling that *Payne v. Tennessee*¹⁰⁵⁷ was not “clearly established precedent” limiting a prosecutor’s use of irrelevant evidence regarding the defendant’s extramarital affairs and inflammatory closing argument. The Court ruled that the Court of Appeals was mistaken that AEDPA constrained it to limit *Payne* to its facts; to the contrary, the Court had ruled in multiple cases in multiple contexts “that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair.”¹⁰⁵⁸ The Court stated, “A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court.”¹⁰⁵⁹ How should the Tenth Circuit proceed on remand?

3. **Statutory construction and constitutional adjudication?** Justice Stevens and Justice O’Connor differ on what it means for a state court decision to be “contrary to or an unreasonable application of” clearly established federal law. Who is right? Justice O’Connor argues that Justice Stevens’ approach interpreting “contrary to” to codify *Teague v. Lane* “saps the ‘unreasonable application’ clause of any meaning.” But does not Justice O’Connor’s application of the “unreasonableness” requirement do the same thing to the “contrary to” clause? Justice O’Connor’s approach glosses over Congress’ use of the word “or” to separate the phrases. A strictly grammatical reading of the statute would allow federal courts to grant the writ when a state court decision is contrary to clearly established federal law. Does Justice Stevens’ approach still leave the “unreasonable application” clause with work to do? Justice Stevens suggests that the latter phrase is intended for cases involving questions of mixed law and fact, such as involuntary confessions or ineffective assistance of counsel. Which interpretation presents the greatest threat to uniformity of constitutional standards? Also note Justice Stevens’ footnote regarding *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁶⁰ to support his argument that if Congress had intended to require deference to state court conclusions about federal law, it would have expressed that intent more clearly. The Supreme Court’s recent decision in *Loper-Bright Enterprises v. Raimondo*¹⁰⁶¹ overruled *Chevron* for the very reasons that Justice Stevens gave for his interpretation of § 2254(d)—that interpreting AEDPA to require deference to an incorrect state court decision on questions is unconstitutional under Article III, which places the judicial power and duty to “say what the law is” exclusively in federal courts, citing *Marbury v. Madison*.¹⁰⁶² Should *Williams v. Taylor* be reconsidered in light of *Loper Bright*?

¹⁰⁵⁷ 501 U.S. 808 (1991).

¹⁰⁵⁸ *Id.* at 83.

¹⁰⁵⁹ *Id.* at 82-83.

¹⁰⁶⁰ 467 U.S. 837 (1984).

¹⁰⁶¹ 603 U.S. 369, 412 (2024).

¹⁰⁶² 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

B. An application for habeas relief “shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings.”

Before AEDPA, it was important to have a merits ruling from the state court so that there was no procedural obstacle to federal habeas corpus review of the claim. After AEDPA, the general rule is that federal courts cannot grant habeas petitioners relief on procedurally defaulted claims but they also cannot grant habeas petitioners relief on claims adjudicated on the merits in state court, except for narrow exceptions. The key exception in AEDPA’s procedural restrictions lies in claims *not* adjudicated on the merits in state court. Consider *Johnson v. Williams*, in which the Court observed that “the language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was ‘adjudicated *on the merits* in State court.’ A judgment is normally said to have been rendered ‘on the merits’ only if it was ‘delivered after the court . . . heard and evaluated the evidence and the parties’ substantive arguments’”¹⁰⁶³ Thus, where a claim or a portion of a claim is presented to but ignored by a state court, there is no adjudication on the merits and federal courts may adjudicate that claim *de novo*.¹⁰⁶⁴ Additionally, when a state denies a claim on procedural default grounds but the habeas petitioner can show cause-and-prejudice, federal courts will review the claim *de novo* because there is no state adjudication on the merits.¹⁰⁶⁵ Finally, if a habeas petitioner succeeds in satisfying 28 U.S.C. § 2254(d)(1) or (2), federal review is *de novo*. In other words, traditional habeas corpus jurisdiction and procedure continues to exist under AEDPA’s surface. In this sense, AEDPA is more accurately viewed as a limitation on the habeas remedy, rather than a limitation of federal court jurisdiction to entertain a claim presented in a habeas petition.

Issues not decided by state courts. The deference clause of § 2254(d) applies only to claims that are adjudicated on the merits in state court. When is an issue “adjudicated on the merits” in state court? What if a state court adjudicates only part of a claim? In *Williams v. Taylor*, the Court noted multiple times that the Virginia Supreme Court did not decide the deficient performance prong of Williams’ *Strickland* claim. Both the federal district court and court of appeals assumed for the sake of argument that trial counsel’s performance was deficient. *Strickland* details that because a prisoner must meet both prongs of *Strickland*—deficient performance and prejudice—“there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”¹⁰⁶⁶ In reversing the Fourth Circuit’s judgment denying habeas corpus relief, the Court did not address *Strickland*’s performance prong using the standard under § 2254(d). Instead, it made its own determination that trial counsel “had not

¹⁰⁶³ 568 U.S. 289, 302 (2013) (quoting Black’s Law Dictionary 1199 (9th ed. 2009)).

¹⁰⁶⁴ See, e.g., *Wood v. Milyard*, 721 F.3d 1190, 1194 (10th Cir. 2013); see also *Weeks v. Angelone*, 176 F.3d 249, 258, 263 (4th Cir. 1999), aff’d on other grounds, 528 U.S. 225 (2000).

¹⁰⁶⁵ See Chapter 3.

¹⁰⁶⁶ *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

‘fulfilled their obligation to conduct a thorough investigation of the defendant's background.’¹⁰⁶⁷ The Court did so because the Maryland court did not “adjudicate” the performance prong of Williams’ ineffective assistance of counsel claim. Similarly, in *Wiggins v. Smith*,¹⁰⁶⁸ the Maryland Supreme Court denied Kevin Wiggins’ *Strickland* claim because it unreasonably concluded that trial counsel’s performance was not deficient. Because Maryland did not address the prejudice prong of Wiggins’ *Strickland* claim, the Supreme Court conducted a *de novo* review of the prejudice issue and concluded that “[t]he mitigating evidence counsel failed to discover and present in this case is powerful.”¹⁰⁶⁹ In two other cases, *Rompilla v. Beard*¹⁰⁷⁰ and *Porter v. McCollum*,¹⁰⁷¹ the Court held, “Because the state court did not decide whether [] counsel was deficient, we review this element of [the] *Strickland* claim *de novo*.”¹⁰⁷²

Summary denials. Is a summary denial an “Adjudication on the Merits”? In *Harrington v. Richter*,¹⁰⁷³ the Ninth Circuit ordered habeas relief on Joshua Richter’s claim that his trial attorney was ineffective for failing to retain and present forensic evidence on serology, pathology, and blood spatter patterns supporting Richter’s claim of a double shooting. Richter presented his claim to the California Supreme Court in a petition for writ of certiorari and included affidavits of forensic experts showing that the blood patterns at the scene were more consistent with Richter’s version of events than testimony given by the state’s witness. Without a hearing or further proceedings, the California Supreme Court rejected Richter’s petition in a one-line order. The Ninth Circuit ruled that this summary order was an unreasonable application of clearly established federal law and reviewed Richter’s *Strickland* claim *de novo*.¹⁰⁷⁴ The Supreme Court ruled that this was error:

By its terms § 2254(d) bars relitigation of any claim “adjudicated on the merits” in state court, subject only to the exceptions in §§ 2254(d)(1) and (2). There is no text in the statute requiring a statement of reasons. The statute refers only to a “decision,” which resulted from an “adjudication.” As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state

¹⁰⁶⁷ *Williams*, at 396.

¹⁰⁶⁸ 539 U.S. 510 (2003).

¹⁰⁶⁹ *Id.* at 534.

¹⁰⁷⁰ 545 U.S. 374 (2005).

¹⁰⁷¹ 558 U.S. 30 (2009).

¹⁰⁷² *Porter*, 558 U.S. 30 at 39.

¹⁰⁷³ 562 U.S. 86 (2011).

¹⁰⁷⁴ *Richter v. Hickman*, 578 F.3d 944, 952 (2009).

court explaining the state court's reasoning. [citations omitted] And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). *Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.* This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a “claim,” not a component of one, has been adjudicated.

* * * *

This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been “adjudicated on the merits.” Richter has failed to show that the California Supreme Court's decision did not involve a determination of the merits of his claim. Section 2254(d) applies to his petition.¹⁰⁷⁵

The Court examined the facts of the case in detail, noting the competing theories of the parties at trial and the strategic choices of Richter’s attorney. In assessing trial counsel’s conduct, the Court emphasized how AEDPA changes the habeas court’s assessment of a claim of ineffective assistance of counsel: “The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard.”¹⁰⁷⁶ In the absence of a reasoned state court opinion, “[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.”¹⁰⁷⁷ The Court cautioned, “It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.”¹⁰⁷⁸ Where the state court declined to provide reasons for its judgment, “The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.”¹⁰⁷⁹ Richter was not entitled to relief under this standard because the Court hypothesized justifications that could have

¹⁰⁷⁵ *Harrington v. Richter*, *supra*, at 98-100.

¹⁰⁷⁶ *Id.* at 101.

¹⁰⁷⁷ *Id.* at 102.

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ *Id.* at 105.

led the state court to conclude that Richter’s counsel performed reasonably under the circumstances.

Justice Ginsburg agreed with the Court of Appeals that Richter’s counsel “was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” However, she concurred in the result because the prosecutor’s strong case “was not significantly reduced by the affidavits offered in support of Richter’s habeas petition.”¹⁰⁸⁰ Notably, Justice Ginsburg omits any discussion of § 2254(d), suggesting that Richter’s case did not justify relief on the merits even under *de novo* review. What would a habeas petitioner have to show to obtain relief after *Harrington v. Richter*? In other litigation contexts, summary judgments are reviewed *de novo*, and the party against whom summary judgment is granted receives the benefit of review of the facts in a light most favorable to the claim, including inferences supported by the evidence. Are there circumstances under which a summary order could be unreasonable under § 2254(d)(1) or (2)? What if Richter had requested discovery or an evidentiary hearing and been denied by the state court? Would that have affected how the Court applied *Strickland*? In *Williams v. Taylor* and other *Strickland* claim cases discussed in the preceding section, the state court’s adjudication of only one prong of the *Strickland* standard resulted in *de novo* review of the other prong. How can those decisions be reconciled with *Harrington v. Richter*?

C. Plenary Review Under § 2254(d)

The Court’s application of § 2254(d)—though allowing wrong-but-reasonable state court decisions to stand—continues to resemble a plenary review process. In *Wiggins v. Smith*, for example, the Court found fault in Maryland’s application of *Strickland* only by delving deeply into the record. The misapplication of *Strickland*’s performance prong was that the state court applied *Strickland*’s presumption of reasonable trial strategy to trial counsel’s decision not to present mitigating evidence of Kevin Wiggins’ tragic childhood. This was unreasonable because trial counsel had not investigated Wiggins’ life history. Therefore, counsel’s “failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.”¹⁰⁸¹ To arrive at this conclusion, the Court had to review trial counsel’s file and note the absence of any documents referring to Wiggins’ abusive childhood. Therefore, the Court concluded that counsel’s “statements at the postconviction proceedings that he knew of this abuse, as well as of the hand-burning incident, may simply reflect a mistaken memory shaped by the passage of time.”¹⁰⁸² In applying *Strickland*’s duty of competent performance, the Court was guided not only by ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and the ABA Criminal Justice Standards-Defense Function, but also by facts in the record establishing that

¹⁰⁸⁰ *Id.* at 113-114 (Ginsburg, J., concurring).

¹⁰⁸¹ *Wiggins v. Smith*, 539 U.S. at 526.

¹⁰⁸² *Id.* at 533.

investigation into Wiggins' life history would produce mitigating evidence.¹⁰⁸³ The Court found that counsel breached their duty to investigate because they had expressed an intent to present evidence of Wiggins' background if the trial court had granted their motion to suppress.¹⁰⁸⁴ Further, the Court noted that counsel had begun to investigate Wiggins' background but abandoned their investigation "after having acquired only rudimentary knowledge of his history from a narrow set of sources."¹⁰⁸⁵ Nothing that counsel's investigation had uncovered to that point indicated "that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless."¹⁰⁸⁶ This is contrary to *Strickland*'s standard that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."¹⁰⁸⁷ Because counsel's limited investigation had not established the further investigation would be fruitless or counterproductive, counsel performed deficiently by prematurely abandoning the investigation, and the state's decision was therefore contrary to *Strickland*. The *Wiggins* decision reveals that proper application of § 2254(d) requires a meticulous review of the record.

The Court's analysis in *Porter v. McCollum*¹⁰⁸⁸ illustrates a similar plenary examination of whether the Florida Supreme Court's application of *Strickland*'s prejudice prong was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Porter was sentenced to death for the double homicide of his ex-girlfriend and her boyfriend. Porter's postconviction counsel presented evidence that Porter "was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man."¹⁰⁸⁹ Trial counsel could have presented testimony of commanding officers describing Porter's bravery; even though he was shot in the leg at the battle at Kunu-ri. Porter's unit was the last to withdraw; they engaged in a "fierce hand-to-hand fight with the Chinese" until they were given permission to withdraw.¹⁰⁹⁰ He returned to combat after treatment for his wound, and three months later fought in a battle at Chip'yong-ni, where his unit suffered more than 50% casualties.¹⁰⁹¹ Porter's Colonel describes these battles as "very trying, horrifying experiences" for which Porter was awarded the Presidential Unit Citation,

¹⁰⁸³ *Id.* at 546-47.

¹⁰⁸⁴ *Id.* at 532.

¹⁰⁸⁵ *Id.* at 524.

¹⁰⁸⁶ *Id.* at 525.

¹⁰⁸⁷ *Strickland v. Washington*, *supra*, at 690-91.

¹⁰⁸⁸ 558 U.S. 30 (2009) (per curiam).

¹⁰⁸⁹ *Id.* at 33.

¹⁰⁹⁰ *Id.* at 34.

¹⁰⁹¹ *Id.*

two Purple Hearts, the Combat Infantryman Badge, and other decorations.¹⁰⁹² This mitigating evidence was introduced in addition to Porter's traumatic childhood of parental neglect and maltreatment; Porter enlisted in the army at the age of seventeen to "escape his horrible family life."¹⁰⁹³ Postconviction counsel also presented mental health experts who found that he had cognitive deficits and brain damage "that could manifest in impulsive, violent behavior."¹⁰⁹⁴

The Florida Supreme Court declined to address the performance prong of Porter's *Strickland* claim, and instead, held that Porter was not prejudiced by trial counsel's failure to investigate because the new evidence did not establish additional statutory mitigating circumstances and because Porter's military conduct violations for going AWOL reduced the mitigating impact of his combat experiences to "inconsequential proportions."¹⁰⁹⁵ The Supreme Court found Florida's decision to be an unreasonable application of *Strickland*'s prejudice prong. First, the Court held that Porter's childhood trauma was the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability."¹⁰⁹⁶ The jury that sentenced Porter to death heard evidence of Porter's tumultuous relationship with his former girlfriend, his prior crimes, "and nothing else."¹⁰⁹⁷ The Supreme Court concluded:

Had the judge and jury been able to place Porter's life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury--and the sentencing judge—"would have struck a different balance," and it is unreasonable to conclude otherwise.¹⁰⁹⁸

The language the Court used to reach this conclusion is instructive. Florida's rejection of the mental health expert testimony failed to give "any consideration for the purpose of nonstatutory mitigation [of Porter's] brain abnormality and cognitive deficits."¹⁰⁹⁹ Therefore, "it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge."¹¹⁰⁰ Further, it was "unreasonable to discount to irrelevance the evidence of

¹⁰⁹² *Id.* at 34-35.

¹⁰⁹³ *Id.* at 33.

¹⁰⁹⁴ *Id.* at 36.

¹⁰⁹⁵ *Id.*

¹⁰⁹⁶ *Id.* at 41.

¹⁰⁹⁷ *Id.*

¹⁰⁹⁸ *Id.*, (quoting *Wiggins v. Smith*, *supra*, at 537).

¹⁰⁹⁹ *Id.* at 43.

¹¹⁰⁰ *Id.*

Porter's abusive childhood.”¹¹⁰¹ The Florida courts’ conclusion that Porter going AWOL “reduced his military record to ‘inconsequential proportions’” was an unreasonable “failure to engage with what Porter actually went through in Korea.”¹¹⁰²

Section 2254(d) unquestionably alters the mechanics of federal habeas corpus review of state judgments but does not appear to diminish the plenary nature of federal review. A habeas corpus claim is typically aimed at constitutional error at the trial level, and elements of claims tend to focus on evidence of what did or did not happen at trial, followed by a *de novo* application of federal law. AEDPA changes that—federal courts now focus on the state court’s decision with respect to the claim, including at the trial and appellate level. Consider the Court’s approach in *Frank v. Mangum*, in which the Court simply looked to whether the state allowed Leo Frank to be heard on his claim that his trial was dominated by a lynch mob, and if so, the demands of due process had been met. The Court’s decisions under § 2254(d) are far more searching than that. But post-AEDPA decisions are not the same *de novo* review of trial error claims that the Court historically required. Where is the federal habeas court’s focus now?

Wiggins and *Porter* examined state court judgments in which the state postconviction attorneys made a robust, multiple-day presentation of mitigating evidence supported by substantial evidence and documentation. The plenary nature of the Supreme Court’s review in its post-AEDPA ineffective assistance of counsel cases pressures litigation of constitutional claims back into the state courts. Like *Teague v. Lane*’s retroactivity rule, AEDPA will ‘validate “reasonable, good-faith interpretations” of the law’ by state courts.”¹¹⁰³ How does this scheme affect the duty of postconviction counsel in state courts? Is there any accommodation for under-funded state indigent defense systems? What can lawyers in such systems do to preserve their clients’ federal constitutional rights against arbitrary state action?

D. Section 2254(d)(2): The state court adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.”

AEDPA’s second exception to its bar on federal relief for constitutional claims rejected on the merits by state courts allows some inquiry into the fact-findings and processes of the state courts, though the scope of such inquiry is not clear. There is a strong argument that § 2254(d)(2) preserves the spirit of *Townsend v. Sain*,¹¹⁰⁴ which set the pre-AEDPA standard for evidentiary hearings, though the Court seems reluctant to rely on *Townsend* in its analysis of the (d)(2) standard. What is a federal court to do when faced with a state decision that flies in the face of the

¹¹⁰¹ *Id.*

¹¹⁰² *Id.* at 43-44.

¹¹⁰³ *Williams v. Taylor*, *supra* at 382 (Stevens, J., concurring) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)).

¹¹⁰⁴ 400 U.S. 446 (1963). *Townsend* required or allowed federal courts to hold an evidentiary hearing under virtually any circumstances raising questions about the thoroughness, fairness or reliability of the state court fact findings.

evidence presented in state court? The Court addressed this question in *Miller-El v. Dretke*,¹¹⁰⁵ when Texas courts disregarded clear evidence and unreasonably rejected Thomas Joe Miller-El's compelling claim that Texas prosecutors peremptorily struck black jurors for racist reasons.

Under *Batson v. Kentucky*,¹¹⁰⁶ a party at trial may challenge the other party's racially discriminatory use of peremptory challenges. A defendant can establish a prima facie Equal Protection Clause violation based on "the totality of the relevant facts" about a prosecutor's conduct during trial.¹¹⁰⁷ If that showing is made, the burden shifts to the state to come forward with a neutral explanation.¹¹⁰⁸ The trial court must then decide if, after examining all the relevant circumstances, the defense has established "purposeful discrimination."¹¹⁰⁹

At his Texas capital murder trial, Miller-El challenged the prosecutor's discriminatory use of peremptory challenges to exclude black jurors who qualified for the venire. The 108-person venire included twenty black members, but only one served on Miller-El's jury. His objection was denied, but while his case was on appeal, the Supreme Court decided *Batson v. Kentucky*, and the case was remanded for the prosecutor to comply with *Batson*'s requirement that he provide race-neutral reasons for his strikes. On remand from the direct appeal, the prosecutor claimed that he struck black jurors because their views on rehabilitation made them less likely to vote for the death penalty, and he struck one black juror because he had a brother in prison.¹¹¹⁰ The trial court accepted the prosecutor's explanations, and Miller-El pursued his *Batson* claim, unsuccessfully, in the Texas Court of Criminal Appeals and in federal habeas proceedings.¹¹¹¹ The Supreme Court granted certiorari to decide whether Miller-El was entitled to prevail on his *Batson* claim under § 2254(d).

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JUSTICE SOUTER delivered the opinion of the Court.

¹¹⁰⁵ 545 U.S. 231 (2005). This was Miller-El's second trip to the Supreme Court related to his *Batson* claim; the Court had previously overturned a Fifth Circuit Court of Appeals decision denying him a Certificate of Appealability on his claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003). That phase of Miller-El's claim is discussed in Section IV of this Chapter.

¹¹⁰⁶ 476 U.S. 79 (1986).

¹¹⁰⁷ *Id.* at 94.

¹¹⁰⁸ *Id.* at 97.

¹¹⁰⁹ *Id.* at 96-98.

¹¹¹⁰ *See Miller-El v. Dretke*, *supra*, at 241-247.

¹¹¹¹ *Miller-El v. Dretke*, 361 F.3d 849 (2004).

* * * *

II

B

This case comes to us on review of a denial of habeas relief sought under 28 U. S. C. §2254, following the Texas trial court's prior determination of fact that the State's race-neutral explanations were true, see *Purkett v. Elem*, 514 U. S. 765, 769 (1995) (*per curiam*); *Batson v. Kentucky*, *supra*, at 98, n. 21.

Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the “presumption of correctness by clear and convincing evidence.” § 2254(e)(1). The standard is demanding but not insatiable; as we said the last time this case was here, “[d]eference does not by definition preclude relief.” *Miller-El v. Cockrell*, 537 U.S., at 340.

III

A

The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. *Id.*, at 331. “The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members Happenstance is unlikely to produce this disparity.” *Id.*, at 342.

More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (in employment discrimination cases, “[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive”). . . . The prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served. *Miller-El v. Cockrell*, *supra*, at 343. The details of two panel member comparisons bear this out.¹¹¹²

¹¹¹² [Editor's note: See *Miller-El* at pp. 241-45, where the Court discussed testimony of two black jurors who were stricken, and compared the substance of their responses to similar responses from white jurors who served on the jury, finding no significant difference. The Court noted that if the responses of one juror “did make the prosecutor

* * * *

The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during voir dire to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning. Once the order is established, the panel members seated at the back are likely to escape voir dire altogether, for those not questioned by the end of the week are dismissed. As we previously explained,

“the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.” *Miller-El v. Cockrell*, *supra*, at 346.

* * * *

The next body of evidence that the State was trying to avoid black jurors is the contrasting voir dire questions posed respectively to black and nonblack panel members, on two different subjects. First, there were the prosecutors' statements preceding questions about a potential juror's thoughts on capital punishment. Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, *Miller-El* contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause. If the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation.

As we pointed out last time, for 94% of white venire panel members, prosecutors gave a bland description of the death penalty before asking about the individual's feelings on the subject. *Miller-El v. Cockrell*, 537 U.S., at 332. The abstract account went something like this:

“I feel like it [is] only fair that we tell you our position in this case. The State of Texas . . . is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to

uneasy, he should have worried about a number of white panel members he accepted with no evident reservations.” *Id.* at 244.]

present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell.”

Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it. This is an example of the graphic script:

“I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. . .

“We do that with the anticipation that, when the death penalty is assessed, at some point Mr. Thomas Joe Miller-El--the man sitting right down there --will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically our position going into this thing.”

The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist’s race but on expressed ambivalence about the death penalty in the preliminary questionnaire. Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them.

This argument, however, first advanced in dissent when the case was last here, *Miller-El v. Cockrell, supra*, at 364-368 (opinion of Thomas, J.), and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at voir dire testimony expressly discussing answers on the questionnaires, we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it.

* * * *

The State’s attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. 29 Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As

between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

* * * *

There is a final body of evidence that confirms this conclusion. We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries, as we explained the last time the case was here.

“Although most of the witnesses [presented at the Swain hearing in 1986] denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

“Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. . . . A manual entitled ‘Jury Selection in a Criminal Case’ [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial.” *Miller-El v. Cockrell*, 537 U.S., at 334-335.

Prosecutors here “marked the race of each prospective juror on their juror cards.” *Id.*, at 347.

The Court of Appeals concluded that Miller-El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. We find this conclusion as unsupportable as the “dismissive and strained interpretation” of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appeal-ability. See *Miller-El v. Cockrell*, *supra*, at 344. It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.

In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.

The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.

It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. The judgment of the Court of Appeals is reversed, and the case is remanded for entry of judgment for petitioner together with orders of appropriate relief.

It is so ordered.

Questions and Comments:

1. **The state court record:** In the dissent, Justice Clarence Thomas argued that the majority opinion went far outside the state court record in its analysis of the prosecutor’s discriminatory intent, but the majority opinion conclusively disproves the point—the Court relied on the trial transcripts and exhibits introduced or tendered to the state court. The dissent conflates “argument” with “evidence”; the argument presented in federal court was more probative and persuasive than the defense argument made in the Texas trial court. Nevertheless, the federal habeas argument was based 100% on the state court record. Should differences in the argument matter if the state court was aware of all the facts? Is there any question that a finding of non-discrimination is unreasonable based on what happened in this case? The Court used the phrase: “It blinks reality to deny that the State struck Fields and Warren. . . because they were black.”¹¹¹³ Is that a helpful description of how the § 2254(d)(2) standard should be applied?
2. **The presumption that state court fact findings are correct:** The Court’s first entry into its discussion of Miller-El’s § 2254(d)(2) argument was through the lens of the presumption of correctness codified at § 2254(e)(1), which provides, “a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” This section was not modified by AEDPA, but is rather a codification of the presumption of correctness introduced by *Townsend v. Sain*.¹¹¹⁴ It should be noted that the cases discussed in this section are all cases in which the record supporting the petitioner’s claims was fleshed out in detail in the state courts. The § 2254(d)(1) cases examined whether the state courts failed to follow faithfully clearly established federal law, while the *Miller-El* case focused on the factual portion of the petitioner’s claim—that the elimination of black venire members was racially discriminatory. The presumption of correctness is relevant to the § 2254(d)(2) question. Because the state court records supported the outcome in these cases, they do not speak to the other aspects of *Townsend*’s holding which addresses deficiencies in the state court fact-finding process and other circumstances in which the presumption should not apply. Except for the absence-of-fault requirement of *Williams (Michael) v. Taylor*,¹¹¹⁵ nothing in AEDPA suggests that other aspects of *Townsend*’s holding do not continue to apply on habeas.

For purposes of applying § 2254(d)(2), what constitutes an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding?” Is it necessary to show that the state court “blinked reality” as it did in *Miller-El v. Dretke*, or can a habeas petitioner show that the state court fact finding was deficient for other reasons, such as the denial of adequate time or resources? *Brumfield v. Cain*¹¹¹⁶ addressed this question in the context of an indigent defendant

¹¹¹³ *Id.* at 266.

¹¹¹⁴ 372 U.S. 293 (1963).

¹¹¹⁵ 529 U.S. 362 (2000).

¹¹¹⁶ 576 U.S. 305 (2015).

who was denied funds in the state court when he attempted to show that his intellectual disability rendered his death sentence unconstitutional.

BRUMFIELD V. CAIN

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Atkins v. Virginia*, 536 U. S. 304 (2002), this Court recognized that the execution of the intellectually disabled contravenes the Eighth Amendment’s prohibition on cruel and unusual punishment. After *Atkins* was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner’s claim. That decision, we hold, was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U. S. C. §2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.

I

Petitioner Kevan Brumfield was sentenced to death for the 1993 murder of off-duty Baton Rouge police officer Betty Smothers. Brumfield, accompanied by another individual, shot and killed Officer Smothers while she was escorting the manager of a grocery store to the bank.

At the time of Brumfield’s trial, this Court’s precedent permitted the imposition of the death penalty on intellectually disabled persons. See *Penry v. Lynaugh*, 492 U. S. 302, 340 (1989) (opinion of O’Connor, J.). But in *Atkins*, this Court subsequently held that “in light of . . . ‘evolving standards of decency,’” the Eighth Amendment “‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” 536 U. S., at 321 (quoting *Ford v. Wainwright*, 477 U. S. 399, 405 (1986)). Acknowledging the “disagreement” regarding how to “determin[e] which offenders are in fact” intellectually disabled, the Court left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” 536 U. S., at 317 (internal quotation marks omitted; some alterations in original).

* * * *

[Brumfield amended his] state postconviction petition to raise an *Atkins* claim. He sought an evidentiary hearing on the issue, asserting that his case was “accompanied by a host of objective facts which raise the issue of mental retardation.”

In support, Brumfield pointed to mitigation evidence introduced at the sentencing phase of his trial. He focused on the testimony of three witnesses in particular: his mother; Dr. Cecile Guin, a social worker who had compiled a history of Brumfield by consulting available records and conducting interviews with family members and teachers; and Dr. John Bolter, a clinical neuropsychologist who had performed a number of cognitive tests on Brumfield. A psychologist, Dr. Brian Jordan, had also examined Brumfield and prepared a report, but did not testify at trial. Brumfield contended that this evidence showed, among other things, that he had registered an IQ

score of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having some form of learning disability, and had been placed in special education classes. Brumfield further requested “all the resources necessary to the proper presentation of his case,” asserting that until he was able to “retain the services of various experts,” it would be “premature for [the court] to address [his] claims.”

Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed Brumfield’s petition. With respect to the request for an *Atkins* hearing, the court stated:

“I’ve looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter’s testimony, Dr. Guinn’s [sic] testimony, which refers to and discusses Dr. Jordan’s report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan’s report.

“Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn’t carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.”

After the Louisiana Supreme Court summarily denied his application for a supervisory writ to review the trial court’s ruling, *Brumfield v. State*, 885 So. 2d 580 (La. 2004), Brumfield filed a petition for habeas corpus in federal court, again pressing his *Atkins* claim. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brumfield could secure relief only if the state court’s rejection of his claim was either “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U. S. C. §§2254(d)(1), (2).

The District Court found that both of these requirements had been met. First, the District Court held that denying Brumfield an evidentiary hearing without first granting him funding to develop his *Atkins* claim “represented an unreasonable application of then-existing due process law,” thus satisfying §2254(d)(1). Second, and in the alternative, the District Court found that the state court’s decision denying Brumfield a hearing “suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceeding in violation of §2254(d)(2).”

The District Court further determined Brumfield to be intellectually disabled based on the extensive evidence it received during an evidentiary hearing. . . . This evidence included the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70,—testimony and expert reports regarding Brumfield’s adaptive behavior and “significantly limited conceptual skills,” and proof that these deficits in intellectual functioning had exhibited themselves before Brumfield reached adulthood. Thus, the District Court held, Brumfield had “demonstrated he is mentally retarded as defined by Louisiana law” and was “ineligible for execution.”

The United States Court of Appeals for the Fifth Circuit reversed. 744 F. 3d 918, 927 (2014). It held that Brumfield’s federal habeas petition failed to satisfy either of §2254(d)’s requirements. . . . We granted certiorari on both aspects of the Fifth Circuit’s §2254(d) analysis, and now vacate its decision and remand for further proceedings.

II

Before this Court, Brumfield advances both of the rationales on which the District Court relied in holding §2254(d) to be satisfied. Because we agree that the state court’s rejection of Brumfield’s request for an Atkins hearing was premised on an “unreasonable determination of the facts” within the meaning of §2254(d)(2), we need not address whether its refusal to grant him expert funding, or at least the opportunity to seek pro bono expert assistance to further his threshold showing, reflected an “unreasonable application of . . . clearly established Federal law,” §2254(d)(1).

In conducting the §2254(d)(2) inquiry, we, like the courts below, “look through” the Louisiana Supreme Court’s summary denial of Brumfield’s petition for review and evaluate the state trial court’s reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing. See *Johnson v. Williams*, 568 U. S. 289, 297, n. 1; *Ylst v. Nunnemaker*, 501 U. S. 797, 806, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). . . . [W]e train our attention on the two underlying factual determinations on which the trial court’s decision was premised—that Brumfield’s IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment.

We may not characterize these state-court factual determinations as unreasonable “merely because [we] would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U. S. 290, 301 (2010). Instead, §2254(d)(2) requires that we accord the state trial court substantial deference. If “[r]easonable minds reviewing the record might disagree’ about the finding in question, ‘on habeas review that does not suffice to supersede the trial court’s . . . determination.’” *Ibid.* (quoting *Rice v. Collins*, 546 U. S. 333, 341-342 (2006)). As we have also observed, however, “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,” and “does not by definition preclude relief.” *Miller-El v. Cockrell*, 537 U. S. 322, 340 (2003). Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

A

The state trial court’s rejection of Brumfield’s request for an *Atkins* hearing rested, first, on Dr. Bolter’s testimony that Brumfield scored 75 on an IQ test and may have scored higher on another test. These scores, the state court apparently believed, belied the claim that Brumfield was intellectually disabled because they necessarily precluded any possibility that he possessed subaverage intelligence—the first of the three criteria necessary for a finding of intellectual disability. But in fact, this evidence was entirely consistent with intellectual disability.

To qualify as “significantly subaverage in general intellectual functioning” in Louisiana, “one must be more than two standard deviations below the mean for the test of intellectual functioning.” [*State v. Williams*, 831 So. 2d 835, 853 (La. 2002)] (internal quotation marks omitted). On the Wechsler scale for IQ—the scale employed by Dr. Bolter—that would equate to a score of 70 or less.

As the Louisiana Supreme Court cautioned in *Williams*, however, an IQ test result cannot be assessed in a vacuum. In accord with sound statistical methods, the court explained: “[T]he assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement.” *Ibid.* Thus, *Williams* held, “[a]lthough Louisiana’s definition of significantly subaverage intellectual functioning does not specifically use the word ‘approximately,’ because of the SEM [(standard error of measurement)], any IQ test score has a margin of error and is only a factor in assessing mental retardation.” *Id.*, at 855, n. 29.

Accounting for this margin of error, Brumfield’s reported IQ test result of 75 was squarely in the range of potential intellectual disability. The sources on which *Williams* relied in defining subaverage intelligence both describe a score of 75 as being consistent with such a diagnosis. See AAMR, at 59; DSM-IV, at 41-42. . . . Indeed, in adopting these definitions, the Louisiana Supreme Court anticipated our holding in *Hall v. Florida*, 572 U. S. 701 (2014), that it is unconstitutional to foreclose “all further exploration of intellectual disability” simply because a capital defendant is deemed to have an IQ above 70. *Id.*, at 704; see also *id.*, at 714 (“For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual’s IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning”). To conclude, as the state trial court did, that Brumfield’s reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.

Nor was there evidence of any higher IQ test score that could render the state court’s determination reasonable. The state court claimed that Dr. Jordan, who examined Brumfield but never testified at trial, “came up with a little bit higher IQ.” At trial, the existence of such a test score was mentioned only during the cross-examination of Dr. Bolter, who had simply acknowledged the following: “Dr. Jordan rated his intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning.” And in fact, Dr. Jordan’s written report provides no IQ score. The state court therefore could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence. [citation omitted]

B

The state court’s refusal to grant Brumfield’s request for an Atkins evidentiary hearing rested, next, on its conclusion that the record failed to raise any question as to Brumfield’s “impairment . . . in adaptive skills.” That determination was also unreasonable.

The adaptive impairment prong of an intellectual disability diagnosis requires an evaluation of the individual’s ability to function across a variety of dimensions. The Louisiana Supreme Court in *Williams* described three separate sets of criteria that may be utilized in making this assessment. See 831 So. 2d, at 852-854. Although Louisiana courts appear to utilize all three of these tests in evaluating adaptive impairment, . . . for the sake of simplicity we will assume that the third of these tests, derived from Louisiana statutory law, governed here, as it appears to be the most favorable to the State. Under that standard, an individual may be intellectually disabled if he has “substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care. (ii) Understanding and use of language. (iii) Learning. (iv) Mobility. (v) Self-direction. (vi) Capacity for independent living.” *Williams*, 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. §28:381(12) (repealed 2005)).

The record before the state court contained sufficient evidence to raise a question as to whether Brumfield met these criteria. During the sentencing hearing, Brumfield’s mother testified that Brumfield had been born prematurely at a very low birth weight. She also recounted that he had been taken out of school in the fifth grade and hospitalized due to his behavior, and recalled an incident in which he suffered a seizure.

* * * *

All told, then, the evidence in the state-court record provided substantial grounds to question Brumfield’s adaptive functioning. An individual, like Brumfield, who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level, certainly would seem to be deficient in both “[u]nderstanding and use of language” and “[l]earning”—two of the six “areas of major life activity” identified in *Williams*. 831 So. 2d, at 854. And the evidence of his low birth weight, of his commitment to mental health facilities at a young age, and of officials’ administration of antipsychotic and sedative drugs to him at that time, all indicate that Brumfield may well have had significant deficits in at least one of the remaining four areas.

* * * *

Similarly, in light of the evidence of Brumfield’s deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt. An individual who points to evidence that he was at risk of “neurological trauma” at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot “process information,” has raised substantial reason to believe that he suffers from adaptive impairments.

That these facts were alone sufficient to raise a doubt as to Brumfield’s adaptive impairments is all the more apparent given that Brumfield had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim. At his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability. . . . [T]he state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield’s intellectual disability was not at issue. The court’s failure to do so resulted in an unreasonable determination of the facts.

* * * *

We hold that Brumfield has satisfied the requirements of §2254(d). The judgment of the United States Court of Appeals for the Fifth Circuit is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Relationship between § 2254(d)(2) and 2254(e):** In *Brumfield*, Justice Thomas dissented, arguing that the Court should have applied the restrictive standard of § 2254(e)—cause-plus-innocence—a threshold that Brumfield, like most habeas petitioners, would be unable to meet. The Court rejected that argument because Brumfield was not given a fair opportunity to develop his *Atkins* claim. In this respect, *Brumfield* is consistent with *Williams (Michael) v. Taylor*,¹¹¹⁷ in which the Court determined that Williams did not “fail to develop” his juror bias claim in state court because nothing put him on notice that juror bias was an issue.¹¹¹⁸ Here, Brumfield’s counsel was on notice, but he diligently sought the resources that were reasonably necessary to develop his *Atkins* claim and was denied. There is no credible argument on these facts that Brumfield failed to develop his *Atkins* claim. But what if he had failed to consult experts and obtain the records and affidavits that he submitted with his motion for expert resources in the state court? If Brumfield had not shown that his intellectual disability was a viable issue in his case, would the Court’s decision have been different? What does this say about the duties of state postconviction counsel? Notably, the Court in *Williams* highlighted that the petitioner had asked the state court for funding for an investigator to investigate possible juror claims and was denied. The Court did not view this as a deficiency in the state court proceedings, but rather, this was further evidence of Williams’ diligence and the absence of fault on his part.¹¹¹⁹
2. **Standards applied to state fact-finding:** The Court in *Brumfield* did not cite *Townsend*

¹¹¹⁷ 529 U.S. 420 (2000).

¹¹¹⁸ *Id.* at 430.

¹¹¹⁹ *Id.* at 442.

*v. Sain*¹¹²⁰ in its decision, nor did *Williams v. Taylor*, but does the analysis in those cases resemble any of the *Townsend* exceptions to the presumption of correctness? Could one argue that “the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing” or that “the merits of the factual dispute were not resolved in the state hearing”¹¹²¹ in those cases? In *Taylor v. Maddox*, the Ninth Circuit identified several circumstances in which a state court decision would be deemed unreasonable under § 2254(d)(2) because “no finding was made by the state court at all,” or because “the fact-finding process itself is defective.”¹¹²² State findings are unreasonable and not entitled to the presumption of correctness where (1) “a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence” or (2) “where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim” or (3) “where the state court has before it, yet apparently ignores, evidence that supports petitioner’s claim.”¹¹²³ Also see *Hall v. Quarterman*,¹¹²⁴ where the state court conducted a “paper hearing on mental retardation,” never gave the petitioner “the opportunity to present a full range of evidence on [a] technical issue,” and where “errors in the state court factual findings were not corrected by the Court of Criminal Appeals.”¹¹²⁵ The state court also erroneously excluded the testimony of Hall’s most crucial expert witness based on a mistaken conclusion that his testimony was inadmissible.¹¹²⁶ The Fifth Circuit Court of Appeals reversed the denial of habeas relief, finding that the state court decision was unreasonable under § 2254(d)(2), and that § 2254(e)(2) “does not constrain the district court’s discretion here because Hall diligently developed the factual basis of his claim in state court.”¹¹²⁷

E. Is 28 U.S.C. § 2254(d) Constitutional? Article III and Deference to State Court Judgments on Constitutional Questions

In *Williams (Terry) v. Taylor*, Justice Stevens wrote for a four-justice minority that 28 U.S.C. § 2254(d) could not be read to require federal courts to defer to a state court’s incorrect judgment on a question of federal constitutional law. He argued:

¹¹²⁰ 372 U.S. 293 (1963).

¹¹²¹ *Id.* at 313.

¹¹²² 366 F.3d 992, 999, 1001 (9th Cir.2004).

¹¹²³ *Id.*

¹¹²⁴ 534 F.3d 365 (5th Cir. 2008),

¹¹²⁵ *Id.* at 370-71.

¹¹²⁶ *Id.* 371.

¹¹²⁷ *Id.* at 368.

When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). At the core of this power is the federal courts' independent responsibility -- independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States -- to interpret federal law. A construction of AEDPA that would re-quire the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.¹¹²⁸

In his view, Article III required the Court to interpret § 2254(d) to preserve the power of federal courts to grant the writ of habeas corpus if the state court reached the wrong result on a question of federal constitutional law. "Whatever 'deference' Congress had in mind with respect to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error."¹¹²⁹ Justice Stevens observed that the word "deference" does not appear in § 2254, borrowing Judge Easterbrook's observation that "it does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana."¹¹³⁰

When AEDPA was enacted, the only institutionalized delegation of judicial power was found in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹¹³¹ which required federal courts to defer to an administrative agency's interpretation of federal statutes out of recognition that Congress delegated interpretive or executive power to administrative bodies created for the purpose of bringing specialized expertise to complex matters affecting public safety, health, and welfare. Justice Stevens agreed with Judge Easterbrook that no such intent can be found in AEDPA's vague language:

Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron* . . . , depends on delegation. See *Adams Fruit Co. v. Barrett*, 494 U.S.

¹¹²⁸ *Williams v. Taylor*, *supra*, at 378-79.

¹¹²⁹ *Id.* at 387.

¹¹³⁰ *Id.* at 387, n. 13 (quoting *Lindh v. Murphy*, 96 F.3d 856, 868 (CA7 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997)).

¹¹³¹ 467 U.S. 837 (1984).

638 (1990). Congress did not delegate interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. ‘Deference’ to the jurisdictions bound by those constraints is not sensible.¹¹³²

Since the *Williams v. Taylor* decision, the Supreme Court in *Loper-Bright Enterprises v. Raimondo* has overruled *Chevron*’s requirement of judicial deference to administrative decision-making because “legal interpretation . . . has been, ‘emphatically,’ ‘the province and duty of the judicial department’ for at least 221 years.”¹¹³³

Loper Bright significantly changes the legal landscape in which the Court decided *Williams v. Taylor*. Two of the country’s foremost habeas scholars ask how can it be that *Chevron* deference is dead while AEDPA’s deference lives? The answer: “Only if state judges have more authority to make constitutional law by which federal judges may be bound than federal agencies have to make sub-constitutional law by which federal judges may be bound.”¹¹³⁴ Professors Amsterdam and Liebman make a compelling case that Justice Stevens’ view of AEDPA deference is the only constitutional interpretation that is consistent with the framers’ intent. A brief passage from the conclusion of their article revisits cases and concepts discussed in the opening chapter of this book.

LOPER BRIGHT AND THE GREAT WRIT
ANTHONY G. AMSTERDAM AND JAMES S. LIEBMAN

As they declared throughout the Loper arguments, the New Constitutionalists want the Constitution back. As this article shows, the Constitution that the Framers built was designed to be a bulwark against faction, special interests, bias, and disunity. That is the Constitution Chief Justice Marshall and Justice Story staunchly defended against the Virginia courts’ resistance to the federal judiciary’s independence and to federal law’s supremacy. It is the Constitution Justice Holmes, on habeas, invoked in vain to save Leo Frank from an antisemitic mob but which he resuscitated in time to save the five *Moore v. Dempsey* defendants from “improper Verdicts in State tribunals” swayed by racist mobs. It is the Constitution Chief Justices Marshall in *Marbury*,

¹¹³² *Williams v. Taylor*, supra, at 2387, n. 13, quoting *Lindh v. Murphy*, 96 F.3d at 868.

¹¹³³ *Loper-Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (quoting *Marbury*, 5 U.S. 137, 1 Cranch, at 177).

¹¹³⁴ Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2025) (forthcoming; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093)

Taney in *Gordon*,¹¹³⁵ Chase in *Klein*,¹¹³⁶ Hughes in *Crowell*,¹¹³⁷ and Roberts in *Stern*¹¹³⁸ mustered against Congresses’ efforts to cripple the capacity of Article-III courts’ independently to decide the whole constitutional case and to carry into effect the whole constitutional law. It is the Constitution that calls the tie for the individual, not the state: the Constitution ever at risk from “politically expedient reversals and reinterpretations” and “aggressive newfound readings”¹¹³⁹ from the same evils, in short, that stirred the Loper litigators and Court to wipe *Chevron* and its seventy Supreme Court precedents and 18,000 lower court precedents off the books.

From that Constitutions’ perspective, AEDPA deference is far worse than *Chevron* deference was. Unlike AEDPA deference, *Chevron* never delegated the content, interpretation, and enforcement of the *Constitution* to non-Article-III actors. It never let those actors defend doubtful decisions by saying nothing or as little as possible about how those decisions accorded with the law. It never forced federal courts to invent reasons that non-Article III actors did not offer or to defer without first going through a process where you “don’t [just] say, ‘oh, it’s difficult’” and give up, but instead you “work hard to figure out” the law’s meaning “using every tool you can.”¹¹⁴⁰ *Chevron* deference unified federal law around a single agency’s interpretation—with some disruptions every four or eight years, perhaps—but never fragmented federal law into 30,000 pieces in the inconstant hands of the judges in every State. Yes, it put property and livelihood at risk, but never the most basic liberties of movement and daily self-rule. And life.

Questions and Comments:

1. ***Loper Bright and Williams v. Taylor***: The similarities between the Court’s reasoning in *Loper Bright* and Part II of Justice Stevens’ opinion in *Williams v. Taylor* is remarkable. Both opinions argue that requiring an Article III judge to defer to some other entity’s decision on a matter of federal law violates *Marbury v. Madison*. While *Chevron* also involves an issue of separation of powers, § 2254(d) involves the Supremacy Clause. Professors Amsterdam and Liebman are not the only scholars who believe “that § 2254

¹¹³⁵ *Gordon v. United States*, 117 U.S. 697 (1864).

¹¹³⁶ *United States v. Klein*, 80 U.S. 128 (1872).

¹¹³⁷ *Crowell v. Benson*, 285 U.S. 22 (1932).

¹¹³⁸ *Stern v. Marshall*, 564 U.S. 462 (2011).

¹¹³⁹ Brief Amicus of New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners at 23, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (No. 22-451); Brief of Petitioners at 1-2, *Loper Bright Enters. v. Raimondo*, 114 S. Ct. 2244 (2024) (No. 22-451).

¹¹⁴⁰ Transcript of Oral Argument at 12-13, 18-20, *Relentless, Inc. v. Dep’t of Com.*, 144 S. Ct. 325 (2024) (mem.) (No. 22-1219) (Kagan, J.).

and Chevron stand or fall together.”¹¹⁴¹ Is it enough to say simply that one involves administrative agency decisions and the other involves criminal law? Thus far, the tension between *Williams* and *Loper Bright* have been resolved in unpublished lower court decisions that tend to defer to pre-*Loper v. Bright* decisions rejecting constitutional challenges to § 2254(d).¹¹⁴²

2. **AEDPA and the Supremacy Clause:** Another criticism of *Williams v. Taylor*’s majority opinion requiring federal courts to defer to state court interpretations of federal law, even ones that are incorrect, is that it violates the Supremacy Clause of U.S. Const. art. VI, which provides that the Constitution, as interpreted by federal courts, binds “the Judges in every State.” The Court in *Loper Bright* explained that only Article III courts are equipped to “exercise that judgment independent of influence from the political branches” and to “construe the law with ‘[c]lear heads . . . and honest hearts,’ not with an eye to policy preferences that had not made it into the [law].”¹¹⁴³ Are these concerns more or less important in habeas corpus cases involving life and liberty?

V. Evidentiary Hearing Limitation—28 U.S.C. § 2254(e)

As the cases discussed in Chapter 7, Fact Development in Postconviction Proceedings, demonstrate, evidentiary hearings are critically important to effectuate a prisoner’s right of meaningful access to the courts; a claim without proof is no claim at all. AEDPA imposes significant limitations on federal evidentiary hearings:

- (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
 - (A) the claim relies on--

¹¹⁴¹ Kent Barnett, *How Chevron Deference Fits Into Article III*, 89 GEO. WASH. L. REV. 1143, 1184 (2021).

¹¹⁴² See, e.g., *Miles v. Floyd*, 2025 Fed. App’x 0161 (6th Cir. 2025), citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and *Agostini v. Felton*, 521 U.S. 203, 237 (1997), reasoning that it is exclusively the Supreme Court’s prerogative to overrule its own decisions. One federal district court rejected a *Loper Bright* challenge to § 2254(d), reasoning that “There is a world of difference between telling a court how to decide a case given a certain set of facts and limiting the availability of relief after a judge independently determines the existence of a right and the reach of Supreme Court precedent.” *Piper v. Jackley*, No. 5:20-CV-05074-RAL, 2025 U.S. Dist. LEXIS 55158, 2025 WL 889374 (W.D.S. Da. Filed Mar. 21, 2025), quoting *Evans v. Thompson*, 518 F.3d 1, 11 (1st Cir. 2008). In other words, the federal court can still interpret the law, AEDPA only precludes it from enforcing the law. How can this reasoning square with *Marbury v. Madison*?

¹¹⁴³ 144 S. Ct. at 2257, 2268 (quoting *The Federalist* No. 78, at 522, and 1 Works of James Wilson 363 (J. Andrews ed. 1896)).

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.¹¹⁴⁴

Williams v. Taylor, discussed in Chapter 7, held that the restrictions of § 2254(e)(2) apply only to facts which the petitioner failed to develop in state court. Diligent prisoners will continue to have their evidence heard in federal court. Prisoners who offer evidence in state court will be able to rely on that evidence on federal habeas corpus as well.¹¹⁴⁵

A. Deference and Federal Hearings: The Interplay of §§ 2254(d) and (e)

In *Cullen v. Pinholster*,¹¹⁴⁶ the Court granted certiorari to consider the relationship between the deference clause of § 2245(d) and the hearing restrictions of § 2254(e). Scott Pinholster alleged that his trial attorney performed deficiently in the penalty phase of his capital trial by presenting only one witness, his mother, who testified about his troubled childhood, and described him as “a perfect gentleman” at home.¹¹⁴⁷ Trial counsel also consulted a psychiatrist, Dr. John Stalberg, who diagnosed Pinholster as having antisocial personality disorder and “psychopathic personality traits.”¹¹⁴⁸ Such a diagnosis is damaging to defendants in the penalty phase of a death penalty trial because it can be used effectively by prosecutors to portray the defendant in a negative light,¹¹⁴⁹ and in this case, defense counsel did not present any mental health expert testimony at trial. Pinholster’s trial counsel only heard his mother’s testimony, and nothing else from the defense in

¹¹⁴⁴ 28 U.S.C. § 2254(e)

¹¹⁴⁵ See, e.g., *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011), where the federal court granted habeas corpus relief setting aside the petitioner’s death sentence based on the extensive mitigating evidence presented and unreasonably rejected by the state court. See also *Brumfield v. Cain*, *supra*, where the habeas petitioner’s diligent, well-supported request for resources which was rejected by the state courts enabled him to develop that evidence in federal court under the “unreasonable findings of fact” clause of § 2254(d)(2).

¹¹⁴⁶ 563 U.S. 170 (2011).

¹¹⁴⁷ *Id.* at 176.

¹¹⁴⁸ *Id.*

¹¹⁴⁹ See Kathleen Wayland & Sean D. O’Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guideline-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519 (2014).

the penalty phase of trial. Not surprisingly, Pinholster was sentenced to death for his role in a double homicide for a stabbing committed during a residence robbery.

Pinholster filed a state habeas corpus petition alleging ineffective assistance of counsel for failing to investigate adequately and present mitigating evidence. He presented school, medical, and legal records and affidavits of family members, and a report of a neuropsychiatrist who found that Pinholster suffered from bipolar and seizure disorders. The neuropsychiatrist also criticized Dr. Stalberg's findings. The California Supreme Court summarily denied Pinholster's petition without a hearing.

On federal habeas, Pinholster renewed his ineffective assistance of counsel claim and added that trial counsel was ineffective for failing to provide Dr. Stalberg with adequate life history information. Dr. Stalberg provided a declaration saying that these materials would have prompted him to conduct further inquiry before concluding that Pinholster was antisocial, though he stopped short of repudiating his diagnoses. Dr. Stalberg also found some evidence of brain damage from Pinholster's school records. Pinholster returned to State court to exhaust his new claim and new evidence from Dr. Stalberg, and the California Supreme Court again rejected his claim as "without merit."¹¹⁵⁰

Pinholster returned to federal court and was permitted to file an amended petition, incorporating all of his exhausted claims and supporting evidence. The district court determined that AEDPA did not apply and granted an evidentiary hearing. In addition to the neuropsychiatrist, he offered the testimony of two new medical experts who found that Pinholster had organic personality syndrome, partial epilepsy, and brain injury. They ruled out antisocial personality disorder. However, Dr. Stalberg and another psychiatrist called by the State diagnosed Pinholster with antisocial personality disorder.

The district court granted habeas corpus relief, which was reversed by a panel of the Ninth Circuit Court of Appeals. The Court of Appeals en banc reversed the panel decision and reinstated the district court's order granting the writ of habeas corpus. The Court reasoned that a hearing was not barred by 28 U.S.C. § 2254(e)(2) because the California order denying relief on Pinholster's *Strickland* claim was "was contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1).¹¹⁵¹ That court concluded that "Congress did not intend to restrict the inquiry under § 2254(d)(1) only to the evidence introduced in the state habeas court."¹¹⁵² The Supreme Court granted the warden's petition for writ of certiorari.

¹¹⁵⁰ *Id.* at 178.

¹¹⁵¹ *Id.*

¹¹⁵² Pinholster v. Ayers, 590 F.3d 651, 666 (2009).

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JUSTICE THOMAS delivered the opinion of the Court.¹¹⁵³

* * * *

We granted certiorari to resolve two questions. First, whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court. Second, whether the Court of Appeals properly granted Pinholster habeas relief on his claim of penalty-phase ineffective assistance of counsel.

II

We first consider the scope of the record for a § 2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State.

A

As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody “in violation of the Constitution or laws or treaties of the United States.” Sections 2254(b) and (c) provide that a federal court may not grant such applications unless, with certain exceptions, the applicant has exhausted state remedies.

If an application includes a claim that has been “adjudicated on the merits in State court proceedings,” § 2254(d), an additional restriction applies. Under § 2254(d), that application “shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim”:

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

This is a “difficult to meet,” *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (citation and internal quotation marks omitted). The petitioner carries the burden of proof. *Id.*, at 25.

¹¹⁵³ Justice Thomas delivered the opinion of the Court. Justice Ginsburg and Justice Kagan join only Part II.

We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time--*i.e.*, the record before the state court.

This understanding of the text is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to the state courts. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The federal habeas scheme leaves primary responsibility with the state courts . . ." *Visciotti, supra*, at 27. Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.

Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Williams v. Taylor*, 529 U.S. 362, 405, 406 (2000) (Terry Williams). If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.*, at 413. It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.

* * * *

Today, we reject that assumption and hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.⁷

B

* * * *

Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief. For example, not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims "adjudicated on the merits in State court proceedings." At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider

new evidence when deciding claims that were not adjudicated on the merits in state court. See, e.g., *Michael Williams*, 529 U.S., at 427-429.

Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §§ 2254(d)(1) and (e)(2) ensure that “[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.” *Id.*, at 437; see also *Richter*, 562 U.S., at 103 (“Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions”); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (“[T]he state trial on the merits [should be] the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing”).¹¹⁵⁴

C

Accordingly, we conclude that the Court of Appeals erred in considering the District Court evidence in its review under § 2254(d)(1). Although we might ordinarily remand for a properly limited review, the Court of Appeals also ruled, in the alternative, that Pinholster merited habeas relief even on the state-court record alone. 590 F.3d, at 669. Remand is therefore inappropriate, and we turn next to a review of the state-court record.

* * * *

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE ALITO, concurring in part and concurring in the judgment.

Although I concur in the Court's judgment, I agree with the conclusion reached in Part I of the dissent, namely, that, when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and the law on “cause and prejudice.” See *post*, at 9-12 (opinion of Sotomayor, J.).

JUSTICE BREYER, concurring in part and dissenting in part.

¹¹⁵⁴ [Court's footnote 10] Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, see n. 11, *infra*, Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim.

I join Parts I and II of the Court's opinion. I do not join Part III, for I would send this case back to the Court of Appeals so that it can apply the legal standards that Part II announces to the complex facts of this case.

Like the Court, I believe that its understanding of 28 U.S.C. § 2254(d)(1) does not leave AEDPA's hearing section, § 2254(e), without work to do. An offender who believes he is entitled to habeas relief must first present a claim (including his evidence) to the state courts. If the state courts reject the claim, then a federal habeas court may review that rejection on the basis of the materials considered by the state court. If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed.

For example, if the state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a (d) ground) an (e) hearing might be needed to determine whether the facts alleged were indeed true. Or if the state-court rejection rested on a state ground, which a federal habeas court found inadequate, then an (e) hearing might be needed to consider the petitioner's (now unblocked) substantive federal claim. Or if the state-court rejection rested on only one of several related federal grounds (*e.g.*, that counsel's assistance was not "inadequate"), then, if the federal court found that the state court's decision in respect to the ground it decided violated (d), an (e) hearing might be needed to consider other related parts of the whole constitutional claim (*e.g.*, whether the counsel's "inadequate" assistance was also prejudicial). There may be other situations in which an (e) hearing is needed as well.

In this case, however, we cannot say whether an (e) hearing is needed until we know whether the state court, in rejecting Pinholster's claim on the basis presented to that state court, violated (d). (In my view, the lower courts' analysis in respect to this matter is inadequate.)

There is no role in (d) analysis for a habeas petitioner to introduce evidence that was not first presented to the state courts. But that does not mean that Pinholster is without recourse to present new evidence. He can always return to state court presenting new evidence not previously presented. If the state court again denies relief, he might be able to return to federal court to make claims related to the latest rejection, subject to AEDPA's limitations on successive petitions. See § 2244.

I am not trying to predict the future course of these proceedings. I point out only that, in my view, AEDPA is not designed to take necessary remedies from a habeas petitioner but to give the State a first opportunity to consider most matters and to insist that federal courts properly respect state-court determinations.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join as to Part II, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and permitted therein the

introduction of new evidence in federal habeas proceedings in certain limited circumstances. See 28 U.S.C. § 2254(e)(2). Under the Court's novel interpretation of § 2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1)'s threshold obstacle to federal habeas relief--even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute to “compe[1]” this harsh result, the Court ignores a key textual difference between §§ 2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the § 2254(d)(1) inquiry. I therefore dissent from the Court's first holding.

I also disagree with the Court that, even if the § 2254(d)(1) analysis is limited to the state-court record, respondent Scott Pinholster failed to demonstrate that the California Supreme Court's decision denying his ineffective-assistance-of-counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). There is no reason for the majority to decide whether the § 2254(d)(1) analysis is limited to the state-court record because Pinholster satisfied § 2254(d)(1) on either the state- or federal-court record.

* * * *

To the limited extent that federal evidentiary hearings are available under AEDPA, they ensure that petitioners who diligently developed the factual basis of their claims in state court, discovered new evidence after the state-court proceeding, and cannot return to state court retain the ability to access the Great Writ. See *ante*, at 203-04 (Alito, J., concurring in part and concurring in judgment). “When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the ‘writ of habeas corpus plays a vital role in protecting constitutional rights.’ *Holland v. Florida*, 560 U.S. 631,649 (2010) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Allowing a petitioner to introduce new evidence at a hearing in the limited circumstance permitted by § 2254(e)(2) does not upset the balance that Congress struck in AEDPA between the state and federal courts. By construing § 2254(d)(1) to do the work of other provisions in AEDPA, the majority has subverted Congress' careful balance of responsibilities. It has also created unnecessarily a brand-new set of procedural complexities that lower courts will have to confront.

* * * *

Unlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting. The inclusion of this phrase in § 2254(d)(2) --coupled with its omission from § 2254(d)(2)'s partner provision, § 2254(d)(1) --provides strong reason to think that Congress did not intend for the § 2254(d)(1) analysis to be limited categorically to “the evidence presented in the State court proceeding.”

* * * *

Faced with situations in which a diligent petitioner offers additional evidence in federal court, the courts of appeals have taken two approaches to applying § 2254(d)(1). Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits

in state court, § 2254(d)(1) does not apply at all and the federal court may review the claim *de novo*. [citations omitted]. It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.¹¹⁵⁵

Other courts of appeals, including the court below, have struck a more considered balance. These courts have held that § 2254(d)(1) continues to apply but that new evidence properly presented in a federal hearing is relevant to the reasonableness of the state-court decision. See *Pinholster v. Ayers*, 590 F.3d 651, 668 (CA9 2009) (en banc) (“If the evidence is admissible under *Michael Williams* or § 2254(e)(2), and if it does not render the petitioner’s claims unexhausted . . . , then it is properly considered in evaluating whether the legal conclusion reached by the state habeas court was a reasonable application of Supreme Court law”); accord, *Wilson v. Mazzuca*, 570 F.3d 490, 500 (CA2 2009); *Pecoraro v. Walls*, 286 F.3d 439, 443 (CA7 2002); *Valdez v. Cockrell*, 274 F.3d 941, 952 (CA5 2001). This approach accommodates the competing goals, reflected in §§ 2254(d) and 2254(e)(2), of according deference to reasonable state-court decisions and preserving the opportunity for diligent petitioners to present evidence to the federal court when they were unable to do so in state court.

The majority charts a third, novel course that, so far as I am aware, no court of appeals has adopted: § 2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied § 2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the state’s public records Act. The disclosed documents reveal that the state withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and

¹¹⁵⁵ [Court’s footnote 5] Of course, § 2254(d)(1) only applies when a state court has adjudicated a claim on the merits. There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim. See, e.g., Reply Brief for Petitioner 10-11 (evidence withheld by the prosecutor relating to one claim may give rise to a separate claim under *Brady v. Maryland*, 373 U.S. 83 (1963)). The majority opinion does not foreclose this possibility. I assume that the majority does not intend to suggest that review is limited to the state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault of the state court itself.

prejudice to overcome the default. See *Michael Williams*, 529 U.S., at 444; see also n. 1, *supra*. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (materiality of *Brady* evidence is viewed “collectively, not item by item”). Because the state court adjudicated the petitioner’s *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence. That the majority's interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (“[I]t is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim”).

The majority responds to this anomaly by suggesting that my hypothetical petitioner “may well [have] a new claim.”¹¹⁵⁶ [Court’s fn 7] This suggestion is puzzling. New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.¹¹⁵⁷ [Court’s fn 8] The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the “new” claim to a state court. In that scenario, however, the federal court would review the purportedly “new” claim *de novo*. The majority's approach thus threatens to replace deferential review of new evidence under § 2254(d)(1) with *de novo* review of new evidence in the form of “new” claims.¹¹⁵⁸ [Court’s fn 9] Because it is unlikely that Congress intended *de novo* review--the result suggested by the majority's opinion--it must have intended for district courts to consider newly discovered evidence in conducting the § 2254(d)(1) analysis.

The majority's reading of § 2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners' claims. (“It would be contrary to [AEDPA's exhaustion requirement] to allow a petitioner to overcome an adverse state-

¹¹⁵⁶ [Court’s footnote 7] The majority declines, however, to provide any guidance to the lower courts on how to distinguish claims adjudicated on the merits from new claims.

¹¹⁵⁷ [Court’s footnote 8] Even if it can fairly be argued that my hypothetical petitioner has a new claim, the majority fails to explain how a diligent petitioner with new evidence supporting an existing claim can present his new evidence to a federal court.

¹¹⁵⁸ [Court’s footnote 9] In this vein, it is the majority's approach that “would not take seriously AEDPA's requirement that federal courts defer to state-court decisions.”

court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*”). Justice Breyer takes the same position. . . I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance, as does Justice Alito. Where I disagree with the majority is in my understanding that § 2254(e)(2) already accomplishes this result. By reading § 2254(d)(1) to do the work of § 2254(e)(2), the majority gives § 2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

* * * *

In sum, our cases reflect our recognition that it is sometimes appropriate to consider new evidence in deciding whether a petitioner can satisfy § 2254(d)(1). In reading our precedent to require the opposite conclusion, the majority disregards the concerns that motivated our decision in *Michael Williams*: Some petitioners, even if diligent, may be unable to develop the factual record in state court through no fault of their own. We should not interpret § 2254(d)(1) to foreclose these diligent petitioners from accessing the Great Writ when the state court will not consider the new evidence and could not reasonably have reached the same conclusion with the new evidence before it.

Questions and Comments:

1. **The relationship between § 2254(d) and § 2254(e):** It has always been clear that a constitutional claim consists of both a factual and a legal basis. Pinholster’s legal claim was that he was denied his Sixth Amendment right to representation by effective counsel in violation of *Strickland v. Washington*. The factual basis for his claim was that trial counsel failed to investigate adequately (deficient performance), and had counsel done so, it would have produced a far more persuasive mitigation case (prejudice). What is the practical effect of limiting the § 2254(d) inquiry to evidence that was in the state court record? The dissent argued that by limiting the § 2254(d) inquiry to evidence known to the state court, the majority opinion makes § 2254(d) do the work of § 2254(e). What is the practical effect of this holding? Will petitioners who cannot overcome § 2254(d) based on the state court record ever be able to present new evidence supporting their claims in federal court?
2. **Scope of a properly held federal hearing?** Justice Alito concurred in the result, but he agreed with the dissent that “when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d)(1) must take into account the evidence admitted at that hearing.” That scenario was not squarely before the Court in *Pinholster*. This suggests that if new evidence properly comes before the federal court, it may be considered in connection with any claim that is properly before the habeas court, including the question of whether

the petitioner can satisfy § 2254(d).

3. **No deference owed to “new” claims?** Note the back-and-forth discussion between Justice Thomas and Sotomayor regarding the issue of “new claim.” Justice Sotomayor suggested that a habeas petitioner might acquire so much new evidence supporting a claim that it becomes a “different claim” for purposes of § 2254(d). At footnote 5 of her opinion, Justice Sotomayor uses the example of a new discovery or new disclosure of exculpatory evidence withheld by the prosecution that considerably strengthens a *Brady* claim that was rejected by the state courts. Will the federal court have to defer to that state court decision, made in ignorance of all the relevant evidence? At footnote 10, Justice Thomas concedes that “Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim.” Is there a clear line between adjudicated claims that are subject to § 2254(d) and new claims that are not? A habeas petitioner’s reliance on new evidence to avoid § 2254(d) is not problem-free; there may be exhaust and procedural bar issues with the new evidence. But if the prisoner can overcome those, for example, by a showing of cause-and-prejudice, it appears that Justice Thomas and Justice Sotomayor agree that § 2254(d) would not present an obstacle to *de novo* review.
4. **What is a “new claim” for § 2254(d) purposes?** Are there circumstances other than newly discovered evidence that would present a “new claim” and thereby avoid § 2254(d) deference? Consider *Shaw v. Delo*,¹¹⁵⁹ where the Eighth Circuit Court of Appeals held that a habeas claim made in 1991 challenging a competency-to-be-executed determination made in 1987 should have been dismissed for failure to exhaust state remedies on the question of whether the petitioner was competent to be executed when he filed his habeas petition in 1991. Because the first competency determination was many years earlier, the court concluded that “Shaw asserts a new and different claim in this petition.”¹¹⁶⁰
5. **Exhausting state remedies with new evidence?** Scott Pinholster attempted to expand the scope of facts available to the federal district court by returning to state court to exhaust his new evidence; after returning to the federal district court the second time, Pinholster presented two *additional* expert witnesses whose findings were never before the state court. It was these additional expert witnesses that formed the basis for the warden’s § 2254(d) challenge. Otherwise, the federal habeas court’s decision would have been based on the same body of evidence considered by the state court. If the new expert evidence were that important to the outcome, perhaps Pinholster’s counsel should have made a third trip back to the State courts. In the second round of state habeas, the California Supreme Court clearly rejected the evidence on the merits. What if the second (or the hypothetical third) state habeas were denied on procedural grounds? Pinholster might still have an argument that the new evidence is part of the state court record, especially if state law accommodates successive motions for postconviction relief.

¹¹⁵⁹ 971 F.2d 181 (8th Cir. 1992).

¹¹⁶⁰ *Id.* at 187.

B. *Martinez v. Ryan* Cause-and-Prejudice Claims and § 2254(e)

As discussed in Chapter 5, Abuse of the Writ, the Court in *Martinez v. Ryan*¹¹⁶¹ held that ineffective assistance of counsel in an initial collateral review proceeding could satisfy the “cause” prong of the cause-and-prejudice standard for overcoming a procedural default. In the pre-AEDPA case of *Keeney v. Tamayo-Reyez*,¹¹⁶² a sharply divided Court held that a habeas petitioner who failed to develop his claim in state court was barred from presenting evidence supporting that claim in federal court unless he could show cause-and-prejudice. AEDPA put *Martinez* and *Keeney* on a collision course with § 2254(e); will ineffective assistance of postconviction counsel provide cause to excuse that counsel’s failure to investigate and present evidence? In *Shinn v. Ramirez*,¹¹⁶³ the Court granted certiorari to answer that question.

David Ramirez fatally stabbed his girlfriend and her daughter in their home and later admitted having sex with the daughter on several occasions. The jury found Ramirez guilty and sentenced him to death. In state postconviction, counsel raised several claims, but did NOT allege that trial counsel was ineffective for failing to investigate and present available mitigating evidence at sentencing.¹¹⁶⁴ However, federal habeas counsel did allege that trial counsel failed to investigate mitigating evidence and presented declarations in support of his claim. Federal counsel also alleged that Ramirez’ state postconviction counsel was ineffective for failing to investigate and raise this claim and for failing to present evidence in support of it.¹¹⁶⁵ The district court allowed Martinez to submit affidavits in support of his claim and concluded that he had satisfied the cause-and-prejudice standard to have his claim heard on the merits, but denied relief. The Ninth Circuit Court of Appeals agreed that Ramirez had shown cause-and-prejudice but remanded the case to the district court for an evidentiary hearing on the *Strickland* claim.¹¹⁶⁶ The Supreme Court granted certiorari to decide whether 28 U.S.C. § 2254(e) allows a habeas petitioner to present evidence in federal court which his state postconviction counsel negligently failed to present to the state courts.¹¹⁶⁷

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JUSTICE THOMAS delivered the opinion of the Court.

¹¹⁶¹ 566 U.S. 1 (2012).

¹¹⁶² 504 U.S. 1 (1992).

¹¹⁶³ 596 U.S. 366 (2022).

¹¹⁶⁴ *Id.* at 371.

¹¹⁶⁵ *Id.* at 373.

¹¹⁶⁶ *Ramirez v. Ryan*, 937 F. 3d 1230 (9th Cir. 2019).

¹¹⁶⁷ *Shinn v. Ramirez*, *supra*, at 371. The Court consolidated *Ramirez* with a similarly postured case presenting the same issue, *Jones v. Shinn*, 943 F. 3d 1211 (9th Cir. 2019).

The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with §2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not.

* * * *

In *Martinez*, this Court recognized a “narrow exception” to the rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution. 566 U. S., at 9. There, the Court held that ineffective assistance of state postconviction counsel may constitute “cause” to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. See *ibid.* One year later, in *Trevino v. Thaler*, 569 U. S. 413 (2013), this Court held that this “narrow exception” applies if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims. *Id.*, at 428. Otherwise, attorney error where there is no right to counsel remains insufficient to show cause. *Martinez*, 566 U. S., at 16.

There is an even higher bar for excusing a prisoner's failure to develop the state-court record. Shortly before AEDPA, we held that a prisoner who “negligently failed” to develop the state-court record must satisfy Coleman's cause-and-prejudice standard before a federal court can hold an evidentiary hearing. *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 9 (1992). In *Keeney*, we explained that “little [could] be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum.” *Id.*, at 10. And, consistent with *Coleman*, we held that evidentiary development would be inappropriate “where the cause asserted is attorney error.” 504 U. S., at 11, n. 5.

* * * *

Even though AEDPA largely displaced *Keeney*, §2254(e)(2) retained “one aspect of *Keeney*'s holding.” *Michael Williams*, 529 U. S., at 433, 432. Namely, §2254(e)(2) applies only when a prisoner “has failed to develop the factual basis of a claim.” We interpret “fail,” consistent with *Keeney*, to mean that the prisoner must be “at fault” for the undeveloped record in state court. 529 U. S., at 432. A prisoner is “at fault” if he “bears responsibility for the failure” to develop the record. *Ibid.*

III

Respondents concede that they do not satisfy §2254(e)(2)'s narrow exceptions. Nonetheless, the Court of Appeals forgave respondents' failures to develop the state-court record because, in its view, they each received ineffective assistance of state postconviction counsel. We now hold that, under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.

A

Respondents' primary claim is that a prisoner is not "at fault," *Michael Williams*, 529 U. S., at 432, and therefore has not "failed to develop the factual basis of a claim in State court proceedings," §2254(e)(2), if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner.

1

As stated above, a prisoner "bears the risk in federal habeas for all attorney errors made in the course of the representation," *Coleman*, 501 U. S., at 754, unless counsel provides "constitutionally ineffective" assistance, *Murray*, 477 U. S., at 488. And, because there is no constitutional right to counsel in state postconviction proceedings, see *Davila*, 582 U. S., at ___, 137 S. Ct. 2058 (slip op., at 6), a prisoner ordinarily must "bear responsibility" for all attorney errors during those proceedings, *Michael Williams*, 529 U. S., at 432. Among those errors, a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record.

Both before and after AEDPA, our prior cases have made this point clear. First, in *Keeney*, "material facts had not been adequately developed in the state postconviction court, apparently due to the negligence of postconviction counsel." 504 U. S., at 4 (citation omitted). We required the prisoner to demonstrate cause and prejudice to forgive postconviction counsel's deficient performance, see *id.*, at 11, and recognized that counsel's negligence, on its own, was not a sufficient cause, see *id.*, at 10, n. 5.

* * * *

In sum, under §2254(e)(2), a prisoner is "at fault" even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy §2254(e)(2)'s stringent requirements.

Respondents dispute none of this. Instead, they rely almost exclusively on *Martinez*'s holding that ineffective assistance of postconviction counsel can be "cause" to forgive procedural default of a trial-ineffective-assistance claim if a State forecloses direct review of that claim, as Arizona concededly does. See 566 U. S., at 9. Respondents contend that where, per *Martinez*, a prisoner is not responsible for state postconviction counsel's failure to raise a claim, it makes little sense to hold the prisoner responsible for the failure to develop that claim. Thus, respondents propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under §2254(e)(2).

Congress foreclosed respondents' proposed expansion of *Martinez* when it passed AEDPA. *Martinez* decided that, in the exercise of our "equitable judgment" and "discretion," it was appropriate to modify "[t]he rules for when a prisoner may establish cause to excuse a procedural default." *Id.*, at 13. Such "exceptions" to procedural default "are judge-made rules" that we may modify "only when necessary." *Dretke*, 541 U. S., at 394. Here, however, §2254(e)(2) is a statute that we have no authority to amend. "Where Congress has erected a constitutionally valid

barrier to habeas relief, a court cannot decline to give it effect.” *McQuiggin*, 569 U. S., at 402, 395 (Scalia, J., dissenting); see also *Ex parte Bollman*, 8 U.S. 75, 4 Cranch 75 (1807) (Marshall, C. J., for the Court). For example, in *McQuiggin*, we explained that we have no power to layer a miscarriage-of-justice or actual-innocence exception on top of the narrow limitations already included in §2254(e)(2). See 569 U. S., at 395-396 (majority opinion).

The same follows here. We have no power to redefine when a prisoner “has failed to develop the factual basis of a claim in State court proceedings.” §2254(e)(2). Before AEDPA, Keeney held that “attorney error” during state postconviction proceedings was not cause to excuse an undeveloped state-court record. 504 U. S., at 11, n. 5. And, in *Michael Williams*, we acknowledged that §2254(e)(2) “raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings,” 529 U. S., at 433, while reaffirming that prisoners are responsible for attorney error, see *id.*, at 432. Yet here, respondents claim that attorney error alone permits a federal court to expand the federal habeas record. That result makes factfinding more readily available than *Keeney* envisioned pre-AEDPA and ignores *Michael Williams*’ admonition that “[c]ounsel’s failure” to perform as a “diligent attorney” “triggers the opening clause of §2254(e)(2).” 529 U. S., at 439-440, 433. We simply cannot square respondents’ proposed result with AEDPA or our precedents.

* * * *

To be sure, *Martinez* recognized that state prisoners often need “evidence outside the trial record” to support their trial-ineffective-assistance claims. *Id.*, at 13. But *Martinez* did not prescribe largely unbounded access to new evidence whenever postconviction counsel is ineffective, as respondents propose. Rather, *Martinez* recognized our overarching responsibility “to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism.” *Id.*, at 9. In particular, the Court explained that its “holding . . . ought not to put a significant strain on state resources,” because a State “faced with the question whether there is cause for an apparent default . . . may answer” that the defaulted claim “is wholly without factual support.” *Id.*, at 15-16. That assurance has bite only if the State can rely on the state-court record. Otherwise, “federal habeas courts would routinely be required to hold evidentiary hearings to determine” whether state postconviction counsel’s factfinding fell short. *Murray*, 477 U. S., at 487.

* * * *

Because we have no warrant to impose any factfinding beyond §2254(e)(2)’s narrow exceptions to AEDPA’s “genera[l] ba[r on] evidentiary hearings,” *McQuiggin*, 569 U. S., at 395, we reverse the judgments of the Court of Appeals.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting.

* * * *This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner’s counsel’s failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, as *Martinez* and *Trevino* did, but to fault the same petitioner for that postconviction counsel’s failure to develop evidence in support of the trial-ineffectiveness claim. In so doing, the Court guts *Martinez*’s and *Trevino*’s core reasoning. The Court also arrogates power from Congress: The Court’s analysis improperly reconfigures the balance Congress struck in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) between state interests and individual constitutional rights.

By the Court’s telling, its holding (however implausible) is compelled by statute. Make no mistake. Neither AEDPA nor this Court’s precedents require this result. I respectfully dissent.

* * * *

There is no dispute here that respondents’ trial-ineffectiveness claims clear the procedural default hurdle under *Martinez* and *Trevino*. The question is whether a habeas petitioner can be faultless for a procedural default under *Martinez* and nonetheless barred by AEDPA’s §2254(e)(2) from seeking an evidentiary hearing in federal court, subject to exceptions not applicable here, because the petitioner “failed to develop the factual basis of [the procedurally defaulted] claim in State court proceedings.”

Precedent establishes that §2254(e)(2) incorporates a threshold, fault-based “fail[ure] to develop” standard that must be understood in conjunction with the fault-based reasoning in *Martinez*. In *Williams v. Taylor*, 529 U. S. 420 (2000), this Court examined what it means to have “failed to develop the factual basis of a claim” under §2254(e)(2). The Court concluded that this language imposes a fault-based standard, meaning that it erects a bar only to those who bear some responsibility for a lack of evidentiary development in state-court proceedings. The Court acknowledged that “fail” is “sometimes used in a neutral way, not importing fault or want of diligence.” *Id.*, at 431. As a matter of ordinary meaning, however, the Court concluded that “fail” in §2254(e)(2) connotes “some omission, fault, or negligence.” *Ibid.* The Court explained that “a person is not at fault when his diligent efforts to perform an act are thwarted” by an external force. *Id.*, at 432.

Williams found further support for its fault-based reading of “failed to develop” in pre-AEDPA cases that foreshadowed the language of §2254(e)(2). Specifically, *Williams* noted the similarity between the text of §2254(e)(2) and the language of the Court’s decision in *Keeney v. Tamayo-Reyes*, 504 U. S. 1 (1992). The *Williams* Court reasoned that when it enacted AEDPA, Congress had “raised the bar *Keeney* imposed on prisoners who were not diligent” (i.e., those who were at fault) “in state-court proceedings.” 529 U. S., at 433 (emphasis added). At the same time, however, “the opening clause of §2254(e)(2) codifies *Keeney*’s threshold standard of diligence.” *Id.*, at 434. Phrased differently, under AEDPA, “[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not ‘failed to develop’ the facts under §2254(e)(2)’s opening clause, and he will be excused from showing compliance with the balance of the subsection’s requirements.” *Id.*, at 437.

The reasoning of *Martinez* and *Trevino* applies with equal force to the threshold diligence/fault standard of *Keeney, Williams*, and §2254(e)(2). Under *Williams*, whether petitioners who satisfy *Martinez* are nevertheless subject to §2254(e)(2) turns on whether they were at fault for not developing evidence in support of their trial-ineffectiveness claims in state postconviction proceedings. All agree that a habeas petitioner is not at fault when the responsibility for an error is properly imputed to the State or to some other external factor. *Martinez* cases are among the rare ones in which attorney error constitutes such an external factor. That is because a State’s “deliberat[e] cho[ice]” to move trial ineffectiveness claims outside of direct appeal and into postconviction review “significantly diminishes prisoners’ ability to file such claims.” *Martinez*, 566 U. S., at 13. There is nothing nefarious about this choice, but it is “not without consequences.” *Ibid.* Together, *Martinez, Trevino*, and *Williams* demonstrate that when a State both provides a criminal defendant with ineffective trial counsel and decides to remove his trial-ineffectiveness claim from appellate review, postconviction counsel’s ineffectiveness cannot fairly be attributed to the defendant, and he therefore has not “failed to develop the factual basis of [his] claim.” §2254(e)(2).

Any other reading hollows out *Martinez* and *Trevino*. *Martinez* repeatedly recognized that to prove a trial-ineffectiveness claim (or even to show that it is “substantial”), habeas petitioners frequently must introduce evidence outside of the trial record. See, e.g., 566 U. S., at 13 (“Ineffective-assistance claims often depend on evidence outside the trial record”). Ineffective-assistance claims frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued. Demonstrating that counsel failed to take each of these measures by definition requires evidence beyond the trial record. See *Trevino*, 569 U. S., at 413 (observing that “the inherent nature of most ineffective assistance” claims means that the “trial court record will often fail to ‘contai[n] the information necessary to substantiate’ the claim”); Brief for Federal Defender Capital Habeas Units as Amici Curiae 4-6. Indeed, the very reason States like Arizona might choose to reserve a trial-ineffectiveness claim for a collateral proceeding is to allow development of the factual basis for the claim. *Martinez*, 566 U. S., at 13. To hold a petitioner at fault for not developing a factual basis because of postconviction counsel’s ineffectiveness in the *Martinez* context, however, would be to eliminate altogether such evidentiary development and doom many meritorious trial-ineffectiveness claims that satisfy *Martinez*. Such a rule is not only inconsistent with the reasoning of *Martinez* and *Trevino* but renders those decisions meaningless in many, if not most, cases.

* * * *

Text and precedent instruct that in States that limit review of trial-ineffectiveness claims to postconviction proceedings, habeas petitioners who receive ineffective assistance of both trial and postconviction counsel are not responsible for any failure to raise their substantial claim of trial ineffectiveness, nor for any “fail[ure] to develop” evidence in support of that claim under AEDPA’s §2254(e)(2). By holding otherwise, the Court not only extinguishes the central promise

of *Martinez and Trevino*, but it makes illusory the protections of the Sixth Amendment. I respectfully dissent.

Questions and Comments:

1. **Claims without evidence?** The net effect of *Shinn* is that petitioners can still allege ineffective assistance of postconviction counsel as cause to excuse a procedural default, but they will not be able to present evidence supporting a showing of cause. Lower courts have held that after *Shinn v. Ramirez*, proper procedure is for the district court to consider whether the underlying ineffective assistance of counsel claim succeeds based solely on the state court record.¹¹⁶⁸ This includes taking depositions and other means of discovery.¹¹⁶⁹ *Shinn v. Ramirez* is yet another decision that elevates obstacles to prisoners seeking relief from convictions based on allegations of constitutional violations. Citing *Shinn* in her dissent from yet another decision interpreting AEDPA to restrict the habeas jurisdiction of federal courts, Justice Ketanji Brown Jackson said,

Today's ruling follows a recent series of troubling AEDPA interpretations. All of these opinions have now collectively managed to transform a statute that Congress designed to provide for a rational and orderly process of federal postconviction judicial review into an aimless and chaotic exercise in futility. The route to obtaining collateral relief is presently replete with imagined artificial barriers, arbitrary dead ends, and traps for the unwary.¹¹⁷⁰

2. **Interference with counsel?** *Shinn*'s rationale for disqualifying counsel's negligence as cause does not apply to other forms of interference with the petitioner's ability to discover and present claims; evidence outside the state court record is admissible to demonstrate cause to excuse a procedural default.¹¹⁷¹ One district court found that *Shinn* does not apply where postconviction counsel's failure to develop the state court record is the result of the state's failure to fund postconviction counsel's defense,¹¹⁷² similar to the Supreme Court's

¹¹⁶⁸ *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 720 (3d Cir. 2022).

¹¹⁶⁹ *Id.* at 724.

¹¹⁷⁰ *Jones v. Hendrix*, 599 U.S. 465, 530 (2023) (Jackson, J., dissenting) (citing *Shoop v. Twyford*, 596 U. S. 811(2022), 142 S. Ct. 2037, 213 L. Ed. 2d 318, 326 (2022); *Shinn v. Martinez Ramirez*, *supra*; *Brown v. Davenport*, 596 U. S. 118 (2022), 142 S. Ct. 1510, 212 L. Ed. 2d 463, 468 (2022); *Edwards v. Vannoy*, 593 U.S. 255 (2021) 141 S. Ct. 1547, 209 L. Ed. 2d 651, 655 (2021).

¹¹⁷¹ *Mullis v. Lumpkin*, 70 F.4th 906 (5th Cir. June 19, 2023); *Eaddy v. Delbalso*, 2024 U.S. Distc. LEXIS 32450 (ED Penn., Feb. 26, 2024)

¹¹⁷² *Wessinger v. Vannoy*, 2022 U.S. Dist. LEXIS 229618 at *57 (M.D. La.) (December 20, 2022).

reasoning in *Brumfield v. Cain*. Further, § 2254(e) will not bar a federal hearing if the petitioner sought, but was denied, a hearing in state court.¹¹⁷³

3. **Exhausting new facts:** In some states, it is possible to present new evidence in a state postconviction proceeding alleging ineffective assistance of postconviction counsel or some other factor as cause to excuse a procedural default. See *Thomas v. State*,¹¹⁷⁴ finding that a Nevada district judge erred in denying a hearing on Thomas' claim that ineffective assistance of state postconviction counsel was sufficient cause to revisit a prior denial of Thomas' *Strickland* claim and remanding the case for a hearing. Exhausting new evidence in available state court proceedings is a viable solution to habeas petitioners facing *Pinholster* and *Shinn* fact-bar problems. Where a habeas petitioner's failure to exhaust state remedies is attributable to ineffective assistance of postconviction counsel, good cause is established to hold the proceedings in abeyance while the petitioner exhausts state remedies.¹¹⁷⁵

VI. Certificate of Appealability

A habeas petitioner who is denied relief in the district court does not have a right to appeal that judgment to a higher court. Before AEDPA, a prisoner was required to obtain a Certificate of Probable Cause (CPC) to Appeal. A CPC could be issued by the district court that denied habeas relief if the petitioner made "a "substantial showing of the denial of [a] federal right.""¹¹⁷⁶ A CPC was not issue-specific. Once granted, petitioners could appeal adverse judgments and brief any issue of their choosing. Although purporting to use the same substantive standard, AEDPA replaced the CPC with a Certificate of Appealability (COA) and tightened the requirement in a way that has reduced the number of appeals allowed. The statute provides:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255 [28 USCS § 2255].

¹¹⁷³ *Morris v. Beard*, 633 F.3d 185 (3rd Cir. 2011).

¹¹⁷⁴ 510 P.3d 754 (Nev. 2022).

¹¹⁷⁵ *Blake v. Baker*, 745 F.3d 977, 982-83 (9th Cir. 2014); *Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017).

¹¹⁷⁶ *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (alteration in original) (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (2d Cir. 1971)).

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).¹¹⁷⁷

This is one provision of AEDPA that the Supreme Court applied to all pending cases because AEDPA did not change the substantive standard for granting permission to appeal.¹¹⁷⁸ A court can issue a COA to allow the petitioner to appeal the denial of a claim on procedural grounds, but only if the petitioner can make a substantial showing of the denial of a constitutional right with respect to the claim itself.¹¹⁷⁹

Although § 2253(c) gives a “circuit judge or justice” authority to issue a COA, Federal Rules direct the district court to “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”¹¹⁸⁰ If a COA is denied, that decision is unappealable, but a petitioner may seek a COA from the Court of Appeals under Fed. R. App. Pro. 22. The petitioner must seek a COA from the district court before requesting one from the appellate court.¹¹⁸¹ If the district court denies a COA, the Court of Appeals can treat the petitioner’s notice of appeal as an application for a COA.

Procedures for applying for a COA vary from Circuit to Circuit. For example, the Fifth Circuit simply requires that applications for a COA must conform to Fed. R. App. P. 32(a) in form and length.¹¹⁸² The Tenth Circuit Court of Appeals, on the other hand, considers the notice of

¹¹⁷⁷ 28 U.S.C. § 2253(c).

¹¹⁷⁸ *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

¹¹⁷⁹ *Id.*

¹¹⁸⁰ Fed. R. § 2254 Cases 11(a).

¹¹⁸¹ *Brewer v. Quarterman*, 466 F.3d 344 (5th Cir. 2006), reh'g denied, 475 F.3d 25 (5th Cir. 2006), cert. denied, 552 U.S. 834 (2007); *Sims v United States*, 244 F.3d 509 (6th Cir. 2001); *United States v. Mitchell*, 216 F.3d 1126 (DC Cir. 2000).

¹¹⁸² 5th Cir. Loc. R. 22. Sixth, Seventh, Eighth and Eleventh Circuits have a similar approach, though only the Eleventh Circuit has a local rule addressing the practice. 11th Cir. R. 22-1. In practice, the courts in these circuits will entertain a motion, or consider the notice of appeal as an application for a COA.

appeal to be an application for a COA, but also requires the appellant to file a brief.¹¹⁸³ Other circuits impose time deadlines for applying for a COA.¹¹⁸⁴

Although the standard for issuing a COA spelled out in § 2253(c) is identical to the pre-AEDPA standard, AEDPA has resulted in a significant reduction in the number of cases in which appeals are allowed.¹¹⁸⁵ This could be attributable to the scenario before the Court in *Slack v. McDaniel*; where the lower court denied relief on procedural default grounds, the petitioner must show a reasonable likelihood of success on *both* the procedural hurdle and the underlying constitutional claim.

The reduction in permission to appeal could also reflect the increased frequency with which habeas petitions are denied because of the statute of limitations or other procedural grounds. Five years after AEDPA became law, Professor Liebman identified thirty prisoners on Alabama's death row whose statute of limitations lapsed because they had no counsel to represent them.¹¹⁸⁶ Ten years after AEDPA, Professor Blume estimated that thousands of prisoners were time-barred from federal habeas corpus review under AEDPA.¹¹⁸⁷ Habeas petitioners also face a more hostile legal landscape with respect to success on the merits of their claims under § 2254(d), and with respect to their ability to prove their claims under § 2254(e). Even if they could make the §2253(c) "substantial showing of a constitutional right," these prisoners would also have to show a reasonable likelihood that they could overcome the statute of limitations and other procedural barriers to relief. Looking only at death-sentenced petitioners, forty percent succeeded in obtaining

¹¹⁸³ 10th Cir. R. 22.1(a) ("Although a notice of appeal constitutes a request for a certificate of appealability, the appellant must also file a brief. The Clerk will provide pro se appellants a form for this purpose which serves as both a brief and a request for a certificate.") The Fourth Circuit has a similar provision. The appellant may file a request for a COA, which may be denied by a three-judge panel. In the alternative, if no motion is filed, the notice of appeal will be taken as a request for a COA, and the applicant will be ordered to file a brief. If the three-judge panel grants a COA, then the clerk of the court will issue a schedule for respondent's brief and any reply. 4th Cir. Local R. 22(a).

¹¹⁸⁴The Second Circuit imposes a 28-day deadline after the district court denies a COA or the filing of the notice of appeal, whichever is later. 2nd Cir. Local Rule 22.1(a). The rule also specifies the content and form of the application for COA. The Third Circuit fixes a 21-day deadline from the docketing of the appeal or the district court's denial of a COA, whichever is later, and the opposing party may file a memorandum in opposition within fourteen days. 3rd Cir. L.A.R. 22.0. The Ninth Circuit fixes time limits for seeking and responding to a request for COA. 9th Cir. R. 22-1.

¹¹⁸⁵ "In 1997, 52% of all habeas petitioners were denied permission to appeal by the federal courts of appeals. By 2004, 61% of habeas petitioners were denied a certificate of appealability." John Blume, *The Hype and the 'Bite'*, *supra* n. 28, at 286, citing ADMIN. OFFICE OF THE U.S. COURTS, 1997 JUDICIAL BUSINESS, at 104 tbl. B-5A, and ADMIN. OFFICE OF THE U.S. COURTS, 1997 JUDICIAL BUSINESS 133 tbl.C-2 (2004).

¹¹⁸⁶ James Liebman, *AEDPA and Error Detection*, *supra* n. 28, at 417, quoting Death Row Inmates Lack Lawyers, Says Legal Agency, BIRMINGHAM NEWS, Mar. 25, 2001.

¹¹⁸⁷ John Blume, *The Hype and the 'Bite'*, *supra* n. 28, at 288-89.

habeas relief before AEDPA.¹¹⁸⁸ After AEDPA, a similar study of cases between 2001 and 2006 found that prisoners received federal habeas relief in just 12.4 percent of cases.¹¹⁸⁹

A third explanation lies with the courts' application of the COA standard. The variance from one court to another in the rate at which COAs are issued suggests that the decisions are subjective. For example, one study found that outside of Texas, judges grant a COA in 70% of death penalty cases. In Texas, that rate is only 21%.¹¹⁹⁰ The Supreme Court has repeatedly chastised the Fifth Circuit for its COA practice; the most recent noteworthy example is *Buck v. Davis*.¹¹⁹¹

Duane Buck was sentenced to death in Texas for the shooting of his former girlfriend and her friend. In the same incident, he shot his stepsister, who survived. Under Texas law, in order to impose the death penalty, one of the factors the jury must find is that the defendant would present a future danger if not sentenced to death. The trial court-appointed psychologist, Dr. Walter Quijano, to conduct a future dangerousness assessment of Buck. Dr. Quijano found that Buck was unlikely to be a danger if he were sentenced to life in prison. However, in arriving at this conclusion, one of seven statistical factors considered by Dr. Quijano was race. His report regarding that factor read, "4. Race. Black: Increased probability. There is an over-representation of Blacks among the violent offenders."¹¹⁹² Knowing this, Buck's trial attorney put Dr. Quijano on the stand in the penalty stage of trial. On cross examination, the prosecutor asked Dr. Quijano, "You have determined . . . that the race factor, black, increases the future dangerousness for various complicated reasons, is that correct?" and Dr. Quijano replied, "Yes."¹¹⁹³ In closing argument, the prosecutor referenced Dr. Quijano's testimony, reminding the jury, "You heard from Dr. Quijano... who told you that... the probability did exist that [Buck] would be a continuing threat to society."¹¹⁹⁴ The jury sentenced Buck to death. Buck pursued appeals and postconviction remedies in Texas, but none of his lawyers raised a claim that trial counsel was ineffective for presenting racially inflammatory future dangerousness evidence to a Texas jury.

Dr. Quijano had testified in other cases, and while Buck's first state habeas petition was pending, one of those cases, Victor Hugo Saldano, reached the U.S. Supreme Court, which vacated the state court judgment and remanded the case.¹¹⁹⁵ Following the *Saldano* decision, the Texas

¹¹⁸⁸ James S. Liebman, Jeffrey Fagan, Valerie West, and Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995* 78 Tex. L. Rev. 1839, 1849 (2000).

¹¹⁸⁹ NANCY J. KING, ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS, at 10 (2017),

¹¹⁹⁰ *Id.* at 53.

¹¹⁹¹ 580 U.S. 100 (2017).

¹¹⁹² *Id.* at 107.

¹¹⁹³ *Id.* at 108.

¹¹⁹⁴ *Id.*

¹¹⁹⁵ *Saldano v. Texas*, 530 U. S. 1212 (2000).

Attorney General, John Cornyn, issued a public statement that “it is inappropriate to allow race to be considered as a factor in our criminal justice system.” The Attorney General conducted an audit and identified eight cases in which Dr. Quijano had testified, six of which involved opinions based on race. Buck was one of the six cases. Cornyn “confessed error, waived any available procedural defenses, and consented to resentencing in the cases of five of those six defendants.”¹¹⁹⁶ Buck was not one of them. His attorney filed a second state habeas alleging trial counsel was ineffective for calling Quijano, but that petition was denied by the Texas Court of Criminal Appeals as an abuse of the writ.¹¹⁹⁷

Buck filed a petition for federal habeas corpus in 2004; the State of Texas, now represented by a different Attorney General, contested the writ, alleging that Buck’s ineffectiveness claim was procedurally defaulted. At that time, Buck could not use ineffective assistance of postconviction counsel to excuse his procedural default because of *Coleman v. Thompson*.¹¹⁹⁸ The district court denied the claim as procedurally defaulted, and Buck’s subsequent attempts to overturn that ruling were unsuccessful. Then, in 2012, the Supreme Court decided *Martinez v. Ryan*,¹¹⁹⁹ which held that ineffective assistance of postconviction counsel could be used to show cause for failure to raise a claim of ineffective assistance of counsel.

After unsuccessfully seeking state postconviction relief yet again, Buck filed a motion under Federal Rule of Civil Procedure 60(b) to reopen his first federal habeas petition. Pursuant to *Gonzalez v. Crosby*,¹²⁰⁰ Buck argued that *Martinez* and *Trevino* removed a procedural barrier to the denial of his ineffective assistance of trial counsel claim.¹²⁰¹ He also argued that other extraordinary circumstances justified relief. The district court denied relief, concluding that Buck had failed to demonstrate extraordinary circumstances, and that trial counsel was not ineffective.¹²⁰² Buck then asked the Fifth Circuit Court of Appeals for a Certificate of Appealability, which was denied. That court concluded Buck’s case was “not extraordinary at all in the habeas context.”¹²⁰³ He then petitioned the Supreme Court for a writ of certiorari.

¹¹⁹⁶ *Id.* at 109.

¹¹⁹⁷ *Id.* at 110.

¹¹⁹⁸ 501 U.S. 722, 752-53 (1991).

¹¹⁹⁹ 566 U. S. 1 (2012). There was an additional layer to Buck’s claim; Texas allows ineffective assistance of counsel claims to be brought on direct appeal, so that arguably his postconviction motion was not an “initial collateral review proceeding” as defined in *Martinez*. Buck’s ineffectiveness-as-cause argument was not truly available to him until the Court decided in *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) that because Texas made it practically impossible to raise ineffective assistance of counsel claims on appeal, postconviction motions in Texas qualify as a *Martinez* initial collateral review proceeding.

¹²⁰⁰ 545 U. S. 524, 535 (2005).

¹²⁰¹ *Buck v. Davis*, *supra* at 101.

¹²⁰² *Id.*

¹²⁰³ *Id.* at 114 (quoting *Buck v. Stephens*, 623 Fed. Appx. 668, 673 (2015)).

BUCK V. DAVIS

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

* * * *

A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 U. S. C. §2253(c)(1). A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” §2253(c)(2). Until the prisoner secures a COA, the court of appeals may not rule on the merits of his case. *Miller-El v. Cockrell*, 537 U. S. 322, 336 (2003).

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Id.*, at 327. This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.” *Id.*, at 336. “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.*, at 336-337.

The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief, but it reached that conclusion only after essentially deciding the case on the merits. As the court put it in the second sentence of its opinion: “Because [Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.” The balance of the Fifth Circuit’s opinion reflects the same approach. The change in law affected by *Martinez* and *Trevino*, the panel wrote, was “not an extraordinary circumstance.” Even if Texas initially indicated to Buck that he would be resentenced, its “decision not to follow through” was “not extraordinary.” Buck “ha[d] not shown why” the State’s alleged broken promise “would justify relief from the judgment.”

But the question for the Fifth Circuit was not whether Buck had “shown extraordinary circumstances” or “shown why [Texas’s broken promise] would justify relief from the judgment.” Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A “court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,” and ask “only if the District Court’s decision was debatable.” *Miller-El*, 537 U. S., at 327, 348.

The dissent does not accept this established rule, arguing that a reviewing court that deems a claim nondebtable “must necessarily conclude that the claim is meritless.” (opinion of Thomas, J.). Of course, when a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate

showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justifi[es] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El*, 537 U. S., at 336-337. *Miller-El* flatly prohibits such a departure from the procedure prescribed by §2253. *Ibid.*

The State defends the Fifth Circuit’s approach by arguing that the court’s consideration of an application for a COA is often quite thorough. The court “occasionally hears oral argument when considering whether to grant a COA in a capital case.” Indeed, in one recent case, it “received nearly 200 pages of initial briefing, permitted a reply brief, considered the parties’ supplemental authorities, invited supplemental letter briefs from both sides, and heard oral argument before denying the request for a COA.”

But this hurts rather than helps the State’s case. “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Miller-El*, 537 U. S., at 338. The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course. We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry.

Given the approach of the court below, it is perhaps understandable that the parties have essentially briefed and argued the underlying merits at length. See, e.g., Brief for Petitioner 32 (“[T]rial counsel rendered deficient performance under *Strickland*.”); *id.*, at 39 (“[T]here is a reasonable probability that Dr. Quijano’s race-as-dangerousness opinion swayed the judgment of jurors in favor of death.” (internal quotation marks and alteration omitted)); *id.*, at 59 (Buck “has demonstrated his entitlement to relief under Rule 60(b)(6)”; Brief for Respondent 40 (“The particular facts of petitioner’s case do not establish extraordinary circumstances justifying relief from the judgment.” (boldface type deleted)). With respect to this Court’s review, §2253 does not limit the scope of our consideration of the underlying merits, and at this juncture we think it proper to meet the decision below and the arguments of the parties on their own terms.

[In Part III of its opinion, the Court examined the merits of Buck’s *Strickland* claim, and the issue of his entitlement to relief under Rule 60(b), and determined that he was entitled to habeas corpus relief.]

For the foregoing reasons, we conclude that Buck has demonstrated both ineffective assistance of counsel under *Strickland* and an entitlement to relief under Rule 60(b)(6). It follows that the Fifth Circuit erred in denying Buck the COA required to pursue these claims on appeal.

The judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Persistent misapplication of the COA standard:** The Fifth Circuit Court of Appeals is notorious for denying certificates of appealability to habeas petitioners. One writer called the court’s COA practice a “shortcut to death,” and examined four death penalty cases between 2003 and 2007 in which the Supreme Court reversed the Fifth Circuit Court of Appeals over its COA practices.¹²⁰⁴ The cases in which the Court reversed the Fifth Circuit are *Miller-El v. Cockrell*,¹²⁰⁵ *Banks v. Dretke*,¹²⁰⁶ *Tennard v. Dretke*,¹²⁰⁷ and *Buck v. Davis*. In a fifth case, *Jordan v. Fisher*,¹²⁰⁸ three dissenting justices wrote that the Fifth Circuit “had demonstrated a ‘troubling’ ‘pattern’ of refusing to follow the COA standard created by Congress and explained repeatedly by the Court.”¹²⁰⁹ What would motivate a court to misapply the Supreme Court’s standard repeatedly? In all four cases in which the Court scolded the Fifth Circuit, the Supreme Court eventually ordered the grant of habeas relief on the merits of the underlying claim.
2. **Inconsistent application of the COA standard:** A review of death penalty cases between 2008 and 2009 showed a wide variance in the percentage of cases disposed of by denial of a COA, ranging from a high of almost 21% (5th Circuit) to a low of 0% (First and Second Circuits). The next highest percentage of cases disposed of by COA denials was the Eighth Circuit (15.8%), followed by the 11th Circuit (11.1%). All other circuits disposed of death penalty cases by denying COAs at a rate of 5% or below.¹²¹⁰ Astonishingly, after being rebuked by the Chief Justice in *Buck v. Davis*, the Fifth Circuit’s rate of closing death penalty cases by COA denials went *up* to nearly 30%. As a result, a significant number of capital cases are being denied after receiving truncated review—including cases in which the Supreme Court concludes that habeas corpus relief should have been granted.

¹²⁰⁴ Kevin Trahan, *A Shortcut to Death: An Analysis of the Fifth Circuit’s Refusal to Adopt the Supreme Court’s Certificate of Appealability Standard in Capital Cases*, 48 Am. J. Crim. L. 1 (2021).

¹²⁰⁵ 537 U.S. 322 (2003). The Fifth Circuit reached the same result on remand, and the Supreme Court granted relief in *Miller-El v. Dretke*.

¹²⁰⁶ 540 U.S. 668 (2004).

¹²⁰⁷ 542 U.S. 274 (2004).

¹²⁰⁸ 135 S.Ct. 2647 (2015) (Sotomayor, J., dissenting from denial of certiorari).

¹²⁰⁹ Trahan, *Shortcut to Death*, *supra* n. 30, at 14.

¹²¹⁰ *Id.* at 17-18. Trahan collected and sorted the data from *Federal Judicial Center Integrated Data Base Appeals Documentation* FY 2008-Present, FED. JUDICIAL CTR.

CHAPTER 9: INNOCENCE AND HABEAS CORPUS

Chapter 4, Procedural Bars: Independent, Adequate State Grounds, discussed actual innocence claims as a procedural mechanism for petitioners to overcome state court procedural defaults. This chapter revisits innocence, but this time presented as redressing a failure in the justice system: that factually innocent individuals are sometimes convicted and punished. Convicting an innocent person is among one of the justice system's gravest errors, undermining public confidence in the integrity, fairness, and reliability of judicial outcomes.

Actual innocence is defined as factual innocence—that a person did not commit or participate in the crime of conviction—and is typically shown by new evidence not presented at trial. Actual innocence claims differ from claims of legal insufficiency to support a conviction or claims that legal errors infected a trial's outcome. In federal habeas corpus proceedings, actual innocence is viewed as such a miscarriage of justice that it operates as a gateway for petitioners to have constitutional claims reviewed, despite procedural bars, because prisoners are being imprisoned for conduct that was not prohibited by law.

State prisoners' innocence claims in habeas corpus proceedings generally fall into one of three main categories: 1) freestanding, substantive constitutional claims for habeas relief; 2) gateways for habeas review of procedurally defaulted claims of constitutional error; or 3) invoked to overcome the expiration of the Antiterrorism and Effective Death Penalty Act's (AEDPA) statute of limitations. Despite these potential paths, state prisoners face significant hurdles in raising actual innocence claims in federal habeas.

After a conviction removes the presumption of innocence, overturning a conviction in postconviction proceedings, even with evidence of actual innocence, is difficult. Federal habeas corpus review is restrained by systemic interests in comity, finality, and conservation of judicial resources,¹²¹¹ discussed in *Schlup* in Chapter 4, Procedural Bars: Independent, Adequate State Grounds. Moreover, federal habeas review of state court convictions is typically premised on correcting violations of federal constitutional rights, not of relitigating innocence. In light of those interests, granting relief for innocent persons is considered only in the most extraordinary cases, typically under a legal standard requiring a showing that no reasonable juror would have convicted the prisoner under the new evidence.

While innocence cases in habeas are frequently presented as a gateway to allow review of otherwise procedurally barred constitutional claims, some prisoners presented new evidence of innocence as a standalone or freestanding claim without alleging that a constitutional error led to their conviction. The section below discusses the Supreme Court's surprising answer to whether convicting an innocent person violates the federal constitution.

¹²¹¹ *Schlup*, 513 U.S. at 324.

I. Freestanding Innocence Claims

Herrera v. Collins below examines if the Constitution provides a right of habeas review for state prisoners claiming actual innocence when a claim is not supported by a related constitutional violation. Challenging his pending execution, Herrera raised a freestanding claim of innocence, defined as an argument that the petitioner “is entitled to habeas relief because newly discovered evidence shows that [his or her] conviction is factually incorrect.”¹²¹²

HERRERA V. COLLINS¹²¹³

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992 -- 10 years after his conviction -- he urged in a second federal habeas petition that he was "actually innocent" of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Shortly before 11 p.m. on an evening in late September 1981, the body of Texas Department of Public Safety Officer David Rucker was found by a passer-by on a stretch of highway about six miles east of Los Fresnos, Texas, a few miles north of Brownsville in the Rio Grande Valley. Rucker's body was lying beside his patrol car. He had been shot in the head.

At about the same time, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west towards Los Fresnos, away from the place where Rucker's body had been found, along the same road. Carrisalez, who was accompanied in his patrol car by Enrique Hernandez, turned on his flashing red lights and pursued the speeding vehicle. After the car had stopped briefly at a red light, it signaled that it would pull over and did so. The patrol car pulled up behind it. Carrisalez took a flashlight and walked toward the car of the speeder. The driver opened his door and exchanged a few words with Carrisalez before firing at least one shot at Carrisalez' chest. The officer died nine days later.

¹²¹² *Herrera*, 506 U.S. at 404. Earlier in *Sawyer*, the Court defined actual innocence as either the wrong person has been convicted or that a petitioner was ineligible for the death penalty under state law because, for example, there was no lawful aggravating circumstance present, or the State failed to meet other conditions of eligibility for death.

¹²¹³ 506 U.S. 390 (1993)

Petitioner Herrera was arrested a few days after the shootings and charged with the capital murder of both Carrisalez and Rucker. He was tried and found guilty of the capital murder of Carrisalez in January 1982, and sentenced to death. In July 1982, petitioner pleaded guilty to the murder of Rucker.

At petitioner's trial for the murder of Carrisalez, Hernandez, who had witnessed Carrisalez' slaying from the officer's patrol car, identified petitioner as the person who had wielded the gun. A declaration by Officer Carrisalez to the same effect, made while he was in the hospital, was also admitted. Through a license plate check, it was shown that the speeding car involved in Carrisalez' murder was registered to petitioner's "live-in" girlfriend. Petitioner was known to drive this car, and he had a set of keys to the car in his pants pocket when he was arrested. Hernandez identified the car as the vehicle from which the murderer had emerged to fire the fatal shot. He also testified that there had been only one person in the car that night.

The evidence showed that Herrera's Social Security card had been found alongside Rucker's patrol car on the night he was killed. Splatters of blood on the car identified as the vehicle involved in the shootings, and on petitioner's blue jeans and wallet were identified as type A blood -- the same type which Rucker had. (Herrera has type O blood.) Similar evidence with respect to strands of hair found in the car indicated that the hair was Rucker's and not Herrera's. A handwritten letter was also found on the person of petitioner when he was arrested, which strongly implied that he had killed Rucker.¹²¹⁴

¹²¹⁴ The letter read: "To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

"I'm not a tormented person. . . . I believe in the law. What would it be without this [*sic*] men that risk their lives for others, and that's what they should be doing -- protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

"What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

"My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

"You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera].

"I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others -- robbers, rapists, or burglars -- are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this." App. to Brief for United States as *Amicus Curiae* 3a-4a.

Petitioner appealed his conviction and sentence, arguing, among other things, that Hernandez' and Carrisalez' identifications were unreliable and improperly admitted. The Texas Court of Criminal Appeals affirmed, *Herrera v. State*, 682 S.W.2d 313 (1984), and we denied certiorari, 471 U.S. 1131 (1985). Petitioner's application for state habeas relief was denied. *Ex parte Herrera*, No. 12,848-02 (Tex. Crim. App., Aug. 2, 1985). Petitioner then filed a federal habeas petition, again challenging the identifications offered against him at trial. This petition was denied, see 904 F.2d 944 (CA5), and we again denied certiorari, 498 U.S. 925 (1990).

Petitioner next returned to state court and filed a second habeas petition, raising, among other things, a claim of "actual innocence" based on newly discovered evidence. In support of this claim petitioner presented the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacios, one of Raul, Senior's former cellmates. Both individuals claimed that Raul, Senior, who died in 1984, had told them that he -- and not petitioner -- had killed Officers Rucker and Carrisalez.¹²¹⁵ The State District Court denied this application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991), P35. The Texas Court of Criminal Appeals affirmed, *Ex parte Herrera*, 819 S.W.2d 528 (1991), and we denied certiorari, *Herrera v. Texas*, 502 U.S. 1085, 117 L. Ed. 2d 279, 112 S. Ct. 1074 (1992).

In February 1992, petitioner lodged the instant habeas petition -- his second -- in federal court, alleging, among other things, that he is innocent of the murders of Rucker and Carrisalez, and that his execution would thus violate the Eighth and Fourteenth Amendments. In addition to proffering the above affidavits, petitioner presented the affidavits of Raul Herrera, Jr., Raul, Senior's son, and Jose Ybarra, Jr., a schoolmate of the Herrera brothers. Raul, Junior, averred that he had witnessed his father shoot Officers Rucker and Carrisalez and petitioner was not present. Raul, Junior, was nine years old at the time of the killings. Ybarra alleged that Raul, Senior, told him one summer night in 1983 that he had shot the two police officers.¹²¹⁶ Petitioner alleged that

¹²¹⁵ Villarreal's affidavit is dated December 11, 1990. He attested that while he was representing Raul, Senior, on a charge of attempted murder in 1984, Raul, Senior, had told him that he, petitioner, their father, Officer Rucker, and the Hidalgo County Sheriff were involved in a drugtrafficking scheme; that he was the one who had shot Officers Rucker and Carrisalez; that he did not tell anyone about this because he thought petitioner would be acquitted; and that after petitioner was convicted and sentenced to death, he began blackmailing the Hidalgo County Sheriff. According to Villarreal, Raul, Senior, was killed by Jose Lopez, who worked with the sheriff on drug-trafficking matters and was present when Raul, Senior, murdered Rucker and Carrisalez, to silence him.

Palacios' affidavit is dated December 10, 1990. He attested that while he and Raul, Senior, shared a cell together in the Hidalgo County jail in 1984, Raul, Senior, told him that he had shot Rucker and Carrisalez.

¹²¹⁶ Raul, Junior's affidavit is dated January 29, 1992. Ybarra's affidavit is dated January 9, 1991. It was initially submitted with Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeas Corpus filed January 18, 1991, in the Texas Court of Criminal Appeals.

law enforcement officials were aware of this evidence and had withheld it in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The District Court dismissed most of petitioner's claims as an abuse of the writ. No. M-92-30 (SD Tex., Feb. 17, 1992). However, "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process," the District Court granted petitioner's request for a stay of execution so that he could present his claim of actual innocence, along with the Raul, Junior, and Ybarra affidavits, in state court. App. 38-39. Although it initially dismissed petitioner's *Brady* claim on the ground that petitioner had failed to present "any evidence of withholding exculpatory material by the prosecution," App. 37, the District Court also granted an evidentiary hearing on this claim after reconsideration, *id.*, at 54.

The Court of Appeals vacated the stay of execution. 954 F.2d 1029 (CA5 1992). It agreed with the District Court's initial conclusion that there was no evidentiary basis for petitioner's *Brady* claim, and found disingenuous petitioner's attempt to couch his claim of actual innocence in *Brady* terms. 954 F.2d, at 1032. Absent an accompanying constitutional violation, the Court of Appeals held that petitioner's claim of actual innocence was not cognizable because, under *Townsend v. Sain*, 372 U.S. 293, 317 (1963), "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." See 954 F.2d at 1034.¹²¹⁷ We granted certiorari, 502 U.S. 1085 (1992), and the Texas Court of Criminal Appeals stayed petitioner's execution. We now affirm.

Petitioner asserts that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent. See *United States v. Nobles*, 422 U.S. 225, 230 (1975). But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.

* * * *

Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. ... Here, it is not disputed that the State

¹²¹⁷ After the Court of Appeals vacated the stay of execution, petitioner attached a new affidavit by Raul, Junior, to his petition for rehearing, which was denied. The affidavit alleges that during petitioner's trial, various law enforcement officials and the Hidalgo County Sheriff told Raul, Junior, not to say what happened on the night of the shootings and threatened his family.

met its burden of proving at trial that petitioner was guilty of the capital murder of Officer Carrisalez beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but, on the contrary, as one who has been convicted by due process of law of two brutal murders.

Based on affidavits here filed, petitioner claims that evidence never presented to the trial court proves him innocent notwithstanding the verdict reached at his trial. Such a claim is not cognizable in the state courts of Texas.

* * * *

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Chief Justice Warren made this clear in *Townsend v. Sain, supra*, at 317 (emphasis added):

"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.*"

This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact. ... More recent authority construing federal habeas statutes speaks in a similar vein. "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.* Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.

* * * *

This is not to say that our habeas jurisprudence casts a blind eye toward innocence. In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. See *McCleskey, supra*, at 502. But this body of our habeas jurisprudence makes clear that a claim of "actual innocence"

is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases. For he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence." *Kuhlmann, supra*, at 454 (emphasis added). We have never held that it extends to freestanding claims of actual innocence. Therefore, the exception is inapplicable here.

Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray v. Giarratano*, 492 U.S. 1, 9, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (plurality opinion). We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. ... But petitioner's claim does not fit well into the doctrine of these cases, since, as we have pointed out, it is far from clear that a second trial 10 years after the first trial would produce a more reliable result.

Perhaps mindful of this, petitioner urges not that he necessarily receive a new trial, but that his death sentence simply be vacated if a federal habeas court deems that a satisfactory showing of "actual innocence" has been made. Tr. of Oral Arg. 19-20. But such a result is scarcely logical; petitioner's claim is not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.

Petitioner argues that our decision in *Ford v. Wainwright*, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986), supports his position. The plurality in *Ford* held that, because the Eighth Amendment prohibits the execution of insane persons, certain procedural protections inhere in the sanity determination. "If the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact," Justice Marshall wrote, "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.*, at 411. Because the Florida scheme for determining the sanity of persons sentenced to death failed "to achieve even the minimal degree of reliability," *id.*, at 413, the plurality concluded that Ford was entitled to an evidentiary hearing on his sanity before the District Court.

Unlike petitioner here, Ford did not challenge the validity of his conviction. Rather, he challenged the constitutionality of his death sentence in view of his claim of insanity. Because Ford's claim went to a matter of punishment -- not guilt -- it was properly examined within the purview of the Eighth Amendment. Moreover, unlike the question of guilt or innocence, which

becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution. Finally, unlike the sanity determination under the Florida scheme at issue in *Ford*, the guilt or innocence determination in our system of criminal justice is made "with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.*, at 411.

Petitioner also relies on *Johnson v. Mississippi*, 486 U.S. 578, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988), where we held that the Eighth Amendment requires reexamination of a death sentence based in part on a prior felony conviction which was set aside in the rendering State after the capital sentence was imposed. There, the State insisted that it was too late in the day to raise this point. But we pointed out that the Mississippi Supreme Court had previously considered similar claims by writ of error *coram nobis*. Thus, there was no need to override state law relating to newly discovered evidence in order to consider Johnson's claim on the merits. Here, there is no doubt that petitioner seeks additional process -- an evidentiary hearing on his claim of "actual innocence" based on newly discovered evidence -- which is not available under Texas law more than 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992).¹²¹⁸

Alternatively, petitioner invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial, or at least to a vacation of his death sentence.¹²¹⁹ "Because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition," we have "exercis[ed] substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 445-446, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). Thus, we have found criminal process lacking only where it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Ibid.* (quoting *Patterson v. New York*, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)). "Historical

¹²¹⁸ The dissent relies on *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), for the proposition that, "at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt." *Post*, at 434. To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance. We have difficulty extending this principle to hold that a capital defendant who has been afforded a full and fair trial may challenge his conviction on federal habeas based on after-discovered evidence.

¹²¹⁹ The dissent takes us to task for examining petitioner's Fourteenth Amendment claim in terms of procedural, rather than substantive, due process. Because "execution of an innocent person is the ultimate 'arbitrary imposition,'" *post*, at 437, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (internal quotation marks omitted), the dissent concludes that "petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent," *post*, at 437. But the dissent puts the cart before the horse. For its due process analysis rests on the assumption that petitioner is in fact innocent. However, as we have discussed, petitioner does not come before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders. The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his "actual innocence" claim. This issue is properly analyzed only in terms of procedural due process.

practice is probative of whether a procedural rule can be characterized as fundamental." 505 U.S. at 446.

* * * *

Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

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. The showing made by petitioner in this case falls far short of any such threshold.

Petitioner's newly discovered evidence consists of affidavits. In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations. See Orfield, 2 Vill. L. Rev., at 333. Petitioner's affidavits are particularly suspect in this regard because, with the exception of Raul Herrera, Jr.'s affidavit, they consist of hearsay. Likewise, in reviewing petitioner's new evidence, we are mindful that defendants often abuse new trial motions "as a method of delaying enforcement of just sentences." *United States v. Johnson*, 327 U.S. 106, 112, 90 L. Ed. 562, 66 S. Ct. 464 (1946). Although we are not presented with a new trial motion *per se*, we believe the likelihood of abuse is as great -- or greater -- here.

The affidavits filed in this habeas proceeding were given over eight years after petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour -- and, indeed, until after the alleged perpetrator of the murders himself was dead -- to make their statements. Cf. *Taylor v. Illinois*, 484 U.S. at 414 ("It is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed"). Equally troubling, no explanation has been offered as to why petitioner, by hypothesis an innocent man, pleaded guilty to the murder of Rucker.

Moreover, the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place on the night Officers Rucker and Carrisalez were killed. For instance, the affidavit of Raul, Junior, who was nine years old at the time, indicates that there were three people in the speeding car from which the murderer emerged, whereas Hector Villarreal attested that Raul, Senior, told him that there were two people in the car that night. Of course,

Hernandez testified at petitioner's trial that the murderer was the only occupant of the car. The affidavits also conflict as to the direction in which the vehicle was heading when the murders took place and petitioner's whereabouts on the night of the killings.

Finally, the affidavits must be considered in light of the proof of petitioner's guilt at trial - proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter in which petitioner apologized for killing the officers and offered to turn himself in under certain conditions. See *supra*, at 393-395, and n. 1. That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt.

This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, concurring.

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed -- "contrary to contemporary standards of decency," *post*, at 430 (dissenting opinion) (relying on *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)), "shocking to the conscience," *post*, at 430 (relying on *Rochin v. California*, 342 U.S. 165, 172 (1952)), or offensive to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *ante*, at 407-408 (opinion of the Court) (quoting *Medina v. California*, 505 U.S. 437, 445-446 (1992), in turn quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)) -- the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.

* * * *

Consequently, the issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial. In most circumstances, that question would answer itself in the negative. Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent. The question similarly would be

answered in the negative today, except for the disturbing nature of the claim before us. Petitioner contends not only that the Constitution's protections "sometimes fail," *post*, at 430 (dissenting opinion), but that their failure in his case will result in his execution -- even though he is factually innocent and has evidence to prove it.

* * * *

. . . [T]he proper disposition of this case is neither difficult nor troubling. No matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981; petitioner's new evidence is bereft of credibility. Indeed, despite its stinging criticism of the Court's decision, not even the dissent expresses a belief that petitioner might possibly be actually innocent. Nor could it: The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," *post*, at 446 (dissenting opinion), but instead himself the established perpetrator of two brutal and tragic ones.

* * * *

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, *ante*, at 417, the federal courts will be deluged with frivolous claims of actual innocence. Justice Jackson explained the dangers of such circumstances some 40 years ago:

"It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537, 97 L. Ed. 469, 73 S. Ct. 397 (1953) (concurring in result).

If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well.

* * * *

Ultimately, two things about this case are clear. First is what the Court does *not* hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim. Second is what petitioner has not demonstrated. Petitioner has failed to make a persuasive showing of actual innocence. Not one judge -- no state court judge, not the District Court Judge, none of the three judges of the Court of Appeals, and none of the Justices of this Court -- has expressed doubt about petitioner's guilt. Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether

federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." I would have preferred to decide that question, particularly since, as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) "shock[s]" the dissenters' consciences, *post*, at 430, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of "conscience shocking" as a legal test.

I nonetheless join the entirety of the Court's opinion, including the final portion, *ante*, at 417-419 -- because there is no legal error in deciding a case by assuming, *arguendo*, that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate. With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

* * * *

JUSTICE WHITE, concurring in the judgment.

In voting to affirm, I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). For the reasons stated in the Court's opinion, petitioner's showing falls far short of satisfying even that standard, and I therefore concur in the judgment.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE SOUTER join with respect to Parts I-IV, dissenting.

Nothing could be more contrary to contemporary standards of decency, see *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), or more shocking to the conscience, see *Rochin v. California*, 342 U.S. 165, 172 (1952), than to execute a person who is actually innocent. * * * * We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, see Tr. of Oral Arg. 37, I do not see how the answer can be anything but "yes."

The Eighth Amendment prohibits "cruel and unusual punishments." This proscription is not static but rather reflects evolving standards of decency. . . . I think it is crystal clear that the execution of an innocent person is "at odds with contemporary standards of fairness and decency." *Spaziano v. Florida*, 468 U.S. 447, 465, (1984). Indeed, it is at odds with any standard of decency that I can imagine.

This Court has ruled that punishment is excessive and unconstitutional if it is "nothing more than the purposeless and needless imposition of pain and suffering," or if it is "grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592(1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 173 (opinion of Stewart, Powell, and STEVENS, JJ.). It has held that death is an excessive punishment for rape, *Coker v. Georgia*, 433 U.S. at 592, and for mere participation in a robbery during which a killing takes place, *Enmund v. Florida*, 458 U.S. 782, 797 (1982). If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epitomizes "the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. at 592.¹²²⁰

* * * *

I believe it contrary to any standard of decency to execute someone who is actually innocent. Because the Eighth Amendment applies to questions of guilt or innocence, *Beck v. Alabama*, 447 U.S. at 638, and to persons upon whom a valid sentence of death has been imposed, *Johnson v. Mississippi*, 486 U.S. at 590, I also believe that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent.

B

¹²²⁰ It also may violate the Eighth Amendment to imprison someone who is actually innocent. See *Robinson v. California*, 370 U.S. 660, 667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). On the other hand, this Court has noted that "'death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.'" *Beck v. Alabama*, 447 U.S. 625, 637, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), quoting *Gardner v. Florida*, 430 U.S. 349, 357, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) (opinion of STEVENS, J.). We are not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent, see Brief for Petitioner 39, n. 52; Tr. of Oral Arg. 3-5, and I do not address that question.

Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment. . . . Petitioner's claim falls within our due process precedents. In *Rochin*, deputy sheriffs investigating narcotics sales broke into Rochin's room and observed him put two capsules in his mouth. The deputies attempted to remove the capsules from his mouth and, having failed, took Rochin to a hospital and had his stomach pumped. The capsules were found to contain morphine. The Court held that the deputies' conduct "shock[ed] the conscience" and violated due process. 342 U.S. at 172. "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." *Ibid.* The lethal injection that petitioner faces as an allegedly innocent person is certainly closer to the rack and the screw than the stomach pump condemned in *Rochin*. Execution of an innocent person is the ultimate "arbitrary imposition." *Planned Parenthood*, 505 U.S. at 848. It is an imposition from which one never recovers and for which one can never be compensated. Thus, I also believe that petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent.

...

II

The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of this Court's recent habeas jurisprudence. Beginning with a trio of decisions in 1986, this Court shifted the focus of federal habeas review of successive, abusive, or defaulted claims away from the preservation of constitutional rights to a fact-based inquiry into the habeas petitioner's guilt or innocence. See *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (plurality opinion); *Murray v. Carrier*, 477 U.S. 478, 496; *Smith v. Murray*, 477 U.S. 527, 537; see also *McCleskey v. Zant*, 499 U.S. 467, 493-494 (1991). The Court sought to strike a balance between the State's interest in the finality of its criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. *Kuhlmann v. Wilson*, 477 U.S. at 452. In striking this balance, the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).

Justice Powell, writing for the plurality in *Wilson*, explained the reason for focusing on innocence:

"The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is

innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain." 477 U.S. at 452.

In other words, even a prisoner who appears to have had a *constitutionally perfect* trial "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." It is obvious that this reasoning extends beyond the context of successive, abusive, or defaulted claims to substantive claims of actual innocence. Indeed, Judge Friendly recognized that substantive claims of actual innocence should be cognizable on federal habeas. 38 U. Chi. L. Rev., at 159-160, and n. 87.

Having adopted an "actual-innocence" requirement for review of abusive, successive, or defaulted claims, however, the majority would now take the position that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Ante*, at 404. In other words, having held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

III

The Eighth and Fourteenth Amendments, of course, are binding on the States, and one would normally expect the States to adopt procedures to consider claims of actual innocence based on newly discovered evidence. See *Ford v. Wainwright*, 477 U.S. at 411-417 (plurality opinion) (minimum requirements for state-court proceeding to determine competency to be executed). The majority's disposition of this case, however, leaves the States uncertain of their constitutional obligations.

A

Whatever procedures a State might adopt to hear actual-innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: "A pardon is an act of grace." *Ante*, at 413. The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal. Indeed, in *Ford v. Wainwright*, we explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U.S. at 416. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Solem v. Helm*, 463 U.S. 277, 303, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983).

* * * *

The question that remains is what showing should be required to obtain relief on the merits of an Eighth or Fourteenth Amendment claim of actual innocence. I agree with the majority that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." *Ante*, at 416. I also think that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Ante*, at 417. The question is what "a truly persuasive demonstration" entails, a question the majority's disposition of this case leaves open.

In articulating the "actual-innocence" exception in our habeas jurisprudence, this Court has adopted a standard requiring the petitioner to show a "'fair probability that, in light of all the evidence . . . , the trier of the facts would have entertained a reasonable doubt of his guilt.'" *Kuhlmann v. Wilson*, 477 U.S. at 455, n. 17. In other words, the habeas petitioner must show that there probably would be a reasonable doubt. See also *Murray v. Carrier*, 477 U.S. at 496 (exception applies when a constitutional violation has "probably resulted" in a mistaken conviction); *McCleskey v. Zant*, 499 U.S. at 494 (exception applies when a constitutional violation "probably has caused" a mistaken conviction).¹²²¹

I think the standard for relief on the merits of an actual-innocence claim must be higher than the threshold standard for merely reaching that claim or any other claim that has been procedurally defaulted or is successive or abusive. I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent. This standard is supported by several considerations. First, new evidence of innocence may be discovered long after the defendant's conviction. Given the passage of time, it may be difficult for the State to retry a defendant who obtains relief from his conviction or sentence on an actual-innocence claim. The actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished. In light of this fact, an otherwise constitutionally valid conviction or sentence should not be set aside lightly. Second, conviction after a constitutionally adequate trial strips the defendant of the presumption of innocence. The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *In re Winship*, 397 U.S. 358, 364 (1970), but once the government has done so, the burden of proving

¹²²¹ Last Term in *Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992), this Court adopted a different standard for determining whether a federal habeas petitioner bringing a successive, abusive, or defaulted claim has shown "actual innocence" of the death penalty. Under *Sawyer*, the petitioner must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." *Id.*, at 336. That standard would be inappropriate here. First, it requires a showing of constitutional error in the trial process, which, for reasons already explained, is inappropriate when petitioner makes a substantive claim of actual innocence. Second, it draws its "no reasonable juror" standard from the standard for sufficiency of the evidence set forth in *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). As I explain below, however, sufficiency of the evidence review differs in important ways from the question of actual innocence. Third, the Court developed this standard for prisoners who are concededly guilty of capital crimes. Here, petitioner claims that he is actually innocent of the capital crime.

innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt.

In considering whether a prisoner is entitled to relief on an actual-innocence claim, a court should take all the evidence into account, giving due regard to its reliability. See *Sawyer v. Whitley*, 505 U.S. at 339, n. 5 (1992); *Kuhlmann v. Wilson*, 477 U.S. at 455, n. 17; *Friendly*, 38 U. Chi. L. Rev., at 160. Because placing the burden on the prisoner to prove innocence creates a presumption that the conviction is valid, it is not necessary or appropriate to make further presumptions about the reliability of newly discovered evidence generally. Rather, the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be. A prisoner raising an actual-innocence claim in a federal habeas petition is not entitled to discovery as a matter of right. *Harris v. Nelson*, 394 U.S. 286, 295 (1969); 28 U.S.C. § 2254 Rule 6. The district court retains discretion to order discovery, however, when it would help the court make a reliable determination with respect to the prisoner's claim. *Harris v. Nelson*, 394 U.S. at 299-300; see Advisory Committee Note on Rule 6, 28 U.S.C., pp. 421-422.

It should be clear that the standard I would adopt would not convert the federal courts into "forums in which to relitigate state trials." *Ante*, at 401, quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). It would not "require the habeas court to hear testimony from the witnesses who testified at trial," *ante*, at 402, though, if the petition warrants a hearing, it may require the habeas court to hear the testimony of "those who made the statements in the affidavits which petitioner has presented." *Ibid*. I believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made "a truly persuasive demonstration," *ante*, at 417, and his execution would violate the Constitution. I would so hold.

* * * *

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. See *Coleman v. Thompson*, 501 U.S. 722, 758-759 (1991) (dissenting opinion). See also *Coleman v. Thompson*, 504 U.S. 188, 189 (1992) (dissent from denial of stay of execution). I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. *Sawyer v. Whitley*, 505 U.S. at 343-345 (opinion concurring in judgment). Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.

Questions and Comments:

1. **Habeas' role in innocence cases:** Innocence claims present a fundamental tension about the role of federal habeas corpus. Some of the language in *Herrera* seemed to foreclose the proposition that actual innocence can, by itself, create a basis for constitutional protection or federal habeas relief absent extraordinary, and improbable, circumstances. The Court in *Herrera* emphasized that “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.” ... “This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.”¹²²² Nevertheless, six members of the Court in *Herrera*—three justices concurring and three dissenting—acknowledged that executing an innocent person would be an independent constitutional violation.¹²²³ Justices O’Connor, White, and Kennedy allowed that executing an innocence person would violate some constitutional right, but did not specify which one.¹²²⁴ The dissenters, Justices Blackmun, Stevens, and Souter, would have found either the Eighth Amendment or substantive due process supported evidence of innocence as an independent constitutional ground for habeas relief. Should habeas’ historical role as a safeguard against unlawful detention limit federal court review to only whether a state has properly ensured that prisoners’ constitutional rights were protected during the original trial and direct appeals process? Or should habeas be a bulwark against wrongful convictions, allowing courts to consider any evidence that might prove a person’s innocence without requiring an accompanying constitutional violation? Are there other procedural mechanisms adequately suited to protect the innocent from wrongful detention or execution? If not, how does that inform the role of habeas in innocence cases?
2. **Freestanding innocence claims after Herrera:** In *Herrera*, the Supreme Court presumed “for the sake of argument in deciding this case,” that a freestanding innocence claim could be a viable basis for relief in federal habeas corpus. While some U.S. Supreme Court

¹²²² *Herrera*, 506 U.S. at 398.

¹²²³ In *Herrera*, 506 U.S. at 417, Chief Justice Rehnquist, writing for the majority, presumed for the sake of argument “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.”).

¹²²⁴ Justice O’Connor, with Justice Kennedy joining, suggested in their concurring opinion that the majority opinion should not be construed as permitting execution of an innocent person: “Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.” *Herrera v. Collins*, 506 U.S. 390, 427 (1993) (O’Connor, J., concurring). Justice White, concurring separately, assumed that “a persuasive showing of “actual innocence” made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.” *Herrera v. Collins*, 506 U.S. 390, 429 (1993) (White, J., concurring). Justice Blackmun’s dissent, joined by Justices Stevens and Souter, explicitly recognized that executing an innocent person is “equally offensive” to the Eighth Amendment and the Fourteenth Amendment’s Due Process Clause.

Justices have stated that the execution of an innocent person would violate the Constitution, the Court has not definitively resolved if innocence is a freestanding constitutional claim or established a concrete standard for proving it.¹²²⁵ Although *Herrera* suggests a theoretical possibility that a prisoner may have a credible innocence claim in federal habeas, no federal court has found that a case meets this theoretical standard (as of Feb. 2025). The high standard of proof for such claims, discussed below, may partially explain this.

3. **Proof standards for freestanding innocence claims:** An innocence claim’s standard of proof in habeas corpus depends on if the claim is a freestanding or a gateway claim and whether the constitutional error affects the determination of guilt or sentencing. In *Herrera*, the Supreme Court stated that the threshold for proving a freestanding claim of innocence was “extraordinarily high” and required a “truly persuasive” demonstration of innocence.¹²²⁶ As of yet, the Court has not further articulated what would be a sufficiently persuasive showing.
4. **Clemency as the “fail safe” for newly discovered evidence of innocence:** Clemency is an executive power that allows for the mitigation or forgiveness of a criminal sentence, often exercised by governors or the President, and is viewed as the historic remedy to prevent miscarriages of justice. In *Herrera*, the Court emphasized that state clemency processes, not federal courts, are the appropriate venue to present new evidence of innocence, calling clemency the “fail safe” in our criminal justice system when judicial processes have been exhausted.¹²²⁷ Thus, the Court conditioned habeas review of actual innocence to cases in which there is “no state avenue open to process such a claim.”¹²²⁸ Justice Blackmun’s dissent rejected the argument that federal courts should rely on state clemency to vindicate an innocent person’s Eighth Amendment right to not be subject to cruel and unusual punishment, pointing out that the Court has “explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane.”¹²²⁹ Justice Blackmun’s dissent reflects longstanding critiques that clemency is not equipped nor should it be employed to address claims of actual innocence or other extraordinary circumstances. When an innocent person is convicted, clemency places the burden to address systemic criminal justice system issues on executive discretion rather than ensuring robust judicial remedies. Clemency decisions are not constitutionally required and are not bound by the same standards of evidence or due process required in judicial proceedings. Because the exercise of clemency is often

¹²²⁵ *Herrera* at 419 (O’Connor, J., concurring). In Justice O’Connor’s concurrence, she stated that “the execution of a legally and factually innocent person would be a constitutionally intolerable event.”

¹²²⁶ *Herrera*, 506 U.S. at 417.

¹²²⁷ *Herrera*, 506 U.S. at 411-12 (“Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”) (internal citation omitted).

¹²²⁸ *Herrera*, 506 U.S. at 417.

¹²²⁹ *Ford v. Wainwright*, 477 U.S. at 416.

viewed as a matter of grace rather than a right, it is subject to political winds of executive discretion.

5. **Too late for innocence?**¹²³⁰ Despite the Supreme Court's indecision about the viability of actual innocence as a freestanding claim, in 2009 the Court took an unusual step and exercised its jurisdiction to review an original habeas petition filed by a Georgia death row prisoner who sought to present evidence of his innocence.¹²³¹ Troy Davis was convicted of murder and sentenced to death in Georgia for the murder of a police officer. Years after his conviction, seven of the nine key witnesses against him recanted their testimony, claiming they had been pressured by police to implicate Davis. No court had conducted a hearing to assess the reliability of postconviction affidavits that could demonstrate Davis' actual innocence. Based on this initial showing, the Supreme Court invoked its original habeas jurisdiction for the first time in decades, concluding that the situation made the case sufficiently exceptional to warrant the use of the Court's original habeas jurisdiction. The Supreme Court transferred Davis' case to the federal district court to hold a hearing on if Davis could show evidence of actual innocence. Davis' case posed procedural dilemmas in district court, however, which prompted Justice Antonin Scalia to call the grant of original jurisdiction a "fool's errand."¹²³² Justice Scalia maintained that the Court's invoking original jurisdiction was legally unproductive because the district court would ultimately lack the authority to grant relief, even if persuaded by Davis' evidence of actual innocence. Under AEDPA's restrictions in § 2254(d)(1), Scalia noted that the district court could not grant relief since a stand-alone innocence claim had not been recognized by the Supreme Court as a constitutional basis for alleging that a state acted in violation of clearly established federal law. Because AEDPA's statutory framework does not permit federal courts to treat claims of actual innocence differently from other habeas claims even in the face of compelling evidence, the district court could either adhere to AEDPA and deny the requested relief, or step beyond the bounds of the law and risk having its decision overturned under AEDPA, both unpalatable choices.¹²³³ Justice Stevens, in a concurrence, challenged Justice Scalia's take, stating that AEDPA would permit relief if the district court found it unconstitutional to execute an innocent person. Davis was ultimately executed in 2011 after the district court found that he had not clearly established his innocence. *In re Davis* remains significant for establishing that claims of actual innocence supported by new evidence may warrant extraordinary intervention, even when normal appeals have been exhausted.

¹²³⁰ See George C. Thomas III, et. al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. Pitt. L. Rev. 263 (2003) (discussing a due process exception for procedurally barred claims of innocence).

¹²³¹ 557 U.S. 952 (2009).

¹²³² 557 U.S. at 957 (Scalia, J., dissenting).

¹²³³ See Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61, 121 (2011) (noting that the habeas statute authorizes relief only for constitutional violations, and the Supreme Court has not identified the constitutional violation that a freestanding crime-innocence claim invokes, thus creating procedural and constitutional uncertainty about innocence claims).

6. **Freestanding innocence claims in noncapital cases:** Because *Herrera* was a capital case, the Court focused on whether habeas review provided a remedy for an innocent person facing execution. Since *Herrera*, the Court has considered innocence in a noncapital case, *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009). In *Osborne*, the Court again presumed without deciding that freestanding innocence claims would be available to noncapital prisoners. Osborne had sought access to state evidence for new DNA-testing technology that he alleged could prove him innocent. In considering Osborne's alternative argument that he had a substantive due process right to bring an independent claim of innocence in federal habeas, the Court again "assume[d] without deciding that such a claim exists[,]"¹²³⁴ but noted that "[w]hether such a federal right exists is an open question" that the Court had struggled with for years.¹²³⁵
7. **A hard case making bad law?** The Court in *Herrera* was skeptical of the proof of innocence, including the reliability of the new evidence—the delayed affidavits. In 1993, when *Herrera* was decided, there were relatively few DNA exonerations; today, hundreds of wrongfully convicted people in the United States have been exonerated through DNA evidence.¹²³⁶ Do you think DNA's enhanced reliability might have led the Court to more seriously consider whether executing someone who had DNA-backed evidence of innocence violates the Eighth Amendment? Or would the Court's concerns about federalism, finality, and the proper role of federal habeas review lead it to the same conclusion?

States Recognizing Freestanding Claims of Innocence

Alaska	Grinols v. State, 10 P.3d 600 (Alaska Ct. App. 2000) (recognizing that actual innocence claims could be addressed through Alaska state constitution's due process provision)
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¹²³⁴ *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009).

¹²³⁵ *Osborne*, 557 U.S. at 71.

¹²³⁶ Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 Cal. W. L. Rev. 171, 202 n.134 (2014), citing SAMUEL R. GROSS & MICHAEL SHAFFER, *NAT'L REG'Y OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012*, at 21 (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (noting that the total number of DNA exonerations from 1989 to 1993 was 16, and the total number of DNA exonerations from 2008 to 2012 was 92).

Arizona	Ariz. R. Crim. P. 32.1(h) (postconviction rule allowing for relief on the grounds of an illegal sentence or actual innocence)
Connecticut	Summerville v. Warden, State Prison, 641 A.2d 1356 (Conn. 1994) (freestanding state habeas corpus claim of actual innocence can be asserted without constitutional gateway claim)
District of Columbia	Bell v. United States, 871 A.2d 1199 (D.C. 2005) (allowing proof of freestanding claim of actual innocence by clear and convincing evidence)
Illinois	People v. Barnslater, 869 N.E.2d 293 (Ill. App. Ct. 2007) (actual innocence claims allowable through newly discovered evidence)
Maryland	Md. Code Ann., Crim. Proc. § 8-301 (statute granting right to present freestanding innocence claim)
Missouri	State ex rel. Armine v. Roper, 102 S.W.3d 541 (Mo. 2003) (state constitutional claim of actual innocence may be presented independent of any constitutional violation at trial)
New Mexico	Montoya v. Ulibarri, 163 P.3d 476, 478, 484 (N.M. 2007) (habeas defendants may assert claims of actual innocence under New Mexico Constitution)
New York	CPL section 440.10 253 Actual Innocence Justice Act of 2013 (N.Y. 2013); People v. Cole, 765 N.Y.S.2d 477 (Sup. Ct. Kings County 2003) (imprisonment of the

innocent violates state constitution's due process and cruel and unusual provisions)

II. Innocence as a Gateway to Show Miscarriage of Justice

The Court's reluctance to recognize a freestanding innocence claim in *Herrera* did not render innocence irrelevant in habeas. The Supreme Court recognized in *Wainwright v. Sykes* (discussed in Chapter 4, Procedural Bars: Independent, Adequate State Grounds) that innocence could show a miscarriage of justice that could provide a pathway to federal habeas review.¹²³⁷ Twenty years after *Sykes* discussed innocence as a miscarriage of justice, the Supreme Court held in *Schlup v. Delo*, also discussed in Chapter 4, that a habeas petitioner could show a miscarriage of justice if evidence of innocence was supported by a related violation of a constitutional right. A federal court may thus excuse a state prisoner's procedurally defaulted claim or failure to file a habeas petition within AEDPA's one-year deadline if the prisoner makes a credible showing of actual innocence. This "gateway innocence" exception allows federal courts to consider a potentially innocent person's constitutional claims and correct a fundamental miscarriage of justice.¹²³⁸ However, a *Schlup* innocence claim provides only a procedural gateway, not a substantive right or a basis of relief.¹²³⁹

The applicable standard of review is central to an innocence claim's success. The Supreme Court set a less demanding probability standard of proof for a *Schlup* gateway claim."¹²⁴⁰ To show a *Schlup* miscarriage of justice claim, the petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."¹²⁴¹ This probability standard—a less exacting standard than what Schlup faced in his earlier habeas proceeding—likely saved him from execution. In federal habeas, the court required Schlup to demonstrate innocence by "clear and convincing evidence," *Sawyer v. Whitley*'s more stringent standard to evaluate claims of innocence of the death penalty.¹²⁴²

¹²³⁷ In *Wainwright v. Sykes*, the Supreme Court held that before state prisoners could argue that their wrongful conviction amounted to a miscarriage of justice, they first had to clear two hurdles: (1) demonstrate "cause" - a valid reason for failing to comply with state procedural rules, and (2) show "prejudice" - establish that the constitutional violation likely affected the outcome of their case.

¹²³⁸ *McQuiggin v. Perkins*, 569 U.S. 383, 393-98 (2013); *Schlup*, 513 U.S. at 319-21.

¹²³⁹ *Schlup*, at 314–15 (the claim of innocence "does not by itself provide a basis for relief.")

¹²⁴⁰ *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¹²⁴¹ *Schlup v. Delo*, 513 U.S. at 322.

¹²⁴² *Sawyer*, 505 U.S. at 336. Actual innocence standards of proof of correlate to the stage of trial where a constitutional error occurs. When actual innocence is presented to allow consideration of a constitutional claim

After the Supreme Court’s decision, Schlup’s case returned to the same federal district court. This time, Schlup’s claim of innocence was evaluated using the “more likely than not” standard in his Supreme Court decision. Upon hearing the evidence of actual innocence, the federal district court found it probable that no reasonable juror would find Schlup guilty of the murder, the gateway for the court to hear his constitutional claims. Finding that Schlup’s trial had been unconstitutional, the district court granted his habeas petition and ordered a new trial. In later state court proceedings, Schlup accepted a plea offer in which he avoided the death penalty and any additional time in prison. Read more about Schlup’s case, including how his attorneys and supporters litigated his innocence through postconviction and trial, in Sean D. O’Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 UMKC L. Rev. 1021, 1047 (2009).

While federal legislation provides mechanisms for prisoners to get access to evidence to prove their innocence,¹²⁴³ the Supreme Court has not held, as of 2025, that the Constitution mandates review of an independent, free-standing claim of innocence that does not rely on a violation of a constitutional right.¹²⁴⁴ Federal courts primarily treat actual innocence claims as gateways for overcoming procedural barriers in federal habeas that would otherwise preclude a review of the merits. Could gateway innocence claims be more beneficial to habeas petitioners than freestanding innocence claims if overturning state court convictions on federal constitutional grounds is seen as preferable to rejecting state courts’ factual findings of guilt years after trial? Or does that impose unnecessary additional burdens on innocent petitioners?

III. DNA and Gateway Innocence Claims

DNA testing is powerful evidence that can prove a prisoner’s innocence. In DNA cases, federal habeas courts may evaluate innocence claims where either the DNA evidence couldn't be obtained during the original trial or the DNA testing technology at the time of trial was not sophisticated enough to produce reliable results.

Paul House in *House v. Bell* below was convicted of murder based on circumstantial evidence. In postconviction proceedings he sought to present newly discovered DNA evidence and information about another suspect that suggested his innocence. However, the evidence of innocence he relied on became available after he missed AEDPA’s one-year statute of limitations.

affecting a death sentence, rather than guilt, the gateway showing of innocence required is “clear and convincing evidence that but for a constitutional error, no reasonable juror would find [the petitioner] eligible for the death penalty under law.”).

¹²⁴³ See the Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004), giving grants to states to maintain biological evidence and relieve backlogs of testing biological evidence for DNA testing, 18 U.S.C. §§ 3600-3600A, and authorizing grants to states for capital prosecution and capital defense improvement, 42 U.S.C. §§ 14163-14163e.

¹²⁴⁴ *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (“[A]ctual innocence is not itself a constitutional claim . . .”).

House is the first post-*Schlup* case where the Supreme Court found that a petitioner satisfied the gateway innocence standard to overcome a state court procedural default.

HOUSE V. BELL¹²⁴⁵

JUSTICE KENNEDY delivered the opinion of the Court.

I

[Summary of the facts:

On July 14, 1985, Carolyn Muncey's body was found concealed in brush on an embankment 100 yards from her Union County, Tennessee home. She had last been seen the evening before at 8 p.m. visiting neighbor Pam Luttrell with her children, saying her husband William Hubert Muncey, Jr., known in the community as "Little Hube" and to his family as "Bubbe," had left to dig a grave but hadn't returned. Around 1 a.m., Hube Muncey brought his children to Luttrell's, saying his wife was missing. The Munceys' ten-year-old daughter Lora told Luttrell that earlier that night she had heard someone who sounded like her grandfather ask if "Bubbe" was home, then later tell her mother that her husband had wrecked by the creek. Mrs. Muncey cried and went downstairs.

The next afternoon, Mrs. Muncey's cousin, Billy Ray Hensley, saw Paul House near an embankment wiping his hands on a black rag, with a white Plymouth parked across the street at a sawmill. When Hensley questioned him, House claimed he was looking for Mr. Muncey because he'd heard that Carolyn had disappeared. Suspicious of House's explanation, Hensley returned with a friend and found Carolyn's body across from the sawmill on the embankment.

The medical examiner estimated Carolyn's death occurred between 9-11 p.m. on July 13th. The medical examiner found that Carolyn's body had a black eye, bloodstained hands, neck bruises consistent with choking, and a fatal brain hemorrhage, consistent with either receiving a blow or striking an object.

When questioned by law enforcement, House initially lied about spending the entire evening with his girlfriend, but later admitted he left her trailer around 10:30-10:45 p.m. for a walk and returned hot, panting, and missing his shirt and shoes. He claimed he was attacked by people in a vehicle. The girlfriend's trailer was located just under two miles by road from the Munceys' residence. The girlfriend owned a white Plymouth that House occasionally drove, however, forensic testing showed no connection to Carolyn's death. House had scratches on his hands and arms and a bruised knuckle, which he attributed to cats and construction work. Police found House's heavily soiled pants with human blood confirmed by FBI testing. He was arrested July 17, 1985, while on parole for prior charge of aggravated sexual assault in Utah.]

¹²⁴⁵ 547 U.S. 518 (2006)

A jury convicted petitioner Paul Gregory House of the crime and sentenced him to death, but new revelations cast doubt on the jury's verdict. House, protesting his innocence, seeks access to federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law.

Out of respect for the finality of state-court judgments, federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. See *Schlup v. Delo*, 513 U.S. 298, 319-322 (1995). After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed.

II

The State of Tennessee charged House with capital murder. At House's trial, the State presented testimony by Luttrell, Hensley, Adkins, Lora Muncey, Dr. Carabia, the sheriff, and other law enforcement officials. Through TBI Agents Presnell and Scott, the jury learned of House's false statements. Central to the State's case, however, was what the FBI testing showed--that semen consistent (or so it seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House.

Regarding the semen, FBI Special Agent Paul Bigbee, a serologist, testified that the source was a "secretor," meaning someone who "secrete[s] the ABO blood group substances in other body fluids, such as semen and saliva"--a characteristic shared by 80 percent of the population, including House. *Id.*, at 55. Agent Bigbee further testified that the source of semen on the gown was blood-type A, House's own blood type. As to the semen on the panties, Agent Bigbee found only the H blood-group substance, which A and B blood-type secretors secrete along with substances A and B, and which O-type secretors secrete exclusively. Agent Bigbee explained, however--using science an *amicus* here sharply disputes, see Brief for Innocence Project, Inc., as *Amicus Curiae* 24-26--that House's A antigens could have "degraded" into H, App. 57-58. Agent Bigbee thus concluded that both semen deposits could have come from House, though he acknowledged that the H antigen could have come from Mrs. Muncey herself if she was a secretor--something he "was not able to determine," *id.*, at 58--and that, while Mr. Muncey was himself blood-type A (as was his wife), Agent Bigbee was again "not able to determine his secretor status," *id.*, at 57. Agent Bigbee acknowledged on cross-examination that "a saliva sample" would have sufficed to determine whether Mr. Muncey was a secretor; the State did not provide such a sample, though it did provide samples of Mr. Muncey's blood. *Id.*, at 62.

As for the blood, Agent Bigbee explained that "spots of blood" appeared "on the left outside leg, the right bottom cuff, on the left thigh and in the right inside pocket and on the lower pocket on the outside." *Id.*, at 48. Agent Bigbee determined that the blood's source was type A (the type shared by House, the victim, and Mr. Muncey). He also successfully tested for the enzyme

phosphoglucosmutase and the blood serum haptoglobin, both of which "are found in all humans" and carry "slight chemical differences" that vary genetically and "can be grouped to differentiate between two individuals if those types are different." *Id.*, at 49-50. Based on these chemical traces and on the A blood type, Agent Bigbee determined that only some 6.75 percent of the population carry similar blood, that the blood was "consistent" with Mrs. Muncey's (as determined by testing autopsy samples), and that it was "impossible" that the blood came from House. *Id.*, at 48-52.

A different FBI expert, Special Agent Chester Blythe, testified about fiber analysis performed on Mrs. Muncey's clothes and on House's pants. Although Agent Blythe found blue jean fibers on Mrs. Muncey's nightgown, brassiere, housecoat, and panties, and in fingernail scrapings taken from her body (scrapings that also contained trace, unidentifiable amounts of blood), he acknowledged that, as the prosecutor put it in questioning the witness, "blue jean material is common material," so "this doesn't mean that the fibers that were all over the victim's clothing were necessarily from [House's] pair of blue jeans." 6 Tr. 864-865. On House's pants, though cotton garments both transfer and retain fibers readily, Agent Blythe found neither hair nor fiber consistent with the victim's hair or clothing.

In the defense case House called Hankins, Clinton, and Turner, as well as House's mother, who testified that House had talked to her by telephone around 9:30 pm. on the night of the murder and that he had not used her car that evening. House also called the victim's brother, Ricky Green, as a witness. Green testified that on July 2, roughly two weeks before the murder, Mrs. Muncey called him and "said her and Little Hube had been into it and she said she was wanting to leave Little Hube, she said she was wanting to get out--out of it, and she was scared." 7 *id.*, at 1088. Green recalled that at Christmastime in 1982 he had seen Mr. Muncey strike Mrs. Muncey after returning home drunk.

As Turner informed the jury, House's shoes were found several months after the crime in a field near her home. Turner delivered them to authorities. Though the jury did not learn of this fact (and House's counsel claims he did not either), the State tested the shoes for blood and found none. House's shirt was not found.

The State's closing argument suggested that on the night of her murder, Mrs. Muncey "was deceived She had been told [her husband] had had an accident." 9 *id.*, at 1226. The prosecutor emphasized the FBI's blood analysis, noting that "after running many, many, many tests," Agent Bigbee

"was able to tell you that the blood on the defendant's blue jeans was not his own blood, could not be his own blood. He told you that the blood on the blue jeans was consistent with every characteristic in every respect of the deceased's, Carolyn Muncey's, and that ninety-three (93%) percent of the white population would not have that blood type. . . . He can't tell you one hundred (100%) percent for certain that it was her blood. But folks, he can sure give you a pretty good--a pretty good indication." *Id.*, at 1235-1236.

In the State's rebuttal, after defense counsel questioned House's motive "to go over and kill a woman that he barely knew[,] [w]ho was still dressed, still clad in her clothes," *id.*, at 1274, the prosecutor referred obliquely to the semen stains. While explaining that legally "it does not make any difference under God's heaven, what the motive was," App. 106, the prosecutor told the jury, "you may have an idea why he did it," *ibid.*:

"The evidence at the scene which seemed to suggest that he was subjecting this lady to some kind of indignity, why would you get a lady out of her house, late at night, in her night clothes, under the trick that her husband has had a wreck down by the creek? . . . Well, it is because either you don't want her to tell what indignities you have subjected her to, or she is unwilling and fights against you, against being subjected to those indignities. In other words, it is either to keep her from telling what you have done to her, or it is that you are trying to get her to do something that she nor any mother on that road would want to do with Mr. House, under those conditions, and you kill her because of her resistance. That is what the evidence at the scene suggests about motive." *Id.*, at 106-107.

In addition the government suggested the black rag Hensley said he saw in House's hands was in fact the missing blue tank top, retrieved by House from the crime scene. And the prosecution reiterated the importance of the blood. "[D]efense counsel," he said, "does not start out discussing the fact that his client had blood on his jeans on the night that Carolyn Muncey was killed. . . . He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over his jeans, that is scientifically, completely different from his blood." *Id.*, at 104-105. The jury found House guilty of murder in the first degree.

The trial advanced to the sentencing phase. As aggravating factors to support a capital sentence, the State sought to prove: (1) that House had previously been convicted of a felony involving the use or threat of violence; (2) that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of, rape or kidnaping. * * * The jury recommended a death sentence, which the trial judge imposed. [House's direct appeal and two state postconviction petitions were denied.] * * * *

House, after being convicted in state court, sought federal habeas relief based on claims of ineffective counsel and prosecutorial misconduct.

[The United States District Court for the Eastern District of Tennessee initially determined that most of House's claims were procedurally defaulted and granted summary judgment to the State on those claims. The district court then held an evidentiary hearing to determine whether House fell within the "actual innocence" exception to procedural default under *Schlup v. Delo* (for claims of innocence of the underlying crime) and *Sawyer v. Whitley* (for claims of ineligibility for the death penalty). During this hearing, House presented new evidence challenging the forensic

evidence used at trial (semen and blood) and introduced evidence suggesting another person, Mr. Muncey, was the actual murderer. Despite this new evidence, the district court denied relief, finding House had not demonstrated actual innocence under *Schlup* nor established that he was ineligible for the death penalty under *Sawyer*. House then appealed to the Sixth Circuit Court of Appeals. After a withdrawal of an initial panel decision, the case was decided by a divided en banc court. The six-judge majority believed House had made a compelling showing of actual innocence under *Herrera v. Collins*. The Sixth Circuit majority therefore certified questions to the Tennessee Supreme Court to determine whether House still had any available remedies in state court. Four dissenting judges argued the court should have simply decided the merits of the case without consulting the state court, believing House couldn't meet the standards for relief under any of the relevant Supreme Court precedents. A fifth dissenting judge thought House presented a strong case for relief regarding his death sentence but disagreed with certifying questions to the state court. The Supreme Court denied review at this stage of the proceedings, allowing the Sixth Circuit's certification of questions to the Tennessee Supreme Court to proceed.]

The State urged the Tennessee Supreme Court not to answer the Court of Appeals' certified questions, and the state court did not do so. The case returned to the United States Court of Appeals for the Sixth Circuit. This time an eight-judge majority affirmed the District Court's denial of habeas relief. 386 F.3d 668 (2004). Six dissenters argued that House not only had met the actual-innocence standard for overcoming procedural default but also was entitled to immediate release under *Herrera*. 386 F.3d, at 708 (opinion of Merritt, J.). A seventh dissenter (the same judge who wrote separately in the previous en banc decision) described the case as "a real-life murder mystery, an authentic 'who-done-it' where the wrong man may be executed." *Id.*, at 709 (opinion of Gilman, J.). He concluded such grave uncertainty necessitated relief in the form of a new trial for House. *Id.*, at 710.

We granted certiorari, 545 U.S. 1151 (2005), and now reverse.

IV

As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error.... The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup*, 513 U.S., at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808, the Court has recognized a miscarriage-of-justice exception. . . .

In *Schlup*, the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S., at 327, 115 S. Ct. 851, 130 L. Ed. 2d 808. This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Ibid.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). In the usual case the presumed guilt of a prisoner convicted in

state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified. 513 U.S., at 317.

For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "[t]o be credible" a gateway claim requires "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial," *id.*, at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808, the habeas court's analysis is not limited to such evidence. There is no dispute in this case that House has presented some new reliable evidence; the State has conceded as much. In addition, because the District Court held an evidentiary hearing in this case, and because the State does not challenge the court's decision to do so, we have no occasion to elaborate on *Schlup*'s observation that when considering an actual-innocence claim in the context of a request for an evidentiary hearing, the District Court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment," but rather may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." 513 U.S., at 331-332. Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider "all the evidence," old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See *id.*, at 327-328 (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)). Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." 513 U.S., at 329. The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. *Ibid.*

Second, it bears repeating that the *Schlup* standard is demanding and permits review only in the "extraordinary" case. *Id.*, at 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (quoting *Zant, supra*, at 494, 111 S. Ct. 1454, 113 L. Ed. 2d 517); see also 513 U.S., at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful"). At the same time, though, the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt--or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

* * * *

With this background in mind we turn to the evidence developed in House's federal habeas proceedings.

DNA Evidence

First, in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House. The State, though conceding this point, insists this new evidence is immaterial. At the guilt phase at least, neither sexual contact nor motive were elements of the offense, so in the State's view the evidence, or lack of evidence, of sexual assault or sexual advance is of no consequence. We disagree. In fact we consider the new disclosure of central importance.

From beginning to end the case is about who committed the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." 9 Tr. 1302-1303. Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, *State v. House*, 743 S. W. 2d, at 143, 144, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder.

Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury came to the unanimous conclusion, beyond a reasonable doubt, that the murder was committed in the course of a rape or kidnaping. The alleged sexual motivation relates to both those determinations. This is particularly so given that, at the sentencing phase, the jury was advised that House had a previous conviction for sexual assault.

A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore, House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious. *Bloodstains*

The other relevant forensic evidence is the blood on House's pants, which appears in small, even minute, stains in scattered places. As the prosecutor told the jury, they were stains that, due to their small size, "you or I might not detect[,] [m]ight not see, but which the FBI lab was able to find on [House's] jeans." App. 11. The stains appear inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants. Due to testing by the FBI, cuttings now appear on the pants in several places where stains evidently were found. (The cuttings were destroyed in the testing process, and defense experts were unable to replicate the tests.) At trial, the government argued "nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over [House's] jeans, that is scientifically, completely different from his blood." *Id.*, at 105. House,

though not disputing at this point that the blood is Mrs. Muncey's, now presents an alternative explanation that, if credited, would undermine the probative value of the blood evidence.

During House's habeas proceedings, Dr. Cleland Blake, an Assistant Chief Medical Examiner for the State of Tennessee and a consultant in forensic pathology to the TBI for 22 years, testified that the blood on House's pants was chemically too degraded, and too similar to blood collected during the autopsy, to have come from Mrs. Muncey's body on the night of the crime. The blood samples collected during the autopsy were placed in test tubes without preservative. Under such conditions, according to Dr. Blake, "you will have enzyme degradation. You will have different blood group degradation, blood marker degradation." Record, Doc. 275, p 80 (hereinafter R275:80). The problem of decay, moreover, would have been compounded by the body's long exposure to the elements, sitting outside for the better part of a summer day. In contrast, if blood is preserved on cloth, "it will stay there for years," *ibid.*; indeed, Dr. Blake said he deliberately places blood drops on gauze during autopsies to preserve it for later testing. The blood on House's pants, judging by Agent Bigbee's tests, showed "similar deterioration, breakdown of certain of the named numbered enzymes" as in the autopsy samples. *Id.*, at 110. "[I]f the victim's blood had spilled on the jeans while the victim was alive and this blood had dried," Dr. Blake stated, "the deterioration would not have occurred," *ibid.*, and "you would expect [the blood on the jeans] to be different than what was in the tube," *id.*, at 113. Dr. Blake thus concluded the blood on the jeans came from the autopsy samples, not from Mrs. Muncey's live (or recently killed) body.

Other evidence confirms that blood did in fact spill from the vials. It appears the vials passed from Dr. Carabia, who performed the autopsy, into the hands of two local law enforcement officers, who transported it to the FBI, where Agent Bigbee performed the enzyme tests. The blood was contained in four vials, evidently with neither preservative nor a proper seal. The vials, in turn, were stored in a styrofoam box, but nothing indicates the box was kept cool. Rather, in what an evidence protocol expert at the habeas hearing described as a violation of proper procedure, the styrofoam box was packed in the same cardboard box as other evidence including House's pants (apparently in a paper bag) and other clothing (in separate bags). The cardboard box was then carried in the officers' car while they made the 10-hour journey from Tennessee to the FBI lab. Dr. Blake stated that blood vials in hot conditions (such as a car trunk in the summer) could blow open; and in fact, by the time the blood reached the FBI it had hemolyzed, or spoiled, due to heat exposure. By the time the blood passed from the FBI to a defense expert, roughly a vial and a half were empty, though Agent Bigbee testified he used at most a quarter of one vial. Blood, moreover, had seeped onto one corner of the styrofoam box and onto packing gauze inside the box below the vials.

In addition, although the pants apparently were packaged initially in a paper bag and FBI records suggest they arrived at the FBI in one, the record does not contain the paper bag but does contain a plastic bag with a label listing the pants and Agent Scott's name--and the plastic bag has blood on it. The blood appears in a forked streak roughly five inches long and two inches wide running down the bag's outside front. Though testing by House's expert confirmed the stain was

blood, the expert could not determine the blood's source. Speculations about when and how the blood got there add to the confusion regarding the origins of the stains on House's pants.

Faced with these indications of, at best, poor evidence control, the State attempted to establish at the habeas hearing that all blood spillage occurred after Agent Bigbee examined the pants. Were that the case, of course, then blood would have been detected on the pants before any spill--which would tend to undermine Dr. Blake's analysis and support using the bloodstains to infer House's guilt. In support of this theory the State put on testimony by a blood spatter expert who believed the "majority" of the stains were "transfer stains," that is, stains resulting from "wip[ing] across the surface of the pants" rather than seeping or spillage. App. 293-294. Regarding the spillage in the styrofoam box, the expert noted that yellow "Tennessee Crime Laboratory" tape running around the box and down all four sides did not line up when the bloodstains on the box's corner were aligned. The inference was that the FBI received the box from Tennessee authorities, opened it, and resealed it before the spillage occurred. Reinforcing this theory, Agent Bigbee testified that he observed no blood spillage in the styrofoam box and that had he detected such signs of evidence contamination, FBI policy would have required immediate return of the evidence.

In response House argued that even assuming the tape alignment showed spillage occurring after FBI testing, spillage on one or more earlier occasions was likely. In fact even the State's spatter expert declined to suggest the blood in the box and on the packing gauze accounted for the full vial and a quarter missing. And when the defense expert opened the box and discovered the spills, the bulk of the blood-caked gauze was located around and underneath the half-full vial, which was also located near the stained corner. No gauze immediately surrounding the completely empty vial was stained. The tape, moreover, circled the box in two layers, one underneath the other, and in one spot the underlying layer stops cleanly at the lid's edge, as if cut with a razor, and does not continue onto the body of the box below. In House's view this clean cut suggests the double layers could not have resulted simply from wrapping the tape around twice, as the spatter expert claimed; rather, someone possessing Tennessee Crime Lab tape--perhaps the officers transporting the blood and pants--must have cut the box open and resealed it, possibly creating an opportunity for spillage. Supporting the same inference, a label on the box's lid lists both blood and vaginal secretions as the box's contents, though Agent Bigbee's records show the vaginal fluids arrived at the FBI in a separate envelope. Finally, cross-examination revealed that Agent Bigbee's practice did not always match the letter of FBI policy. Although Mrs. Muncey's bra and housecoat were packed together in a single bag, creating, according to Agent Bigbee, a risk of "cross contamination," *id.*, at 286, he did not return them; nor did he note the discrepancy between the "[b]lood and vaginal secretions" label and the styrofoam box's actual contents, though he insisted his customary practice was to match labels with contents immediately upon opening an evidence box, *id.*, at 287.

The State challenged Dr. Blake's scientific conclusions, and to do so it called Agent Bigbee as a witness. Agent Bigbee defended the testimony he had given at the trial. To begin with, he suggested Dr. Blake had misconstrued the term "inc" in Agent Bigbee's trial report, interpreting it

to mean "incomplete" when it in fact meant "inconclusive." *Id.*, at 254-256, 282. Dr. Blake, however, replied "[s]ame difference" when asked whether his opinion would change if "inc" meant "inconclusive." *Id.*, at 256; see also 6 Tr. 906 (Bigbee trial testimony) ("You will notice I have INC written under the transparent, that is the symbol that I use to mean the test was incomplete"). Agent Bigbee further asserted that, whereas Dr. Blake (in Bigbee's view) construed the results to mean the enzyme was not present at all, in fact the results indicated only that Bigbee could not identify the marker type on whatever enzymes were present. App. 282. Yet the State did not cross-examine Dr. Blake on this point, nor did the District Court resolve the dispute one way or the other, so on this record it seems possible that Dr. Blake meant only to suggest the blood was too degraded to permit conclusive typing. The State, moreover, does not ask us to question Dr. Blake's basic premise about the durability of blood chemicals deposited on cotton--a premise Agent Bigbee appeared to accept as a general matter. Given the record as it stands, then, we cannot say Dr. Blake's conclusions have been discredited; if other objections might be adduced, they must await further proceedings. At the least, the record before us contains credible testimony suggesting that the missing enzyme markers are generally better preserved on cloth than in poorly kept test tubes, and that principle could support House's spillage theory for the blood's origin.

In this Court, as a further attack on House's showing, the State suggests that, given the spatter expert's testimony, House's theory would require a jury to surmise that Tennessee officials donned the pants and deliberately spread blood over them. We disagree. This should be a matter for the trier of fact to consider in the first instance, but we can note a line of argument that could refute the State's position. It is correct that the State's spatter expert opined that the stains resulted from wiping or smearing rather than direct spillage; and she further stated that the distribution of stains in some spots suggests the pants were "folded in some manner or creased in some manner" when the transfers occurred, *id.*, at 296. While the expert described this pattern, at least with respect to stains on the lap of the pants, as "consistent" with the pants being worn at the time of the staining, *ibid.*, her testimony, as we understand it, does not refute the hypothesis that the packaging of the pants for transport was what caused them to be folded or creased. It seems permissible, moreover, to conclude that the small size and wide distribution of stains--inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants--fits as well with spillage in transport as with wiping and smearing from bloody objects at the crime scene, as the State proposes. (As has been noted, no blood was found on House's shoes.)

The District Court discounted Dr. Blake's opinion, not on account of Blake's substantive approach, but based on testimony from Agent Scott indicating he saw, as the District Court put it, "what appeared to be bloodstains on Mr. House's blue jeans when the jeans were removed from the laundry hamper at Ms. Turner's trailer." *Id.*, at 348. This inference seems at least open to question, however. Agent Scott stated only that he "saw reddish brownish stains [he] suspected to be blood"; he admitted that he "didn't thoroughly examine the blue jeans at that time." R276:113-114. The pants were in fact extensively soiled with mud and reddish stains, only small portions of which are blood.

In sum, considering "all the evidence," *Schlup*, 513 U.S., at 328 (quoting *Friendly*, 38 U. Chi. L. Rev., at 160), on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin. *A Different Suspect*

Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief. There is, however, more; for in the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself could have been the murderer.

At trial, as has been noted, the jury heard that roughly two weeks before the murder Mrs. Muncey's brother received a frightened phone call from his sister indicating that she and Mr. Muncey had been fighting, that she was scared, and that she wanted to leave him. The jury also learned that the brother once saw Mr. Muncey "smac[k]" the victim. 7 Tr. 1087-1088. House now has produced evidence from multiple sources suggesting that Mr. Muncey regularly abused his wife. For example, one witness--Kathy Parker, a lifelong area resident who denied any animosity toward Mr. Muncey--recalled that Mrs. Muncey "was constantly with black eyes and busted mouth." App. 235. In addition Hazel Miller, who is Kathy Parker's mother and a lifelong acquaintance of Mr. Muncey, testified at the habeas hearing that two or three months before the victim's death Mr. Muncey came to Miller's home and "tried to get my daughter [Parker] to go out with him," R274:47. (Parker had dated Mr. Muncey at age 14.) According to Miller, Muncey said "[h]e was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." App. 236.

Another witness--Mary Atkins, also an area native who "grew up" with Mr. Muncey and professed no hard feelings, R274:10, 16--claims she saw Mr. Muncey "backhan[d]" Mrs. Muncey on the very night of the murder. App. 226, 228. Atkins recalled that during a break in the recreation center dance, she saw Mr. Muncey and his wife arguing in the parking lot. Mr. Muncey "grabbed her and he just backhanded her." *Id.*, at 228. After that, Mrs. Muncey "left walking." *Id.*, at 229. There was also testimony from Atkins' mother, named Artie Lawson. A self-described "good friend" of Mr. Muncey, *id.*, at 231, Lawson said Mr. Muncey visited her the morning after the murder, before the body was found. According to Lawson, Mr. Muncey asked her to tell anyone who inquired not only that she had been at the dance the evening before and had seen him, but also

that he had breakfasted at her home at 6 o'clock that morning. Lawson had not in fact been at the dance, nor had Mr. Muncey been with her so early.

Of most importance is the testimony of Kathy Parker and her sister Penny Letner. They testified at the habeas hearing that, around the time of House's trial, Mr. Muncey had confessed to the crime. Parker recalled that she and "some family members and some friends [were] sitting around drinking" at Parker's trailer when Mr. Muncey "just walked in and sit down." R274:37. Muncey, who had evidently been drinking heavily, began "rambling off . . . [t]alking about what happened to his wife and how it happened and he didn't mean to do it." *Ibid.* According to Parker, Mr. Muncey "said they had been into [an] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." *Id.*, at 38. Parker said she "freaked out and run him off." *Ibid.*

Letner similarly recalled that at some point either "during [House's] trial or just before," *id.*, at 30, Mr. Muncey intruded on a gathering at Parker's home. Appearing "pretty well blistered," Muncey "went to crying and was talking about his wife and her death and he was saying that he didn't mean to do it." App. 232. "[D]idn't mean to do what[?]," Letner asked, R274:33, at which point Mr. Muncey explained:

"[S]he was 'bitching him out' because he didn't take her fishing that night, that he went to the dance instead. He said when he come home that she was still on him pretty heavily 'bitching him out' again and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder." App. 232-233.

Letner, who was then 19 years old with a small child, said Mr. Muncey's statement "scared [her] quite badly," so she "got out of there immediately." *Id.*, at 233. Asked whether she reported the incident to the authorities, Letner stated, "I was frightened, you know. . . . I figured me being 19 year old they wouldn't listen to anything I had to say." R274:31. Parker, on the other hand, claimed she (Parker) in fact went to the Sheriff's Department, but no one would listen:

"I tried to speak to the Sheriff but he was real busy. He sent me to a deputy. The deputy told me to go upstairs to the courtroom and talk to this guy, I can't remember his name. I never did really get to talk to anybody." App. 234.

Parker said she did not discuss the matter further because "[t]hey had it all signed, sealed and delivered. We didn't know anything to do until we heard that they reopened [House's] trial." R274:45. Parker's mother, Hazel Miller, confirmed she had driven Parker to the courthouse, where Parker "went to talk to some of the people about this case." App. 237.

Other testimony suggests Mr. Muncey had the opportunity to commit the crime. According to Dennis Wallace, a local law enforcement official who provided security at the dance on the night of the murder, Mr. Muncey left the dance "around 10:00, 10:30, 9:30 to 10:30." R274:56-57.

Although Mr. Muncey told law enforcement officials just after the murder that he left the dance only briefly and returned, Wallace could not recall seeing him back there again. Later that evening, Wallace responded to Mr. Muncey's report that his wife was missing. Muncey denied he and his wife had been "a fussing or a fighting"; he claimed his wife had been "kidnapped." *Id.*, at 58. Wallace did not recall seeing any blood, disarray, or knocked-over furniture, although he admitted he "didn't pay too much attention" to whether the floor appeared especially clean. According to Wallace, Mr. Muncey said "let's search for her" and then led Wallace out to search "in the weeds" around the home and the driveway (not out on the road where the body was found). *Id.*, at 58, 60, 63.

In the habeas proceedings, then, two different witnesses (Parker and Letner) described a confession by Mr. Muncey; two more (Atkins and Lawson) described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

As to Parker and Letner, the District Court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence," especially considering that "there was no physical evidence in the Muncneys' kitchen to corroborate [Mr. Muncey's] alleged confession that he killed [his wife] there." App. 348. Parker and Letner, however, did attempt to explain their delay coming forward, and the record indicates no reason why these two women, both lifelong acquaintances of Mr. Muncey, would have wanted either to frame him or to help House. Furthermore, the record includes at least some independent support for the statements Parker and Letner attributed to Mr. Muncey. The supposed explanation for the fatal fight--that his wife was complaining about going fishing--fits with Mrs. Muncey's statement to Luttrell earlier that evening that her husband's absence was "all right, because she was going to make him take her fishing the next day," *id.*, at 11-12. And Dr. Blake testified, in only partial contradiction of Dr. Carabia, that Mrs. Muncey's head injury resulted from "a surface with an edge" or "a hard surface with a corner," not from a fist. R275:72. (Dr. Carabia had said either a fist or some other object could have been the cause.)

Mr. Muncey testified at the habeas hearing, and the District Court did not question his credibility. Though Mr. Muncey said he seemed to remember visiting Lawson the day after the murder, he denied either killing his wife or confessing to doing so. Yet Mr. Muncey also claimed, contrary to Constable Wallace's testimony and to his own prior statement, that he left the dance on the night of the crime only when it ended at midnight. Mr. Muncey, moreover, denied ever hitting Mrs. Muncey; the State itself had to impeach him with a prior statement on this point.

It bears emphasis, finally, that Parker's and Letner's testimony is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect that Justice O'Connor described in her concurring opinion in *Herrera* as "unfortunate" and "not uncommon" in capital cases, 506 U.S., at 423, 113 S. Ct. 853, 122 L. Ed. 2d 203; nor was the confession Parker and Letner described induced under pressure of interrogation. The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no

evident motive to lie. For this reason it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused.

The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt. *Other Evidence*

Certain other details were presented at the habeas hearing. First, Dr. Blake, in addition to testifying about the blood evidence and the victim's head injury, examined photographs of House's bruises and scratches and concluded, based on 35 years' experience monitoring the development and healing of bruises, that they were too old to have resulted from the crime. In addition Dr. Blake claimed that the injury on House's right knuckle was indicative of "[g]etting mashed"; it was not consistent with striking someone. R275:63. (That of course would also eliminate the explanation that the injury came from the blow House supposedly told Turner he gave to his unidentified assailant.)

The victim's daughter, Lora Muncey (now Lora Tharp), also testified at the habeas hearing. She repeated her recollection of hearing a man with a deep voice like her grandfather's and a statement that her father had had a wreck down by the creek. She also denied seeing any signs of struggle or hearing a fight between her parents, though she also said she could not recall her parents ever fighting physically. The District Court found her credible, and this testimony certainly cuts in favor of the State.

Finally, House himself testified at the habeas proceedings. He essentially repeated the story he allegedly told Turner about getting attacked on the road. The District Court found, however, based on House's demeanor, that he "was not a credible witness." App. 329. *Conclusion*

This is not a case of conclusive exoneration. Some aspects of the State's evidence--Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants--still support an inference of guilt. Yet the central forensic proof connecting House to the crime--the blood and the semen--has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where--had the jury heard all the conflicting testimony--it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

V

In addition to his gateway claim under *Schlup*, House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera*, decided three years before *Schlup*, the Court assumed without deciding 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." 506 U.S., at 417; see also *id.*, at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"). "[T]he threshold showing for such an assumed right would necessarily be extraordinarily high," the Court explained, and petitioner's evidence there fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist." *Id.*, at 417, 418-419, 113 S. Ct. 853, 122 L. Ed. 2d 203; see also *id.*, at 427, 113 S. Ct. 853, 122 L. Ed. 2d 203 (O'Connor, J., concurring) (noting that because "[p]etitioner has failed to make a persuasive showing of actual innocence," "the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence"). House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.

We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt--doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." 506 U.S., at 417, 113 S. Ct. 853, 122 L. Ed. 2d 203. The sequence of the Court's decisions in *Herrera* and *Schlup*--first leaving unresolved the status of freestanding claims and then establishing the gateway standard--implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

To overcome the procedural hurdle that Paul House created by failing to properly present his constitutional claims to a Tennessee court, he must demonstrate that the constitutional violations he alleges "ha[ve] probably resulted in the conviction of one who is actually innocent," such that a federal court's refusal to hear the defaulted claims would be a "miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 326, 327 (1995) (internal quotation marks omitted). To make the requisite showing of actual innocence, House must produce "new *reliable* evidence" and "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, at 324, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (emphasis added). The question is not whether House was prejudiced at his trial because the jurors were not aware of the

new evidence, but whether all the evidence, considered together, proves that House was actually innocent, so that no reasonable juror would vote to convict him. Considering all the evidence, and giving due regard to the District Court's findings on whether House's new evidence was reliable, I do not find it probable that no reasonable juror would vote to convict him, and accordingly I dissent.

Because I do not think that House has satisfied the actual innocence standard set forth in *Schlup*, I do not believe that he has met the higher threshold for a freestanding innocence claim, assuming such a claim exists. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993). I therefore concur in the judgment with respect to the Court's disposition of that separate claim.

* * * *

In *Schlup*, we made clear that the standard we adopted requires a "stronger showing than that needed to establish prejudice." 513 U.S., at 327. In other words, House must show more than just a "reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). House must present such compelling evidence of innocence that it becomes more likely than not that no single juror, acting reasonably, would vote to convict him. *Schlup, supra*, at 329. The majority's conclusion is that given the sisters' testimony (if believed), and Dr. Blake's rebutted testimony about how to interpret Agent Bigbee's enzyme marker analysis summary (if accepted), combined with the revelation that the semen on Mrs. Muncey's clothing was deposited by her husband (which the jurors knew was just as likely as the semen having been deposited by House), no reasonable juror would vote to convict House. Given the District Court's reliability findings about the first two pieces of evidence, the evidence before us now is not substantially different from that considered by House's jury. I therefore find it more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House. The evidence as a whole certainly does not establish that House is actually innocent of the crime of murdering Carolyn Muncey, and accordingly I dissent.

IV. Fast Facts about Wrongful Convictions Overturned by DNA Evidence in the U.S. (1989-2020)

Data Source: Innocence Project¹²⁴⁶

The Innocence Project has tracked more than 375 DNA exonerations from 1989-2020, exposing systemic flaws in the criminal justice system. In addition to direct assistance to wrongfully convicted prisoners, the Innocence Project conducts extensive research into the systemic causes of wrongful convictions, analyzing data from hundreds of DNA exonerations.

¹²⁴⁶ Innocence Project, DNA Exonerations in the United States (1989 – 2020), accessed June 15, 2025, at <https://innocenceproject.org/dna-exonerations-in-the-united-states/>

Below are some facts about those DNA exonerations, providing crucial evidence for criminal justice reform efforts.

- **14:** Average number of years prisoners served before exoneration
- **26.6:** Average age at the time of wrongful conviction
- **43:** Average age at exoneration
- **21 of 375** people served time on death row
- **44 of 375** pled guilty to crimes they did not commit
- **69%** of the cases involved eyewitness misidentification
- **43%** involved misapplication of forensic science
- **29%** involved false confessions
- **268:** DNA exonerees compensated
- **165:** Actual perpetrators later identified.

Questions and Comments:

1. **Facilitating DNA testing through federal statutes:** The Supreme Court's rulings in actual innocence cases highlighted a gap in the ability to address wrongful convictions through the federal courts, even with new evidence. Congress, prompted by a growing number of DNA exonerations in the 1990s and early 2000s, particularly high-profile cases like exoneree Kirk Bloodsworth's (after whom one of the Act's grant programs is named), passed the Innocence Protection Act, part of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004). The Innocence Protection Act aims to reduce wrongful convictions and improve access to postconviction DNA testing. The Act provides block grants to states for postconviction DNA testing, funding to states to improve the quality of legal representation in death penalty cases, and federal funds to states for postconviction DNA testing of evidence that could prove innocence.
2. **Revisiting the standard of review for new evidence gateway claims in habeas:** The Supreme Court in *House* sets a demanding standard to prove that new evidence of innocence is a sufficient gateway to reach the merits of an otherwise-defaulted innocence claim in habeas. Habeas petitioners seeking review of their innocence claim must first

demonstrate that their claim is “sufficiently credible and compelling”¹²⁴⁷ based on “new reliable evidence ... that was not presented at trial.”¹²⁴⁸ To make that determination, a habeas court must consider all record evidence, “old and new.”¹²⁴⁹ Then petitioners must prove that, after considering the new evidence presented, no reasonable juror would find them guilty beyond a reasonable doubt.¹²⁵⁰ Only when a habeas court finds the evidence of innocence so compelling that it “cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error,” may the court then adjudicate the merits of otherwise procedurally barred claims.¹²⁵¹ Does *House* indicate that the standard for showing sufficient proof of innocence in gateway innocence claims is more lenient than that required for an independent innocence claim? Why or why not? What would be the reason for the difference in showing innocence?

3. **Is proving a freestanding claim of innocence impossible?** The Court found that *House*, with exculpatory DNA evidence and a credible confession from the victim’s husband, did not meet the burden of showing a freestanding claim of innocence. Other than saying that a habeas petitioner’s burden to prove a freestanding claim of innocence is “extraordinarily high,” the Supreme Court has not identified exactly what quantum of proof is required to show actual innocence in habeas. At least one federal court has required petitioners asserting innocence claims must affirmatively prove their innocence, rather than raise doubts about their guilt.¹²⁵² Requiring petitioners to meet an extraordinary standard of proof or affirmatively prove their innocence, some authors suggest, sets a nearly insurmountable hurdle in federal habeas.
4. **Sentencing innocence:** In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the U.S. Supreme Court established a strict standard for state prisoners using evidence of innocence claims as a “gateway” to overcome procedural bars in federal habeas corpus.¹²⁵³ The Court in *Sawyer* held that to demonstrate actual innocence of the death penalty and thus excuse procedural defaults in federal court, a habeas petitioner must show “by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner

¹²⁴⁷ *House*, 547 U.S. at 657.

¹²⁴⁸ *House*, 547 U.S. at 537.

¹²⁴⁹ *House*, 547 U.S. at 538.

¹²⁵⁰ *House*, 547 U.S. at 538.

¹²⁵¹ *Schlup*, 513 U.S. at 316.

¹²⁵² In *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc), the Ninth Circuit stated that a petitioner asserting a freestanding actual innocence claim “must go beyond demonstrating doubt about his [or her] guilt” and “must affirmatively prove that he [or she] is probably innocent.”)

¹²⁵³ *Sawyer*, a Louisiana death row prisoner, argued that he was innocent of the death penalty, and thus he could show the miscarriage of justice exception discussed in cases such as *Kuhlmann v. Wilson*. *Sawyer*’s claims centered on allegations that the state suppressed evidence that he helped the victim during the crime (thus lessening his culpability and violating *Brady v. Maryland*) and that his trial counsel failed to present mitigating mental evidence at sentencing that, if presented to the jury, would have resulted in a non-capital sentence.

eligible for the death penalty under the applicable state law.”¹²⁵⁴ The Court deemed the evidence of innocence in *Sawyer* insufficient. Why do you think the Court made the standard for proving actual innocence of the crime easier to meet than the standard for proving innocence of the death penalty?

V. Actual Innocence as a Basis for Overcoming AEDPA’s Limitations Period

The Supreme Court’s decision in *McQuiggin v. Perkins*¹²⁵⁵ establishes a third way that actual innocence may be used in federal habeas: showing sufficient proof of “extraordinary circumstances” to equitably toll AEDPA’s statute of limitations. This topic is discussed in detail in Chapter 8, The Antiterrorism and Effective Death Penalty Act.

Floyd Perkins was convicted of murder in Michigan state court. More than 11 years after his conviction became final, well beyond AEDPA’s one-year filing deadline, Perkins filed a federal habeas petition with new evidence that he claimed proved his innocence. Perkins wanted to present new affidavits in federal habeas to show his innocence and support his ineffective assistance of counsel claims. But six years had elapsed between the time the affidavits were obtained and his filing for federal habeas relief. At the Supreme Court, the central issue was if *Schlup*’s actual innocence gateway could equitably toll AEDPA’s statute of limitations and what impact lack of diligence has on evaluating the reliability of the innocence evidence. In a 5-4 majority, the Supreme Court held that a convincing showing of actual innocence creates an equitable exception to AEDPA’s statute of limitations. The Court found no clear indication that Congress meant to eliminate the Court’s traditional equitable authority to hear compelling claims of actual innocence, despite imposing various procedural limitations in enacting AEDPA. The Court determined that the equitable principles underlying habeas corpus demanded a safety valve for truly innocent petitioners. However, the Court emphasized the rarity of successful actual innocence claims, noting that tenable claims are likely to be few and that petitioners should be mindful that while an “unjustifiable delay” in bringing an actual innocence claim will not bar relief it will be considered “as a factor in determining whether actual innocence has been reliably shown.”¹²⁵⁶

Questions and Comments:

1. **The impact of diligence on assessing the reliability of evidence of innocence:** To establish an actual innocence gateway to overcome AEDPA’s statute of limitations, *McQuiggin v. Perkins* instructs that state prisoners must persuade the reviewing court that,

¹²⁵⁴ *Sawyer*, 505 U.S. at 336.

¹²⁵⁵ *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

¹²⁵⁶ *McQuiggin v. Perkins*, 569 U.S. at 387.

in light of the new evidence, no reasonable juror would have found them guilty beyond a reasonable doubt. The timing of the habeas corpus petition is a factor in assessing the reliability of the evidence of innocence, and a court should consider the impact of an unjustifiable delay. However, lack of diligence, the Court held, should not be an absolute barrier to relief.

2. **Controlling the flow of habeas petitions:** Are the *Schlup* standard plus the review of diligence sufficient to preserve Congress' clear intent to limit habeas review through AEDPA's statute of limitations? Can you imagine a fact pattern where a petitioner presenting an untimely innocence claim could meet the Court's requirements?
3. **Timing of newly discovered evidence:** The timing of when evidence is presented also matters significantly. Courts generally look more favorably on evidence that truly could not have been discovered earlier, for example, DNA testing that wasn't available at the time of trial or witnesses who were afraid to come forward initially but later felt safe doing so. Conversely, courts are more skeptical of evidence that could have been presented at trial.

VI. State Innocence Standards

As state prisoners' access to federal habeas corpus became constrained by the AEDPA and by U.S. Supreme Court's adherence to federalism and finality, state courts were viewed as best positioned to determine factual errors and the credibility of new proof in their own jurisdictions.¹²⁵⁷ Today, states increasingly acknowledge that justice requires allowing prisoners to raise actual innocence claims in state postconviction proceedings, given scientific advances such as DNA and the availability of video and tracking evidence that can definitively prove innocence. Some states have created special judicial pathways for litigating innocence in postconviction proceedings.

States that allow prisoners to bring freestanding actual innocence claims in postconviction proceedings have adopted different standards of proof that fall into three general tiers. The highest standard has been called an "enhanced *Schlup* showing,"¹²⁵⁸ requiring "clear and convincing evidence"¹²⁵⁹ that no reasonable juror would find the person guilty. California,¹²⁶⁰ Connecticut,¹²⁶¹

¹²⁵⁷ See *Herrera*, 506 U.S. at 400.

¹²⁵⁸ *People v. Coleman*, 996 N.E.2d 617, 635, 374 Ill.Dec. 922, 940 (2013).

¹²⁵⁹ *Schlup*, in contrast, required a showing of probability.

¹²⁶⁰ See *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, 739 (1993) (quoting *People v. Gonzalez*, 51 Cal.3d 1179, 275 Cal.Rptr. 729, 800 P.2d 1159, 1196 (1990)) (requiring petitioners to present evidence of actual innocence that "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability.").

¹²⁶¹ See *Miller v. Commissioner of Correction*, 242 Conn. 745, 794, 802, 700 A.2d 1108 (1997) ("to grant a petitioner's request for relief, the habeas court first must be convinced by clear and convincing evidence that the petitioner is actually innocent" ... and "no reasonable fact finder would find the petitioner guilty.").

New Mexico,¹²⁶² New York,¹²⁶³ Texas,¹²⁶⁴ and Virginia¹²⁶⁵ are among the states that use this demanding standard. Under this approach, the evidence of innocence must essentially eliminate any reasonable doubt about guilt. In practice, courts interpret this to mean the evidence must be nearly irrefutable and without any contradictory evidence. A middle-tier standard requires “clear and convincing evidence” of innocence, but without the additional requirement about what a reasonable juror would conclude. Alaska,¹²⁶⁶ Arizona,¹²⁶⁷ Missouri,¹²⁶⁸ and Utah,¹²⁶⁹ for example, take this approach. While still requiring strong proof, this standard is somewhat more attainable than the highest tier. The third and most lenient tier requires showing probable innocence or proof by a “preponderance of the evidence”—meaning it is more likely than not that the person is

¹²⁶² *Montoya v. Ulibarri*, 142 N.M. 89, 99, 163 P.3d 476, 486 (2007) (recognizing a state constitutional guarantee against conviction and imprisonment when innocent and requiring that petitioners raising actual innocence “must convince the court by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.”).

¹²⁶³ *People v. Cole*, 1 Misc. 3d 531, 543 (N.Y. Sup. Ct. 2003) (“a movant making a free-standing claim of innocence must establish by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.”).

¹²⁶⁴ See, e.g., *Ex parte Brown*, 205 S.W.3d 538, 544 (Tex.Crim.App.2006) (stating standard for reviewing actual innocence claims as being proof by “clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.”). Tex. Code Crim. Proc. Ann. art. 11.071, Sec. 5(a)(2) contains the standard needed to prove a gateway innocence claim. The section reads: “(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: ... (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.”

¹²⁶⁵ See, e.g., *Madison v. Commonwealth*, 71 Va. App. 678, 691-92 (2020) (“A petitioner can only obtain a writ of actual innocence if this Court finds by “clear and convincing evidence” that he has proven all of the allegations required under Code § 19.2-327.11(A)(iv) through (viii), and upon a finding that no rational trier of fact would have found proof of guilt beyond a reasonable doubt.”).

¹²⁶⁶ See, e.g., Alaska Stat. § 12.72.020(b)(2)(D) (Under Sec. 12.72.020. Limitations on applications for postconviction relief., a defendant must establish “by clear and convincing evidence that the applicant is innocent.” Alaska’s statute further requires the applicant to present newly discovered evidence that was not known within a specified time frame after the conviction, is not cumulative or impeachment evidence, and establishes the applicant’s innocence.); *Clayton v. State*, 535 P.3d 909, 918 (Alaska Ct. App. 2023) (noting AS 12.72.020(b)(2)(D)’s language and determining under an even lesser standard, petitioner failed to meet burden to show actual innocence).

¹²⁶⁷ See, e.g., Ariz. R. Crim. P. 32.1(h) (actual innocence shown if “the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752.”).

¹²⁶⁸ *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (“a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.”)

¹²⁶⁹ See Utah Code Ann. § 78B-9-404 to prove factual innocence, “the petitioner bears the burden of establishing factual innocence by clear and convincing evidence.”).

innocent. Illinois,¹²⁷⁰ Washington, and Wyoming¹²⁷¹ are among the states that have adopted lower thresholds. While still requiring substantial evidence, this standard acknowledges that absolute proof of innocence may be impossible in many cases.

In *Amrine v. Roper* below, the petitioner presented a freestanding claim of actual innocence as a basis for relief under the Missouri Constitution. Joseph Amrine, who had been convicted of murdering a fellow prison inmate and sentenced to death, presented evidence that all the key witnesses against him recanted their testimony, claiming they had lied under pressure from prison officials. The Missouri Supreme Court acknowledged that the newly discovered evidence showed compelling evidence of actual innocence and discussed the state constitutional basis for an independent innocence claim.

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This case presents the issue of whether a Missouri prisoner sentenced to death can obtain habeas relief on a claim of actual innocence alone, independent of any constitutional violation at trial.¹²⁷³ Because the continued imprisonment and eventual execution of an innocent person is a manifest injustice, a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. The newly discovered evidence presented by Amrine meets this standard.

While the dissenting opinion suggests that questions of credibility remain, the Court disagrees. In light of the resulting lack of any remaining direct evidence of Amrine's guilt from the first trial, Amrine has already met the clear and convincing evidence standard, for our confidence in the outcome of the first trial is sufficiently undermined by the recantation of all the key witnesses against him in the first trial to require setting aside his conviction and sentence of death. There would be no purpose to a preliminary determination of credibility by this Court sitting as a habeas court, either directly or through a master.

For these reasons, Amrine is entitled to relief from his conviction and sentence and to release subject to the prosecutor's decision whether to pursue new charges against Amrine if the state believes it has sufficient evidence to do so. This Court therefore orders Amrine conditionally

¹²⁷⁰ See, e.g., *People v. Harris*, No. 129753, 2024 IL 129753 at *7, (Ill. November 21, 2024) (“When a petitioner submits evidence to support an actual innocence claim, the evidence must be new, material, noncumulative, and, most importantly, of such conclusive character as would probably change the verdict on retrial.”).

¹²⁷¹ Under Wyoming's Factual Innocence Act, petitioners must prove by clear and convincing evidence that they “[d]id not engage in the conduct for which he was convicted[.]” Wyo. Stat. Ann. § 7-12-402(a)(ii)(A); § 7-12-404(p) (2021); *Hamilton v. State*, 2023 WY 89, ¶ 7, 534 P.3d 1253, 1255 (2023).

¹²⁷² 102 S.W.3d 541 (Mo. 2003) (en banc)

¹²⁷³ [Court’s footnote 1] This Court has original jurisdiction because Amrine was sentenced to death. Rule 91.02(b).

discharged from Respondent's custody thirty days from the date the mandate issues in this case unless the state elects to file new charges against Amrine in relation to the murder of which he was convicted.

FACTS

On October 18, 1985, inmate Gary Barber was stabbed to death in a recreation room at the Jefferson City Correctional Center. Officer John Noble identified inmate Terry Russell as the perpetrator. While being questioned about Barber's murder, Russell claimed that Amrine admitted that he had stabbed Barber. Amrine was charged with Barber's murder.

The state's case against Amrine rested on the testimony of inmate witnesses Terry Russell, Randy Ferguson and Jerry Poe. Russell testified that Amrine admitted to the murder. Ferguson testified that Amrine was walking next to Barber for several minutes before pulling a knife out of his waistband and stabbing Barber. Poe was not asked to describe the murder and testified only that he witnessed Amrine stab Barber. There was no physical evidence linking Amrine to the murder.

Amrine introduced evidence showing that he was not the killer and that Terry Russell was. Officer Noble testified that he saw Barber chase Russell across the recreation room before Barber pulled the knife from his back, collapsed, and died. Six inmates testified that Amrine was playing poker in a different part of the room at the time of the stabbing. Three of those inmates identified Terry Russell as the person that Barber was chasing. None of them named Amrine. The jury found Amrine guilty of Barber's murder, and he was sentenced to death.

This Court affirmed Amrine's conviction and sentence on direct appeal. *State v. Amrine*, 741 S.W.2d 665 (Mo. banc 1987). Amrine filed for post-conviction relief, alleging ineffective assistance of counsel under Rule 29.15. Ferguson and Russell testified at the Rule 29.15 hearing and recanted their trial testimony identifying Amrine as the murderer. Poe did not appear or testify in any of the state post-conviction proceedings, leaving his trial testimony intact. The motion court denied Amrine's petition for relief. This Court affirmed the judgment without reviewing the recantations. *Amrine v. State*, 785 S.W.2d 531 (Mo. banc 1990).

Amrine then petitioned for a writ of habeas corpus in the United States District Court for the Western District of Missouri. Although counsel argued that Amrine was actually innocent given the recantations of Russell and Ferguson, counsel introduced no new evidence of innocence. Because of the continued existence of Poe's testimony, the district court did not consider matters pertaining to the credibility of Russell and Ferguson and denied Amrine's petition.

Amrine obtained new counsel who located Jerry Poe. Poe offered an affidavit in which he recanted completely his trial testimony, stating that he did not see Amrine stab Barber and that he falsely implicated Amrine. Poe's affidavit, if believed, would contradict the key evidence against Amrine. In light of this new evidence, the Eighth Circuit Court of Appeals ordered a limited remand for the district court to conduct an evidentiary hearing to determine if Poe's evidence

Amrine presented was new and reliable and warranted habeas relief under *Schlup v. Delo*, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995).¹²⁷⁴ *Amrine v. Bowersox*, 128 F.3d 1222, 1228 (8th Cir. 1997).

On remand, Amrine presented testimony from former inmates Russell and Dean, former corrections officer Noble, and videotaped testimony from Poe and Ferguson. The district court denied Amrine's claim on the basis that only Poe's testimony was "new evidence" and that his recantation was unreliable. The district court did not consider Amrine's other evidence, including the recantations of Russell and Ferguson, because that evidence was not new. The Eighth Circuit affirmed the district court's judgment, holding that the district court properly focused on Poe's testimony because the testimony from Russell, Ferguson, Dean and Noble was not new. *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001). The United States Supreme Court denied certiorari. *Amrine v. Luebbers*, 534 U.S. 963, 151 L. Ed. 2d 283, 122 S. Ct. 372 (2001).

Amrine petitions this Court for a writ of habeas corpus, arguing that he is actually innocent of the Barber murder. Because the recantations were made over the course of years and between rounds of federal court proceedings, no court has addressed, at once, all of the evidence of Amrine's innocence. This Court is the first forum in which all of the existing evidence of innocence will be considered.

DISCUSSION

Amrine contends that he is entitled to habeas relief because all of the evidence now available establishes that he is actually innocent of the Barber murder. Amrine's claim for habeas relief rests on the proposition that his continued incarceration and eventual execution for a murder he did not commit constitutes a manifest injustice entitling him to habeas relief even though his trial and sentencing were otherwise constitutionally adequate. This case thus presents the first impression issue of whether and upon what showing a petitioner who makes a freestanding claim of actual innocence is entitled to habeas corpus relief from his conviction and sentence.

I. Habeas Review of Claims of Constitutional Error

Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as "a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982). To that end, Missouri law provides that a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001). Even though the interests protected by the writ are fundamental,

¹²⁷⁴ [Court's footnote 2] Under *Schlup*, a petitioner may obtain federal habeas review of defaulted constitutional claims if new evidence establishes that it is more likely than not that no reasonable juror would convict in light of the new evidence.

relief is limited in order to avoid unending challenges to final judgments. Habeas relief, therefore, is generally denied if the petitioner raises procedurally barred claims that could have been raised at an earlier stage or if other adequate remedies are available. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). Exceptions to this rule are recognized when the petitioner raises a jurisdictional issue, can demonstrate "cause and prejudice," or in extraordinary circumstances, when the petitioner can demonstrate that a "manifest injustice" would result unless habeas relief is granted. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d at 215; *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993).

Amrine's petition for habeas relief turns on the application of the manifest injustice standard to his claim of actual innocence. The state argues that Amrine's right to habeas relief depends on whether he meets the standards discussed in *Clay* for habeas relief. *Clay* discussed the circumstances in which a prisoner who has failed to raise a claim of constitutional error within the time period allowed under Missouri law may nonetheless obtain review of that claim of constitutional error. *Clay* adopted the federal standard set out in *Schlup v. Delo*, 513 U.S. at 327, and required a showing of either (1) cause for failing to raise the claim in a timely manner and prejudice from the constitutional error asserted, or (2) a showing by the preponderance of the evidence of actual innocence, and this would meet the manifest injustice standard for habeas relief under Missouri law. A showing either of cause and prejudice or of actual innocence acts as a "gateway" that entitles the prisoner to review on the merits of the prisoner's otherwise defaulted constitutional claim. *Clay*, 37 S.W.2d at 217.

II. Freestanding Claims of Actual Innocence As Manifest Injustice

Here, however, Mr. Amrine does not assert actual innocence merely as a gateway to allow consideration of an underlying constitutional claim. Rather, he makes what has been termed a "freestanding" claim of actual innocence.

In *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), the United States Supreme Court discussed the viability of a freestanding claim of actual innocence as a basis for habeas relief in the federal courts. Although the Court determined that federalism concerns militated against recognizing actual innocence as a basis for federal habeas relief, the Court assumed for the sake of argument 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.

Herrera, 506 U.S. at 417.¹²⁷⁵

¹²⁷⁵ [Court's footnote 3] In separate opinions, six members of the Court suggested that there may be circumstances in which it would be constitutionally intolerable under the federal constitution. Specifically, Justice O'Connor,

In other words, as *Herrera* recognized, even if a federal court were found not to have jurisdiction to review a state conviction and sentence in the absence of a federal constitutional issue, this would not deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted. The issue now before this Court, then, is whether, in the words of *Herrera*, Missouri has left a "state avenue open to process such a claim." *Id.* This Court finds that it has done so.

Having recognized the prospect of an intolerable wrong, the state has provided a remedy. As noted, it is not the remedy set out in *Clay*, for, while the *Clay* standard is appropriate for cases involving procedurally defaulted constitutional claims, it fails to account for those rare situations, such as Amrine's, in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial. This is all the more true here, where the execution of a potentially innocent man is at stake, for the death penalty is fundamentally different from other cases in which innocence is asserted after a fair trial. For this reason, uniquely under Missouri's death penalty statute, section 565.035.3, this Court is charged with determining not merely the sufficiency but also the "strength of the evidence." *See State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998). The obvious purpose is to avoid wrongful convictions and executions. The duty to do so in death penalty cases is, just as obviously, a continuing one. It is difficult to imagine a more manifestly unjust and unconstitutional result than permitting the execution of an innocent person. Therefore, it is incumbent upon the courts of this state to provide judicial recourse to an individual who, after the time for appeals has passed, is able to produce sufficient evidence of innocence to undermine the habeas court's confidence in the underlying judgment that resulted in defendant's conviction and sentence of death. The writ of habeas corpus is the appropriate means for Amrine to assert this claim.¹²⁷⁶

joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event," *Herrera*, 506 U.S. at 420, although she then concluded that the existence of federal relief for such a person need not be addressed in the case before the court. Justice White stated that "a persuasive showing of actual innocence made after trial . . . would render unconstitutional the execution of the petitioner in this case." *Herrera*, 506 U.S. at 429, but also failed to finally decide the issue on the record before the Court. By contrast, Justice Blackmun, joined in his dissent by Justices Souter and Stevens, stated that executing an innocent person is the "ultimate arbitrary imposition" and unquestionably violates both the Eighth and Fourteenth Amendments. *Herrera*, 506 U.S. at 437.

Article I, section 10 of the Missouri constitution similarly provides that "no person shall be deprived of life, liberty or property without due process of law." The constitutional guarantee of due process protects the individual from the arbitrary exercise of governmental power. Even were there no federal constitutional violation in the execution of an innocent person, this Court could find as a matter of state law that, as the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent. Because of our finding that such an execution would constitute a manifest injustice in this case, however, this Court, too, avoids finally resolving this issue today.

¹²⁷⁶ [Court's footnote 4] Other states have reached a similar conclusion and presently allow habeas relief on a freestanding claim of actual innocence. *State v. Washington*, 171 Ill. 2d 475, 665 N.E.2d 1330, 1337, 216 Ill. Dec. 773 (Ill. 1996); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); *Summerville*

III. The Burden of Proof of Actual Innocence

A freestanding claim of actual innocence is evaluated on the assumption that the trial was constitutionally adequate. Accordingly, the evidence of actual innocence must be strong enough to undermine the basis for the conviction so as to make the petitioner's continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial. *Cf. Simmons*, 866 S.W.2d at 446; *Schlup*, 513 U.S. at 316 (discussing *Herrera*).

At the same time, because an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrebuttable presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence. If habeas relief were conditioned on a finding that no rational juror could convict the petitioner after introduction of the new evidence, it would be impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard. *See State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Neither is this Court required to impose as high a standard as would a federal court in reviewing a freestanding claim of actual innocence, for, as discussed, this Court is not affected by the federalism concerns that limit the federal courts' jurisdiction to consider non-constitutional claims of actual innocence.

Conversely, it is appropriate that the burden of proof is heavier than the "more likely than not" standard governing *Clay* gateway claims of innocence because relief under *Clay* is premised upon a serious constitutional defect at trial and the conviction is worthy of less confidence by the habeas court. The appropriate burden of proof for a habeas claim based upon a freestanding claim of actual innocence should strike a balance between these competing standards and require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. *See Ex parte Joe Rene Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996); *Miller v. Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108, 1132 (Conn. 1997).

The burden of establishing a fact by clear and convincing evidence is heavier than the "preponderance of the evidence" test of ordinary civil cases and is less than the "beyond reasonable doubt" instruction that is given in criminal cases. Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re T.S.*, 925 S.W.2d 486, 488 (Mo. App. E.D.1996).

IV. Application

v. Warden, State Prison, 229 Conn. 397, 641 A.2d 1356, 1369 (Conn. 1994); *In re Lindley*, 29 Cal. 2d 709, 177 P.2d 918 (Cal. 1947).

Amrine has met his burden of providing clear and convincing evidence of actual innocence that undermines our confidence in the correctness of the judgment. In reviewing a claim under this standard, the evidence supporting the conviction must be assessed in light of all of the evidence now available. Although the evidence at trial was constitutionally sufficient to support the conviction, the evidence was not overwhelming. There was significant evidence indicating Amrine's innocence from the beginning. At trial, officer Noble identified Terry Russell as the perpetrator. He did not identify Amrine as the killer. Nor did the six inmates who testified that Amrine was playing cards in another part of the recreation room. There was no physical evidence linking Amrine to the murder. Instead, Amrine was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony.

This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. This Court, sitting as an original habeas court, determines based on this record that under these rare circumstances, there is clear and convincing evidence of Amrine's innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.

As the evidence was sufficient at Amrine's first trial to convict, however, there is no double jeopardy bar to retrial, if the state believes it can produce enough evidence, based on such evidence as it may have, even recanted evidence,¹²⁷⁷ to once again bring this case to a jury. Given the weakness of the evidence and the long delay since the original trial, during which time Amrine has been imprisoned based on a conviction this Court herein sets aside, however, an expeditious and final resolution of this case is imperative.

Therefore, this Court orders Amrine conditionally discharged from Respondent's custody thirty days from the date the mandate issues in this case unless the state elects to file new charges against Amrine in relation to the murder of which he was convicted.

RICHARD B. TEITELMAN, Judge

White and Stith, JJ., concur; Wolff, J., concurs in separate opinion filed; Benton, J., dissents in separate opinion filed; Limbaugh, C.J., concurs in opinion of Benton, J.; Price, J., dissents in separate opinion filed.

Concur by: Michael A. Wolff

¹²⁷⁷ [Court's footnote 5] See section 491.074, which allows prior inconsistent testimony to be received as substantive evidence of a criminal offense. *See also State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992).

I concur in the principal opinion. I write separately to emphasize the evidentiary aspects of this case that call for the habeas corpus remedy recognized by the principal opinion, rather than the remedy favored by either dissenting opinion.

After a judgment in a death penalty case is final, state courts are not limited to claims of constitutional violations when actual innocence is claimed. State courts can be concerned about - and available to grant relief to - an innocent person even where there is no constitutional violation.

Both the principal opinion and the dissents recognize that the state court's writ of habeas corpus is the appropriate remedy in cases of actual innocence. Even the dissents recognize that the judgment against Amrine is not entitled to the respect normally accorded a final judgment.

This is a highly unusual case. All three witnesses who told the original trial court jury that Amrine killed Barber have recanted their testimony.

The law usually does not condone recantations; they are not normally recognized to overturn a lawful conviction and sentence. *See State v. Harris*, 428 S.W.2d 497, 502 (Mo. 1968).

While relief by habeas based on actual innocence and manifest injustice is not limited to death penalty cases,¹²⁷⁸ death penalty cases are different. For one thing, the death penalty statute requires this Court to assess the "strength of the evidence" in determining whether to uphold a death sentence. Section 565.035.3. *See State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998). For no other crime is an appellate court given this power to review a sentence.

For this reason, it is particularly true in death penalty cases that the duty to assess the strength of the evidence is an ongoing duty. The applicable standard in habeas corpus proceedings is to prevent "manifest injustice." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001). Execution of an innocent person would be manifestly unjust, even if that person received a constitutionally adequate trial.

* * * *

[Dissent by Duane Benton, William Ray Price, Jr. omitted.]

Questions and Comments:

1. ***Amrine's* recognition of freestanding innocence claims:** In *Amrine*, the Missouri Supreme Court recognized freestanding innocence claims, interpreting Article I, Section

¹²⁷⁸ [Court's footnote 1] Missouri has, for example, a statute that gives a right to review an otherwise final judgment where DNA evidence may exist to exonerate a convicted felon. Section 547.035, RSMo 2002; section 547.037, RSMo 2002.

12 of the Missouri Constitution’s due process clause to find that “the purpose of the criminal justice system is to convict the guilty and free the innocent, [and thus] it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent.” How did the Missouri Supreme Court distinguish *Amrine* from U.S. Supreme Court precedents that were reluctant to recognize a constitutional guarantee against being convicted and imprisoned if a prisoner were innocent?

2. **A less strict standard for proving innocence in postconviction:** The majority in *Amrine* also ruled that a petitioner who can show clear and convincing evidence of actual innocence is entitled to habeas relief, even without a constitutional violation. What, according to the Court, justified *Amrine*’s more lenient standard of proof compared to *Herrera*’s stricter “no reasonable juror” standard?
3. **Beyond the courthouse—alternative mechanisms to addressing innocence:** Throughout this chapter, we’ve seen the substantial barriers that innocent persons face to have their claims heard on their merits, including strict procedural rules like statutes of limitations and rigorous pleading and evidentiary standards in state and federal postconviction proceedings. These barriers often prevent postconviction innocence claims from being adequately addressed within the judicial system and have created alternative mechanisms for prisoners to present claims of innocence outside of traditional court proceedings, such as executive clemency, administrative reviews, or statutory remedies. See Chapter 11, Reduction in Sentencing, aka Compassionate Release, discussing a statutory procedure established to remedy excessive sentences that cannot be corrected through traditional postconviction or habeas procedures.

Several states have either interpreted their state constitutions to permit freestanding claims of innocence or created statutes to do so. *See, e.g., Montoya v. Ulibarri*, 142 N.M. 89, 97, 163 P.3d 476, 484 (2007) (permitting freestanding claims of innocence in postconviction under the New Mexico Constitution’s due process and cruel and unusual punishment clauses); Md. Code Ann., Crim. Proc. § 8-301 (statute allowing prisoners to present new evidence of innocence in a “Petition for writ of actual innocence”); and *People v. Cole*, 1 Misc.3d at 541–542, 765 N.Y.S.2d 477 (recognizing freestanding innocence claims under the New York Constitution’s cruel and unusual and due process clauses, N.Y. Const., art. I, § 5 and § 6).

Other states have created innocence commissions or conviction integrity units to address and remedy wrongful convictions after traditional legal appeals have been exhausted. State innocence commissions are formal bodies established to investigate innocence claims and, in some cases, recommend remedies for individuals who have been wrongfully convicted and identify systemic reforms to prevent future injustice. These commissions represent an institutional approach to addressing miscarriages of justice beyond the traditional court system. Another institutional approach, Conviction Integrity Units (CIUs) or Conviction Review Units (CRUs), are programs established by prosecutorial organizations to review and investigate claims of wrongful convictions and have been instrumental in overturning wrongful convictions. CIU/CRUs leverage police and prosecutors’ resources to review factual innocence claims, newly discovered material

evidence, or information that significantly calls into question the legitimacy of a conviction or sentence. *See, e.g.*, Utah Code Ann. 78B-9-503 (establishing prosecuting agencies' CIUs); Mo. Rev. Stat. § 547.500 (establishing a conviction review unit within the Missouri Office of Prosecution Services to investigate claims of actual innocence).

Private nonprofit organizations and journalism and law school clinics have also made a substantial impact for innocent persons by providing pro bono legal and investigative services and advocating for postconviction scientific testing to prove actual innocence. An instrumental part of that effort is the Innocence Project, a national organization whose work has led to the exoneration of hundreds of wrongfully convicted prisoners, including some on death row. Also, the Innocence Project's work extends beyond individual cases to influence broader legal and procedural reforms, including legislative advocacy, creating the Innocence Network (regional groups of sponsoring student clinics at colleges and universities to investigate innocence cases).

CHAPTER 10: LITIGATION RESOURCES FOR INDIGENT PRISONERS

In prior chapters, you've read about the interconnected procedural rules that regulate postconviction litigation. State prisoners must navigate exhaustion requirements, statute of limitations calculations with multiple tolling provisions, procedural default doctrine, and the fair presentation requirement—each with nuanced exceptions. Meeting these procedural and evidentiary requirements is best navigated with the assistance of experienced counsel and litigation resources. Few indigent prisoners have either in state postconviction. While the Supreme Court and Congress have established a few legal mechanisms to provide resources for some indigent postconviction prisoners, those provisions apply only in narrow circumstances. In this chapter, we'll examine the situations when the law provides appointed counsel and litigation expenses for state prisoners seeking federal habeas corpus review.

Most indigent state prisoners represent themselves in postconviction because there's generally no constitutional right to a lawyer after a first direct appeal.¹²⁷⁹ Developing a federal constitutional claim in state court without a lawyer or litigation resources is exceptionally challenging, and the Antiterrorism and Effective Death Penalty Act (AEDPA)'s strict procedural requirements can permanently foreclose federal habeas relief if prisoners' constitutional claims are not properly presented in state court first.¹²⁸⁰ AEDPA requires prisoners to exhaust their constitutional claims in state court before seeking federal review, but *pro se* prisoners may not understand the underlying constitutional framework to properly allege the required elements. For example, a prisoner may allege in her postconviction petition that “the trial prosecutor hid evidence that would have helped my case” without specifically alleging that the evidence was material and that the prosecution knew its exculpatory value as required to show a *Brady v. Maryland* violation. If a prisoner fails to allege all elements of a *Brady* claim in state court, it will likely be dismissed

¹²⁷⁹ The Court has referred to this stage of the legal process as the “first direct appeal of right,” the first opportunity that a criminal defendant can appeal his or her conviction or sentence to a higher court as a matter of legal right, rather than court discretion. The Supreme Court recognized that the first appeal of right is a critical stage in the criminal process, triggering certain constitutional protections, including the right to effective assistance of counsel. *See* *Evitts v. Lucey*, 469 U.S. 387 (1985) in Section A.

¹²⁸⁰ To avoid AEDPA's bar, prisoners must follow all state procedural rules when presenting claims. For example, AEDPA's exhaustion requirement, discussed in Chapter 3, *Balancing the Role of State and Federal Courts: Exhaustion of State Remedies*, requires state prisoners seeking federal habeas corpus relief to first exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). If a state prisoner fails to properly exhaust a claim in state court, say by presenting it untimely, and a state court denies it on procedural grounds, the claim is procedurally defaulted and barred from federal review unless the prisoner demonstrates cause and prejudice or actual innocence. *See, e.g.,* *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (discussing the exhaustion requirement) and *House v. Bell*, 547 U.S. 518, 536-540 (2006) (actual innocence as gateway to procedurally defaulted claims). Additionally, AEDPA's fair presentation requirement (that requires state prisoners seeking habeas review to have presented the same constitutional claims and operative facts to give state courts a fair opportunity to address the constitutional issue raised below) is discussed in Chapter 8, *Antiterrorism and Effective Death Penalty Act*.

in federal habeas as unexhausted, even though the underlying facts were presented in state postconviction. Similarly, AEDPA’s “fairly presented” standard requires that prisoners present the same factual and legal theories in both state and federal proceedings. *Pro se* prisoners frequently fail to develop an adequate factual record in state court because their incarceration prevents them from conducting discovery, interviewing witnesses, or retaining experts. For example, a prisoner alleging ineffective assistance of counsel may present conclusory allegations in state court without the factual development needed to demonstrate deficient performance—such as evidence that counsel failed to investigate obvious defenses, interview key witnesses, or retain necessary experts. When these prisoners later attempt to supplement their federal habeas petitions with new factual allegations or expert testimony, federal courts will likely be barred from considering this evidence under AEDPA’s restrictions on evidentiary hearings.¹²⁸¹

Section I of this chapter gives the background of the right to counsel after trial. Section II discusses the law defining the availability of counsel for indigent prisoners seeking postconviction review. Section III examines the limited federal statutory provisions and equitable exceptions that allow for the appointment of counsel in specific circumstances, particularly in capital cases or when the interests of justice require it. Section IV discusses when indigent defendants in postconviction cases may receive funds for litigation expenses, such as investigative and expert assistance.

As you read this chapter, pay attention to the limited circumstances when litigation resources are available to state prisoners and the reasons behind those limitations.

I. Applying the Right to Counsel After Trial

The Sixth Amendment to the U.S. Constitution requires that all persons accused of a crime and facing imprisonment as a punishment have the right to the effective assistance of counsel at trial.¹²⁸² The Supreme Court has safeguarded the right to counsel as fundamental to a fair trial, as it is the right that protects all other constitutional rights. In the landmark decision *Gideon v. Wainwright*,¹²⁸³ the Supreme Court held that the Sixth Amendment, through the Fourteenth Amendment’s Due Process Clause, required states to provide attorneys for criminal defendants regardless of their ability to pay. The Court recognized that lawyers are “necessities, not luxuries” in ensuring a fair criminal trial, as defendants’ liberty depends on their ability to present their cases

¹²⁸¹ See, e.g., *Shoop v. Twyford*, 596 U.S. 811, 819-20 (2022) (“... [a]lthough state prisoners may occasionally submit new evidence in federal court, “AEDPA’s statutory scheme is designed to strongly discourage them from doing so.””), quoting *Cullen v. Pinholster*, 563 U. S. 170, 186 (2011).

¹²⁸² U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”)

¹²⁸³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

effectively against the State.¹²⁸⁴ In a companion case to *Gideon*, *Douglas v. California*,¹²⁸⁵ the Court recognized a right to appointed counsel in defendants’ first direct appeal as of right, requiring that if states afforded the right to appeal a criminal conviction, the appeals process must be “adequate and effective” and more than a “meaningless ritual.”¹²⁸⁶

In *Evitts v. Lucey* below, the U.S. Supreme Court decided if the constitutional right to the *effective* assistance of counsel applies beyond trial—even when counsel was retained by the defendant. *Evitts* also establishes the limits of the right to counsel between appeals “as of right” and discretionary appeals, which the Court revisits in subsequent decisions about the right to effective representation in postconviction proceedings

EVITTS V. LUCEY¹²⁸⁷

JUSTICE BRENNAN delivered the opinion of the Court.

Douglas v. California, 372 U.S. 353 (1963), held that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right. In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such an appeal.

[*Author’s fact summary*: A Kentucky jury found respondent Keith Lucey guilty of trafficking in controlled substances. Lucey’s retained counsel timely appealed Lucey’s conviction to the Court of Appeals of Kentucky but failed to file a “statement of appeal” that was to contain information including the names of appellants and appellees, counsel, and the trial judge, the date of judgment, the date of notice of appeal, as required by Kentucky Rule of Appellate Procedure 1.095(a)(1). The Commonwealth of Kentucky moved to dismiss the appeal for failure to file the statement of appeal, which the Kentucky Court of Appeals granted. Lucey’s lawyer then filed a statement of appeal and moved for reconsideration, but the Court of Appeals summarily denied the motion. The Supreme Court of Kentucky affirmed the Court of Appeals’ judgment in a one-sentence order.

Lucey then sought federal habeas corpus relief in the United States District Court for the Eastern District of Kentucky, challenging the constitutionality of the dismissal of his appeal. Lucey argued that his lawyer’s failure to file the statement of appeal deprived him of his right to the effective assistance of counsel on appeal. The District Court granted respondent a conditional writ of habeas corpus ordering his release unless the Commonwealth either reinstated his appeal or retried him. On the Commonwealth’s appeal, the U.S. Court of Appeals for the Sixth Circuit, reached no decision on the merits but instead remanded the case to the District Court for

¹²⁸⁴ *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

¹²⁸⁵ *Douglas v. California*, 372 U.S. 353 (1963).

¹²⁸⁶ *Griffin v. Illinois*, 351 U.S. 12, 20 (1956).

¹²⁸⁷ 469 U.S. 387 (1985)

determination whether Lucey had an Equal Protection Clause claim. On remand, the parties stipulated that there was no equal protection issue and that the only issue was if the state court's action in dismissing respondent's appeal violated the Due Process Clause. The U.S. District Court then reissued the conditional writ of habeas corpus, which the U.S. Court of Appeals for the Sixth Circuit affirmed.]

We granted the petition for certiorari. We affirm.¹²⁸⁸

II

Respondent has for the past seven years unsuccessfully pursued every avenue open to him in an effort to obtain a decision on the merits of his appeal and to prove that his conviction was unlawful. The Kentucky appellate courts' refusal to hear him on the merits of his claim does not stem from any view of those merits, and respondent does not argue in this Court that those courts were constitutionally required to render judgment on the appeal in his favor. Rather the issue we must decide is whether the state court's dismissal of the appeal, despite the ineffective assistance of respondent's counsel on appeal, violates the Due Process Clause of the Fourteenth Amendment.

Before analyzing the merits of respondent's contention, it is appropriate to emphasize two limits on the scope of the question presented. First, there is no challenge to the District Court's finding that respondent indeed received ineffective assistance of counsel on appeal. Respondent alleges -- and petitioners do not deny in this Court -- that his counsel's failure to obey a simple court rule that could have such drastic consequences required this finding. We therefore need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Second, the stipulation in the District Court on remand limits our inquiry solely to the validity of the state court's action under the Due Process Clause of the Fourteenth Amendment.¹²⁸⁹

Respondent's claim arises at the intersection of two lines of cases. In one line, we have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective," see *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); among those safeguards is the right to counsel, see *Douglas v. California*, 372 U.S. 353 (1963). In the second line, we have held that the trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, see *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), comprehends the right to

¹²⁸⁸ The Commonwealth informed this Court five days prior to oral argument that respondent had been finally released from custody and his civil rights, including suffrage and the right to hold public office, restored as of May 10, 1983. However, respondent has not been pardoned and some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future. This case is thus not moot. See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Sibron v. New York*, 392 U.S. 40, 55-57 (1968).

¹²⁸⁹ Seemingly, respondent entered the stipulation because his attorney on appeal had been retained, not appointed.

effective assistance of counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). The question presented in this case is whether the appellate-level right to counsel also comprehends the right to effective assistance of counsel.

A

Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 (1894). Nonetheless, if a State has created appellate courts as “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,” *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. In *Griffin* itself, a transcript of the trial court proceedings was a prerequisite to a decision on the merits of an appeal. See *id.*, at 13-14. We held that the State must provide such a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an “adequate and effective” appeal. *Id.*, at 20.

Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. See *Griffin, supra*, at 20. Therefore, *Douglas v. California, supra*, recognized that the principles of *Griffin* required a State that afforded a right of appeal to make that appeal more than a “meaningless ritual” by supplying an indigent appellant in a criminal case with an attorney. 372 U.S., at 358. This right to counsel is limited to the first appeal as of right, see *Ross v. Moffitt*, 417 U.S. 600 (1974), and the attorney need not advance *every* argument, regardless of merit, urged by the appellant, see *Jones v. Barnes*, 463 U.S. 745 (1983). But the attorney must be available to assist in preparing and submitting a brief to the appellate court, *Swenson v. Bosler*, 386 U.S. 258 (1967) (per curiam), and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant’s claim. See *Anders v. California*, 386 U.S. 738 (1967); see also *Entsminger v. Iowa*, 386 U.S. 748 (1967).

B

Gideon v. Wainwright, supra, held that the Sixth Amendment right to counsel was “so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” “*Id.*, at 340, quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942); see also *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Gideon* rested on the “obvious truth” that lawyers are “necessities, not luxuries” in our adversarial system of criminal justice. 372 U.S., at 344. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862 (1975). The defendant’s liberty depends on his ability to present his case in the face of “the intricacies of the law and the advocacy of the public prosecutor,” *United States v. Ash*, 413

U.S. 300, 309 (1973); a criminal trial is thus not conducted in accord with due process of law unless the defendant has counsel to represent him.¹²⁹⁰

As we have made clear, the guarantee of counsel “cannot be satisfied by mere formal appointment,” *Avery v. Alabama*, 308 U.S. 444, 446 (1940). “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S., at 685. Last Term, we emphasized this point while clarifying the standards to be used in assessing claims that trial counsel failed to provide effective representation. See *United States v. Cronin*, 466 U.S. 648 (1984); *Strickland v. Washington*, *supra*. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.

As the quotation from *Strickland*, *supra*, makes clear, the constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed. See *Cuyler v. Sullivan*, *supra*, at 342-345. The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. “Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.” *Cuyler v. Sullivan*, *supra*, at 343 (citations omitted).

C

The two lines of cases mentioned -- the cases recognizing the right to counsel on a first appeal as of right and the cases recognizing that the right to counsel at trial includes a right to effective assistance of counsel -- are dispositive of respondent’s claim. In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant

¹²⁹⁰ Our cases dealing with the right to counsel -- whether at trial or on appeal -- have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor. See, e. g., *Douglas v. California*, 372 U.S. 353, 358 (1963) (noting the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf"). Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision. The facts of this case emphasize a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all -- much less a favorable decision -- on the merits of the case. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. Cf. *Anders v. California*, 386 U.S. 738 (1967); *Entsminger v. Iowa*, 386 U.S. 748 (1967).

must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.¹²⁹¹ This result is hardly novel. The petitioners in both *Anders v. California*, 386 U.S. 738 (1967), and *Entsminger v. Iowa*, 386 U.S. 748 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in *Anders* to submit a brief on appeal and counsel's waiver in *Entsminger* of the petitioner's right to a full transcript rendered the subsequent judgments against the petitioners unconstitutional.¹²⁹² In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal -- like the promise of *Gideon* that a criminal defendant has a right to counsel at trial -- would be a futile gesture unless it comprehended the right to the effective assistance of counsel.

Recognition of the right to effective assistance of counsel on appeal requires that we affirm the Sixth Circuit's decision in this case. Petitioners object that this holding will disable state courts from enforcing a wide range of vital procedural rules governing appeals. Counsel may, according to petitioners, disobey such rules with impunity if the state courts are precluded from enforcing them by dismissing the appeal.

Petitioners' concerns are exaggerated. The lower federal courts -- and many state courts -- overwhelmingly have recognized a right to effective assistance of counsel on appeal. These decisions do not seem to have had dire consequences for the States' ability to conduct appeals in accordance with reasonable procedural rules. Nor for that matter has the longstanding recognition of a right to effective assistance of counsel at trial -- including the recognition in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that this right extended to retained as well as appointed counsel -- rendered

¹²⁹¹ As *Ross v. Moffitt*, 417 U.S. 600 (1974), held, the considerations governing a discretionary appeal are somewhat different. See *infra*, at 401-402. Of course, the right to effective assistance of counsel is dependent on the right to counsel itself. See *Wainwright v. Torna*, 455 U.S. 586, 587-588 (1982) (per curiam) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely") (footnote omitted).

¹²⁹² Moreover, *Jones v. Barnes*, 463 U.S. 745 (1983), adjudicated a similar claim "of ineffective assistance by appellate counsel." *Id.*, at 749. In *Jones*, the appellate attorney had failed to raise every issue requested by the criminal defendant. This Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct in fact served the goal of "vigorous and effective advocacy." *Id.*, at 754. The Court's reasoning would have been entirely superfluous if there were no right to effective assistance of counsel in the first place.

ineffectual the perhaps more complex procedural rules governing the conduct of trials. See also *United States v. Cronin*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984).

To the extent that a State believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction. If instead a state court chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client's due process rights. For instance the Kentucky Supreme Court itself in other contexts has permitted a postconviction attack on the trial judgment as "the appropriate remedy for frustrated right of appeal," *Hammershoy v. Commonwealth*, 398 S. W. 2d 883 (1966); this is but one of several solutions that state and federal courts have permitted in similar cases. A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant -- the right to effective assistance of counsel -- has been violated.

* * *

C

[P]etitioners argue that even if the Due Process Clause does apply to the manner in which a State conducts its system of appeals and even if the appeal denied to respondent was an appeal as of right, the Due Process Clause nonetheless is not offended by the Kentucky court's refusal to decide respondent's appeal on the merits, because that Clause has no role to play in granting a criminal appellant the right to counsel -- or *a fortiori* to the effective assistance of counsel -- on appeal.

According to the petitioners, the constitutional requirements recognized in *Griffin*, *Douglas*, and the cases that followed had their source in the Equal Protection Clause, and not the Due Process Clause, of the Fourteenth Amendment. . . . Petitioners' argument rests on a misunderstanding of the diverse sources of our holdings in this area. . . . Our decisions in *Anders* [*v. California*, 386 U.S. at 744], *Entsminger v. Iowa*, 386 U.S. 748 (1967), and *Jones v. Barnes*, 463 U.S. 745 (1983), are all inconsistent with petitioners' interpretation. . . . [A]ll of these cases rest on the premise that a State must supply indigent criminal appellants with attorneys who can provide specified types of assistance -- that is, that such appellants have a right to effective assistance of counsel. Petitioners claim that all such rights enjoyed by criminal appellants have their source in the Equal Protection Clause, and that such rights are all measured by the rights of nonindigent appellants. But if petitioners' argument in the instant case is correct, nonindigent appellants themselves have no right to effective assistance of counsel. It would follow that indigent appellants also have no right to effective assistance of counsel, and all three of these cases erred in reaching the contrary conclusion.

The lesson of our cases, as we pointed out in *Ross, supra, at 609*, is that each Clause triggers a distinct inquiry: “‘Due Process’ emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. ‘Equal Protection,’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants -- indigent ones -- differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court.

Affirmed.

Questions and Comments:

1. **Respecting state procedural requirements:** The Commonwealth of Kentucky’s counsel argued in *Evitts v. Lucey* that allowing appellants to bring IAC claims when their attorneys fail to comply with state procedural rules could allow those rules to be ignored if state courts could not enforce them through dismissing cases. What did the Court suggest states could do to enforce their procedural rules?
2. **Due process or equal protection?** The Commonwealth of Kentucky also argued that because Lucey’s counsel was retained, he did not have the right to effective assistance because the Court’s prior decisions grounded appellate rights to counsel in the Fourteenth Amendment’s Equal Protection Clause rather than the Due Process Clause. For example, in *Griffin*, the Supreme Court held that a state appeal could not be dismissed for lack of a trial transcript due to an appellant’s indigency, as the Equal Protection Clause requires equal access to constitutional challenges regardless of wealth. In *Evitts*, the Court specified that its right to appeal decisions were grounded in both equal protection and due process, as an appeal is a critical stage of a criminal proceeding and the right to effective assistance of counsel is essential to ensure fairness in the appellate process. Justice Rehnquist dissented in *Evitts* that Lucey should have to accept the consequences of his chosen attorney’s actions under an agency theory, however, the Court continues to treat IAC claims involving retained and appointed counsel similarly.
3. **Defining effective assistance on appeal:** The Court in *Evitts* did not explicitly define the standard for evaluating claims of ineffective assistance on appeal. *Strickland v. Washington*, which established the standard for ineffective assistance of trial counsel, has

since been applied to appellate counsel.¹²⁹³ Under *Strickland*, a defendant must satisfy a demanding two-prong test: first, that counsel's performance was deficient, falling below an objective standard of reasonableness; and second, that the deficient performance prejudiced the defense by creating a reasonable probability that, but for counsel's errors, the result would have been different. This standard creates significant hurdles for defendants. The first prong incorporates a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, requiring courts to be highly deferential to counsel's strategic decisions. The prejudice prong demands more than showing that counsel's errors had some conceivable effect—defendants must demonstrate that the probability of a different result is substantial, not merely possible.

Strickland's application of the IAC standard to appellate counsel's strategic decisions, such as the selection of issues to raise on appeal, remains an evolving area of law. The Supreme Court has ruled that appellate counsel cannot be deemed ineffective for failing to raise every nonfrivolous issue,¹²⁹⁴ deferring to attorneys' strategic choices that make proving ineffective assistance of appellate counsel particularly challenging.

II. The Right to Postconviction Counsel and Safeguards for the Right to Effective Assistance of Counsel

Although the Supreme Court has held that defense lawyers are essential for trials and first appeals of right, it has never recognized a constitutional right to counsel in postconviction proceedings—either for appointment of lawyers or for effective representation. A trio of Supreme Court cases has led to this strong presumption that absent special circumstances, no federal constitutional right to counsel exists in postconviction proceedings. In *Pennsylvania v. Finley*,¹²⁹⁵ the Court reasoned that because postconviction proceedings are civil in nature and not part of the criminal trial process, the constitutional protections afforded during trial and direct appeal end once a conviction has been deemed final on direct appeal.¹²⁹⁶ Two years later, the Court held in

¹²⁹³ *Strickland v. Washington*, 466 U.S. 668 (1984) (requiring a showing of deficient performance and resulting prejudice to establish ineffective assistance of counsel).

¹²⁹⁴ *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every “colorable” claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders. . .”).

¹²⁹⁵ 481 U.S. 551 (1987).

¹²⁹⁶ See *Finley*, 481 U.S. at 555 (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. . . We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process”).

*Murray v. Giarratano*¹²⁹⁷ that even death row inmates are not entitled to state-appointed postconviction counsel.

In line with *Finley* and *Giarratano*, the Court later held in *Coleman v. Thompson*¹²⁹⁸ that a capital prisoner's ineffective assistance of postconviction counsel claim was not cognizable in federal habeas, even after his postconviction attorneys missed a filing deadline on a state postconviction appeal. Thus, absent a special exception, there is no constitutional right to effective counsel in state postconviction proceedings even in capital cases.¹²⁹⁹ Thus, the presumption against IAC claims in postconviction places the responsibility for postconviction attorneys missing filing deadlines or failing to raise claims on their clients.¹³⁰⁰ The Court left open in *Coleman*, however, whether a prisoner has a right to effective counsel in state postconviction proceedings if postconviction was the prisoner's first chance to raise an ineffective assistance of trial counsel claim.¹³⁰¹

Martinez v. Ryan below addressed that open question: whether ineffective postconviction representation could excuse a prisoner's procedural default if state postconviction proceedings were the first chance to raise ineffective assistance of trial counsel. As you read *Martinez*, consider what circumstances should allow federal review of prisoners' ineffectiveness claims even when those claims were procedurally defaulted in state court.

MARTINEZ V. RYAN¹³⁰²

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings. In the instant case, however, petitioner's postconviction counsel did not raise the ineffective-assistance claim in the first collateral proceeding, and, indeed, filed a statement that, after reviewing the case, she found no meritorious claims helpful to petitioner. On federal habeas review, and with new counsel, petitioner sought to argue he had received ineffective assistance of counsel at trial and in the first phase of his state collateral proceeding. Because the state collateral proceeding was the first place to challenge his conviction on grounds of ineffective

¹²⁹⁷ 492 U.S. 1 (1989).

¹²⁹⁸ 501 U.S. 722 (1991).

¹²⁹⁹ 501 U.S. at 753-54.

¹³⁰⁰ See *Shinn v. Ramirez*, 596 U.S. 366 (2022) (state procedural default of prisoner's ineffective assistance of trial counsel because of postconviction counsel's negligence in failing to raise the trial counsel claims could not be granted an evidentiary hearing in federal habeas).

¹³⁰¹ 501 U.S. at 756.

¹³⁰² 566 U.S. 1 (2012)

assistance, petitioner maintained he had a constitutional right to an effective attorney in the collateral proceeding. While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

I

A jury convicted petitioner, Luis Mariano Martinez, of two counts of sexual conduct with a minor under the age of 15. The prosecution introduced a videotaped forensic interview with the victim, Martinez's 11-year-old stepdaughter. It also put in evidence the victim's nightgown, with traces of Martinez's DNA. As part of his defense, Martinez introduced evidence of the victim's recantations, including testimony from the victim's grandmother and mother and a second videotaped interview in which the victim denied any abuse. The victim also denied any abuse when she testified at trial. To explain the inconsistencies, a prosecution expert testified that recantations of child-abuse accusations are caused often by reluctance on the part of the victim's mother to lend support to the child's claims. After considering the conflicting evidence, the jury convicted Martinez. He was sentenced to two consecutive terms of life imprisonment with no possibility of parole for 35 years.

The State appointed a new attorney to represent Martinez in his direct appeal. She made numerous arguments on Martinez's behalf, including a claim that the evidence was insufficient and that newly discovered evidence warranted a new trial. Arizona law, however, did not permit her to argue on direct appeal that trial counsel was ineffective. Arizona instead requires claims of ineffective assistance at trial to be reserved for state collateral proceedings.

While Martinez's direct appeal was pending, the attorney began a state collateral proceeding by filing a "Notice of Post-Conviction Relief." Despite initiating this proceeding, counsel made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all.

The state trial court hearing the collateral proceeding gave Martinez 45 days to file a *pro se* petition in support of postconviction relief and to raise any claims he believed his counsel overlooked. Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to file a *pro se* petition to preserve his rights. The state trial court dismissed the action for postconviction relief, in effect affirming counsel's determination that Martinez had no meritorious claims. The Arizona Court of Appeals affirmed Martinez's conviction, and the Arizona Supreme Court denied review.

About a year and a half later, Martinez, now represented by new counsel, filed a second notice of postconviction relief in the Arizona trial court. Martinez claimed his trial counsel had been ineffective for failing to challenge the prosecution's evidence. He argued, for example, that his trial counsel should have objected to the expert testimony explaining the victim's recantations

or should have called an expert witness in rebuttal. Martinez also faulted trial counsel for not pursuing an exculpatory explanation for the DNA on the nightgown. Martinez's petition was dismissed, in part in reliance on an Arizona Rule barring relief on a claim that could have been raised in a previous collateral proceeding. Martinez, the theory went, should have asserted the claims of ineffective assistance of trial counsel in his first notice for postconviction relief. The Arizona Court of Appeals agreed. It denied Martinez relief because he failed to raise his claims in the first collateral proceeding. The Arizona Supreme Court declined to review Martinez's appeal.

Martinez then sought relief in the United States District Court for the District of Arizona, where he filed a petition for a writ of habeas corpus, again raising the ineffective-assistance-of-trial-counsel claims. Martinez acknowledged the state courts denied his claims by relying on a well-established state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of the claims. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977). He could overcome this hurdle to federal review, Martinez argued, because he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions.

On the Magistrate Judge's recommendation, the District Court denied the petition, ruling that Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review. Martinez had not shown cause to excuse the procedural default, the District Court reasoned, because under *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), an attorney's errors in a postconviction proceeding do not qualify as cause for a default.

The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals relied on general statements in *Coleman* that, absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for a procedural default. Expanding on the District Court's opinion, the Court of Appeals, citing *Coleman*, noted the general rule that there is no constitutional right to counsel in collateral proceedings. The Court of Appeals recognized that *Coleman* reserved ruling on whether there is "an exception" to this rule in those cases "where 'state collateral review is the first place a prisoner can present a challenge to his conviction.'" "623 F.3d, at 736 (quoting *Coleman, supra*, at 755, 111 S.Ct. 2546). It concluded, nevertheless, that the controlling cases established no basis for the exception. Certiorari was granted.

II

Coleman v. Thompson, supra, left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, "initial-review collateral proceedings." *Coleman* had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because "in [these] cases ... state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.*, at 755. As *Coleman* noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective-assistance claim, *id.*, at 756 (emphasis deleted; internal quotation

marks omitted), and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings, see *id.*, at 755; *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding States must appoint counsel on a prisoner’s first appeal).

This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.

A

Federal habeas courts reviewing the constitutionality of a state prisoner’s conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. See, e.g., *Coleman, supra*, at 747–748; *Sykes, supra*, at 84–85. A state court’s invocation of a procedural rule to deny a prisoner’s claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, e.g., *Walker v. Martin*, 562 U.S. 307, 316 (2011); *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See *Coleman, supra*, at 750. There is no dispute that Arizona’s procedural bar on successive petitions is an independent and adequate state ground. Thus, a federal court can hear Martinez’s ineffective-assistance claim only if he can establish cause to excuse the procedural default.

Coleman held that “[n]egligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’” *Maples v. Thomas*, 565 U.S. 266, 280 (2012). *Coleman* reasoned that “because the attorney is the prisoner’s agent ... under ‘well-settled principles of agency law,’ the principal bears the risk of negligent conduct on the part of his agent.” *Maples, supra*, at 280–281.

Coleman, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner’s claims had been addressed by the state habeas trial court. See 501 U.S., at 755.

As *Coleman* recognized, this marks a key difference between initial-review collateral

proceedings and other kinds of collateral proceedings. When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, e.g., *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); cf. *Coleman, supra*, at 730–731. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.

The same is not true when counsel errs in other kinds of postconviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding. See, e.g., *Coleman, supra*, at 756.

Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court “looks to the merits of the clai[m]” of ineffective assistance, no other court has addressed the claim, and “defendants pursuing first-tier review ... are generally ill equipped to represent themselves” because they do not have a brief from counsel or an opinion of the court addressing their claim of error. *Halbert v. Michigan*, 545 U.S. 605, 617 (2005); see *Douglas*, 372 U.S., at 357-358.

As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. See 501 U.S., at 754; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Douglas, supra*, at 357-358. Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U.S., at 619. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g., *id.*, at 620–621 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

A prisoner's inability to present a claim of trial error is of particular concern when the

claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an “obvious truth” the idea that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution’s case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence”). Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446 (2000).

This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding. See *Massaro v. United States*, 538 U.S. 500, 505 (2003). Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim. *Ibid.* Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim. See Primus, Structural Reform in Criminal Defense, 92 Cornell L.Rev. 679, 689–690, and n. 57 (2004) (most rules give between 5 and 30 days from the time of conviction to file a request to expand the record on appeal). Thus, there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage, but this decision is not without consequences for the State’s ability to assert a procedural default in later proceedings. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims. It is within the context of this state procedural framework that counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

* * *

Most jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims. Some States, including Arizona, appoint counsel in every first collateral proceeding. . . . It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings.

B

This limited qualification to *Coleman* does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles. . . . *Coleman* held that an attorney’s negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial. *Coleman* itself did not involve an occasion when an attorney erred in an initial-review collateral

proceeding with respect to a claim of ineffective trial counsel; and in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one.

The holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.

The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. See 501 U.S., at 754; *Carrier*, 477 U.S., at 488. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

In addition, the limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel and Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal. Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal.

Arizona contends that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, bars Martinez from asserting attorney error as cause for a procedural default. AEDPA refers to attorney error in collateral proceedings, but it does not speak to the question presented in this case. Section 2254(i) provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief." "Cause," however, is not synonymous with "a ground for relief." A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. In this case, for example, Martinez's "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA does not bar. Martinez relies on the ineffectiveness of his postconviction attorney to

excuse his failure to comply with Arizona’s procedural rules, not as an independent basis for overturning his conviction. In short, while § 2254(i) precludes Martinez from relying on the ineffectiveness of his postconviction attorney as a “ground for relief,” it does not stop Martinez from using it to establish “cause.” *Holland v. Florida*, 560 U.S. 631, 650-651 (2010).

III

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

In this case Martinez’s attorney in the initial-review collateral proceeding filed a notice akin to an *Anders* brief, in effect conceding that Martinez lacked any meritorious claim, including his claim of ineffective assistance at trial. See *Anders v. California*, 386 U.S. 738 (1967). Martinez argued before the federal habeas court that filing the *Anders* brief constituted ineffective assistance. The Court of Appeals did not decide whether that was so. Rather, it held that because Martinez did not have a right to an attorney in the initial-review collateral proceeding, the attorney’s errors in the initial-review collateral proceeding could not establish cause for the failure to comply with the State’s rules. Thus, the Court of Appeals did not determine whether Martinez’s attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments:

1. **Applying the “initial-review” rule:** *Martinez* initially limited federal court review of ineffective state postconviction counsel to ineffective assistance of trial counsel (IATC) claims raised in “initial-review collateral proceedings” in which the state expressly made postconviction the first opportunity to present IATC claims.¹³⁰³ The Supreme Court later extended *Martinez* to state procedural rules that effectively made postconviction the first or only venue to raise trial ineffectiveness claims (even if not explicitly mandated) in

¹³⁰³ *Martinez*, 566 U.S. at 17.

*Trevino v. Thaler*¹³⁰⁴ (finding that Texas’ procedural rules made it “virtually impossible” to raise ineffectiveness of trial or direct appeal counsel while on direct appeal). But in *Davila v. Davis*,¹³⁰⁵ the Court declined to expand *Martinez v. Ryan*’s equitable exception to claims of ineffective assistance of appellate counsel. The Court held that ineffective assistance of state postconviction counsel does not constitute “cause” to excuse the procedural default of claims of ineffective assistance of appellate counsel because prisoners do not have a constitutional right to counsel in state postconviction proceedings, and thus, errors by postconviction counsel cannot excuse procedural defaults.¹³⁰⁶ *Martinez* reflects the Court’s position that trial errors, particularly those involving ineffective assistance of trial counsel, are more critical because the trial is the primary forum for determining guilt or innocence. In contrast, appellate proceedings do not hold the same “pride of place” in the criminal justice system.¹³⁰⁷

2. **Martinez’s practical effect:** While *Martinez* does not guarantee relief, it allows federal courts to hear previously barred trial-level IAC claims based on ineffective state postconviction representation if state postconviction is the first opportunity to present IATC claims. This exception invokes a consistent theme in federal habeas—balancing federalism concerns with ensuring meaningful review of constitutional violations in state criminal proceedings.
3. **Martinez’s limits:** In 2022, the Supreme Court further limited *Martinez*’s application of the equitable exception in *Shinn v. Ramirez*.¹³⁰⁸ *Shinn* significantly restricted federal habeas courts from considering new evidence or conducting evidentiary hearings for procedurally defaulted IAC claims, when the failure to develop the record was attributable to the prisoner, even if the failure was due to the ineffective assistance of state postconviction counsel.

¹³⁰⁴ 569 U.S. 413, 417 (2013).

¹³⁰⁵ 582 U.S. 521 (2017).

¹³⁰⁶ In *Davila v. Davis*, the Court expressed concern that expanding *Martinez* to allow defaulted claims of ineffective assistance of appellate counsel would create new paths to federal litigation of any defaulted trial error, imposing significant costs to federal courts to review additional claims and unnecessarily intrude on states’ sovereignty of their criminal cases. 582 U.S. at 537-538.

¹³⁰⁷ *Davila*, 582 U.S. at 531(explaining that the U.S. Constitution twice guarantees the right to a criminal trial in Art. III, §2 and the Sixth Amendment, but does not guarantee the right to an appeal and that [t]he trial “is the main event at which a defendant’s rights are to be determined....” (internal citations omitted).

¹³⁰⁸ 596 U.S. 366 (2022).

III. Statutory Provisions and Equitable Exceptions Allowing for Appointment and Effective Assistance of Postconviction Counsel

In *Coleman v. Thompson*, the Supreme Court held the state prisoner responsible for his postconviction attorneys' procedural mistake in failing to timely file his appeal.¹³⁰⁹ The Court has made clear that ordinary negligence or miscalculation of a deadline to file a federal habeas petition will not be considered "extraordinary circumstances" to warrant equitable tolling. In *Lawrence v. Florida*,¹³¹⁰ the Court rejected the excuse an attorney's mistaken belief—that the client's time to file a habeas petition was statutorily tolled while the prisoner's Supreme Court certiorari petition was being considered—was sufficient to toll the time to file a federal habeas petition, even though the attorney admitted to not researching how the tolling period was calculated.

Three years later, the Supreme Court permitted equitable tolling in *Holland v. Florida*¹³¹¹ with a somewhat similar argument that a lawyer's failure to timely file a prisoner's federal habeas petition warranted equitable tolling.¹³¹² *Holland* presented more than a simple mistake, however. Holland's attorney ignored his letters for years and failed to tell him that the Florida Supreme Court had decided his appeal. The Court noted Holland had no effective control over the lawyer under the circumstances, and that the lower court was too rigid in requiring proof that his attorney acted in "bad faith, dishonesty, divided loyalty, mental impairment or so forth."¹³¹³ The Supreme Court stated that the extraordinary circumstances standard should be flexible enough to address new situations requiring equitable intervention, especially because this involved a federal procedural rule and not a state one. *Holland* thus established an important distinction: prisoners are typically held responsible for their attorney's ordinary negligence (like missing deadlines), but extraordinary circumstances beyond the prisoner's control can warrant equitable relief.

Outside of ineffective assistance of counsel, the Supreme Court has found that other claims require minimally adequate procedures in postconviction, including determining competency

¹³⁰⁹ *Coleman*, at 753.

¹³¹⁰ 549 U.S. 327 (2007),

¹³¹¹ 560 U.S. 631 (2010).

¹³¹² 28 U.S.C. § 2244(d)(1) establishes a one-year time limit to file a federal habeas petition from the latest of several specified dates, including the date on which the criminal judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review, but excluding the time the prisoner is in state postconviction proceedings.

¹³¹³ *Holland*, 560 U.S. at 649, quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008) (per curiam).

before execution and the constitutional validity of prior convictions. See *Ford v. Wainwright*¹³¹⁴ and *Johnson v. Mississippi*.¹³¹⁵

Below in *Maples v. Thomas* (2012), the Supreme Court considered another case of extraordinary circumstances. Maples, a capital prisoner, alleged that his attorneys completely abandoned him during postconviction proceedings and argued that the abandonment sufficiently severed the attorney-client relationship to warrant equitable tolling.

MAPLES V. THOMAS¹³¹⁶

JUSTICE GINSBURG delivered the opinion of the Court.

Cory R. Maples is an Alabama capital prisoner sentenced to death in 1997 for the murder of two individuals. At trial, he was represented by two appointed lawyers, minimally paid and with scant experience in capital cases. Maples sought postconviction relief in state court, alleging ineffective assistance of counsel and several other trial infirmities. His petition, filed in August 2001, was written by two New York attorneys serving *pro bono*, both associated with the same New York-based large law firm. An Alabama attorney, designated as local counsel, moved the admission of the out-of-state counsel *pro hac vice*. As understood by New York counsel, local counsel would facilitate their appearance, but would undertake no substantive involvement in the case.

In the summer of 2002, while Maples' postconviction petition remained pending in the Alabama trial court, his New York attorneys left the law firm; their new employment disabled them from continuing to represent Maples. They did not inform Maples of their departure and consequent inability to serve as his counsel. Nor did they seek the Alabama trial court's leave to withdraw. Neither they nor anyone else moved for the substitution of counsel able to handle Maples' case.

In May 2003, the Alabama trial court denied Maples' petition. Notices of the court's order were posted to the New York attorneys at the address of the law firm with which they had been associated. Those postings were returned, unopened, to the trial court clerk, who attempted no further mailing. With no attorney of record in fact acting on Maples' behalf, the time to appeal ran out.

Thereafter, Maples petitioned for a writ of habeas corpus in federal court. The District Court and, in turn, the Eleventh Circuit, rejected his petition, pointing to the procedural default in

¹³¹⁴ 477 U.S. 399 (1986) (requiring minimal procedural due process protection, including an opportunity to be heard in postconviction proceedings, to determine if petitioner was competent to be executed).

¹³¹⁵ 486 U.S. 578, 580 (1988) (due process requires postconviction hearing when petitioner's death sentence was premised on a prior conviction later found unconstitutional).

¹³¹⁶ 566 U.S. 266 (2012)

state court, *i. e.*, Maples' failure timely to appeal the Alabama trial court's order denying him postconviction relief. Maples, it is uncontested, was blameless for the default.

The sole question this Court has taken up for review is whether, on the extraordinary facts of Maples' case, there is "cause" to excuse the default. Maples maintains that there is, for the lawyers he believed to be vigilantly representing him had abandoned the case without leave of court, without informing Maples they could no longer represent him, and without securing any recorded substitution of counsel. We agree. Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door. Satisfied that the requisite cause has been shown, we reverse the Eleventh Circuit's judgment.

I

A

Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report 117-120* (June 2006) (hereinafter ABA Report); Brief for Former Alabama Appellate Court Justices et al. as *Amici Curiae* 7-8 (hereinafter Former Justices Brief). Appointed counsel need only be a member of the Alabama Bar and have "five years' prior experience in the active practice of criminal law." Ala. Code §13A-5-54 (2006). Experience with capital cases is not required. Former Justices Brief 7-8. Nor does the State provide, or require appointed counsel to gain, any capital-case-specific professional education or training. ABA Report 129-131; Former Justices Brief 14-16.

Appointed counsel in death penalty cases are also undercompensated. ABA Report 124-129; Former Justices Brief 12-14. Until 1999, the State paid appointed capital defense attorneys just "\$40.00 per hour for time expended in court and \$20.00 per hour for time reasonably expended out of court in the preparation of [the defendant's] case." Ala. Code §15-12-21(d) (1995). Although death penalty litigation is plainly time intensive,¹ the State capped at \$1,000 fees recoverable by capital defense attorneys for out-of-court work. *Ibid.*² Even today, court-appointed attorneys receive only \$70 per hour. §15-12-21(d) (2011).

¹ One study of federal capital trials from 1990 to 1997 found that defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant's case. Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 14 (May 1998).

² In 1999, the State removed the cap on fees for out-of-court work in capital cases. Ala. Code §15-12-21(d) (2010 Cum. Supp.). Perhaps not coincidentally, 70% of the inmates on Alabama's death row in 2006, including Maples, had been convicted when the \$1,000 cap was in effect. ABA Report 126.

Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings. ABA Report 111-112, 158-160; Former Justices Brief 33. The State has elected, instead, “to rely on the efforts of typically well-funded [out-of-state] volunteers.” Brief in Opposition in *Barbour v. Allen*, O. T. 2006, No. 06-10605, p. 23. Thus, as of 2006, 86% of the attorneys representing Alabama’s death row inmates in state collateral review proceedings “either worked for the Equal Justice Initiative (headed by NYU Law professor Bryan Stevenson), out-of-state public interest groups like the Innocence Project, or an out-of-state mega-firm.” Brief in Opposition 16, n. 4. On occasion, some prisoners sentenced to death receive no postconviction representation at all. See ABA Report 112 (“[A]s of April 2006, approximately fifteen of Alabama’s death row inmates in the final rounds of state appeals had no lawyer to represent them.”).

B

This system was in place when, in 1997, Alabama charged Maples with two counts of capital murder; the victims, Stacy Alan Terry and Barry Dewayne Robinson II, were Maples’ friends who, on the night of the murders, had been out on the town with him. Maples pleaded not guilty, and his case proceeded to trial, where he was represented by two court-appointed Alabama attorneys. Only one of them had earlier served in a capital case. See Tr. 3081. Neither counsel had previously tried the penalty phase of a capital case. Compensation for each lawyer was capped at \$1,000 for time spent out-of-court preparing Maples’ case, and at \$40 per hour for in-court services. See Ala. Code §15-12-21 (1995).

Finding Maples guilty on both counts, the jury recommended that he be sentenced to death. The vote was 10 to 2, the minimum number Alabama requires for a death (“The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.”). Accepting the jury’s recommendation, the trial court sentenced Maples to death. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the convictions and sentence. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999); *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App. 1999). We denied certiorari. *Maples v. Alabama*, 531 U. S. 830, 121 S. Ct. 83, 148 L. Ed. 2d 45 (2000).

Two out-of-state volunteers represented Maples in postconviction proceedings: Jaasi Munanka and Clara Ingen-Housz, both associates at the New York offices of the Sullivan & Cromwell law firm. At the time, Alabama required out-of-state attorneys to associate local counsel when seeking admission to practice *pro hac vice* before an Alabama court, regardless of the nature of the proceeding. Rule Governing Admission to the Ala. State Bar VII (2000) (hereinafter Rule VII).³ The Alabama Rule further prescribed that the local attorney’s name “appear on all notices, orders, pleadings, and other documents filed in the cause,” and that local counsel “accept joint and

³ In 2006, Alabama revised Rule VII. See Rule Governing Admission to the Ala. State Bar VII (2009). Under the new rule, the State allows out-of-state counsel to represent *pro bono* indigent criminal defendants in postconviction proceedings without involvement of local counsel. *Ibid.*

several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters [relating to the case].” Rule VII(C).

Munanka and Ingen-Housz associated Huntsville, Alabama, attorney John Butler as local counsel. Notwithstanding his obligations under Alabama law, Butler informed Munanka and Ingen-Housz, “at the outset,” that he would serve as local counsel only for the purpose of allowing the two New York attorneys to appear *pro hac vice* on behalf of Maples. Given his lack of “resources, available time [and] experience,” Butler told the Sullivan & Cromwell lawyers, he could not “deal with substantive issues in the case.” *Ibid.* The Sullivan & Cromwell attorneys accepted Butler’s conditions. *Id.*, at 257a. This arrangement between out-of-state and local attorneys, it appears, was hardly atypical. See Former Justices Brief 36 (“The fact is that local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted.”).

With the aid of his *pro bono* counsel, Maples filed a petition for postconviction relief under Alabama Rule of Criminal Procedure 32.⁴ Among other claims, Maples asserted that his court-appointed attorneys provided constitutionally ineffective assistance during both guilt and penalty phases of his capital trial. He alleged, in this regard, that his inexperienced and underfunded attorneys failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of his trial. The State responded by moving for summary dismissal of Maples’ petition. On December 27, 2001, the trial court denied the State’s motion.

* * *

[Authors’ fact summary: Seven months later, in summer 2002, both Munanka and Ingen-Housz left Sullivan & Cromwell—Munanka for a federal clerkship and Ingen-Housz for a position with the European Commission in Belgium. Neither told Maples they were leaving or sought court permission to withdraw as required by Ala. Rule Crim. Proc. 6.2(c). No other Sullivan & Cromwell attorney entered an appearance or notified the court of the change in representation. Nine months passed with no action from Sullivan & Cromwell. Munanka and Ingen-Housz remained Maples’ only listed attorneys of record.

In May 2003, the trial court denied Maples’ petition and mailed copies to his three attorneys of record, sending Munanka’s and Ingen-Housz’s copies to Sullivan & Cromwell’s New York address. When the mail arrived, both attorneys had long since left the firm. A mailroom employee returned the unopened envelopes to the court stamped “Returned to Sender—Left Firm.”

The court clerk took no further action and didn’t contact the attorneys at their personal addresses or alert Sullivan & Cromwell. Butler received his copy but assumed Munanka and Ingen-

⁴ Originally filed in August 2001, the petition was resubmitted, with only minor alterations, in December 2001. See App. 22-24, 28-142.

Housz would handle the appeal. No one filed a notice of appeal within Alabama’s 42-day deadline, which expired on July 7, 2003.

On August 13, 2003, Alabama Assistant Attorney General Jon Hayden wrote directly to Maples, informing him that he had missed the state appeal deadline but had four weeks left to file a federal habeas petition. Hayden sent the letter only to Maples at his prison address, not to his attorneys of record. Upon receiving the letter, Maples contacted his mother, who called Sullivan & Cromwell. Prompted by her call, Sullivan & Cromwell attorneys submitted a motion through Butler asking the trial court to reissue its order, thereby restarting the appeal period.

The trial court denied the motion, noting that Munanka and Ingen-Housz were still attorneys of record and the Sullivan & Cromwell attorneys had not been admitted to practice in Alabama or entered appearances. The court declined to “enter into subterfuge in order to gloss over mistakes made by counsel.” Maples then petitioned the Alabama Court of Criminal Appeals for leave to file an out-of-time appeal. The court rejected his plea, determining that the clerk had satisfied his duty by sending notices to the attorneys of record at their provided addresses. The Alabama Supreme Court affirmed, and the U.S. Supreme Court denied certiorari.

Having exhausted state remedies, Maples sought federal habeas relief. The State argued that Maples had forfeited his ineffective-assistance claims by failing to timely appeal the state court’s denial of his postconviction petition. Maples contended the default should be excused because he missed the deadline “through no fault of his own.”

The District Court ruled that Maples had defaulted his claims and failed to show sufficient “cause” to overcome the default. The court rejected Maples’ argument that his postconviction counsel’s errors provided the requisite “cause,” citing *Coleman v. Thompson*, which held that a claim of ineffective postconviction counsel cannot establish cause for procedural default.”

A divided Eleventh Circuit panel affirmed the district court’s decision, with the majority holding that Maples had procedurally defaulted his ineffective assistance claims by failing to file a timely appeal in state court, and that under *Coleman v. Thompson*, Maples could not establish “cause” to excuse the default. Judge Barkett dissented, arguing that the Alabama Court of Criminal Appeals acted “arbitrarily” in denying Maples’ request for an out-of-time appeal because the Alabama court had allowed a late appeal with indistinguishable facts. This inconsistent application of the 42-day appeal rule, she concluded, made it an inadequate ground for barring federal review. Given the exceptional circumstances, high stakes, and Maples’ lack of fault, Judge Barkett argued that the interests of justice required review of his claims.]

We granted certiorari to decide whether the uncommon facts presented here establish cause adequate to excuse Maples’ procedural default. 562 U.S. 1286, 131 S. Ct. 1718, 179 L. Ed. 2d 644 (2011).

As a rule, a state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *Walker v. Martin*, 562 U. S. 307, 316 (2011) (quoting *Coleman*, 501 U. S., at 729-730). The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Id.*, at 750; see *Wainwright v. Sykes*, 433 U. S. 72, 84-85 (1977).

Given the single issue on which we granted review, we will assume, for purposes of this decision, that the Alabama Court of Criminal Appeals' refusal to consider Maples' ineffective-assistance claims rested on an independent and adequate state procedural ground: namely, Maples' failure to satisfy Alabama's Rule requiring a notice of appeal to be filed within 42 days from the trial court's final order. Accordingly, we confine our consideration to the question whether Maples has shown cause to excuse the missed notice of appeal deadline.

Cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . 'impeded [his] efforts to comply with the State's procedural rule.'" *Coleman*, 501 U. S., at 753 (quoting *Murray v. Carrier*, 477 U. S. 478, 488 (1986); emphasis in original). Negligence on the part of a prisoner's postconviction attorney does not qualify as "cause." *Coleman*, 501 U. S., at 753. That is so, we reasoned in *Coleman*, because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principal bears the risk of negligent conduct on the part of his agent. *Id.*, at 753-754. See also *Irwin v. Department of Veterans Affairs*, 498 U. S. 89, 92 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent.'" (quoting *Link v. Wabash R. Co.*, 370 U. S. 626, 634 (1962))). Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. *Coleman*, 501 U. S., at 753-754. We do not disturb that general rule.

A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative. See 1 Restatement (Third) of Law Governing Lawyers §31, Comment 1(1998) ("Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client."). His acts or omissions therefore "cannot fairly be attributed to [the client]." *Coleman*, 501 U. S., at 753. See, e.g., *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (CA8 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent"); *Porter v. State*, 339 Ark. 15, 16-19, 2 S. W. 3d 73, 74-76 (1999) (finding "good cause" for petitioner's failure to file a timely habeas petition where the petitioner's attorney terminated his representation without notifying petitioner and without taking "any formal steps to withdraw as the attorney of record").

Our recent decision in *Holland v. Florida*, 560 U. S. 631 (2010), is instructive. That case involved a missed one-year deadline, prescribed by 28 U. S. C. §2244(d), for filing a federal habeas

petition. *Holland* presented two issues: first, whether the §2244(d) time limitation can be tolled for equitable reasons, and, second, whether an attorney’s unprofessional conduct can ever count as an “extraordinary circumstance” justifying equitable tolling. 560 U. S., at 649, 651 (internal quotation marks omitted). We answered yes to both questions.

On the second issue, the Court recognized that an attorney’s negligence, for example, miscalculating a filing deadline, does not provide a basis for tolling a statutory time limit. *Id.*, at 651–652; *id.*, at 656 (Alito, J., concurring in part and concurring in judgment); see *Lawrence v. Florida*, 549 U. S. 327, 336 (2007). The *Holland* petitioner, however, urged that attorney negligence was not the gravamen of his complaint. Rather, he asserted that his lawyer had detached himself from any trust relationship with his client: “[My lawyer] has abandoned me,” the petitioner complained to the court. 560 U. S., at 637 (brackets and internal quotation marks omitted); see *Nara v. Frank*, 264 F.3d 310, 320 (CA3 2001) (ordering a hearing on whether a client’s effective abandonment by his lawyer merited tolling of the one-year deadline for filing a federal habeas petition).

In a concurring opinion in *Holland*, Justice Alito homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client. 560 U. S., at 659. *Holland*’s plea fit the latter category: He alleged abandonment “evidenced by counsel’s near-total failure to communicate with petitioner or to respond to petitioner’s many inquiries and requests over a period of several years.” *Ibid.*; see *id.*, at 636–637, 652 (majority opinion). If true, Justice Alito explained, “petitioner’s allegations would suffice to establish extraordinary circumstances beyond his control[:]. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.*, at 659.⁷

We agree that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the “extraordinary circumstances beyond his control,” *ibid.*, necessary to lift the state procedural bar to his federal petition.

B

From the time he filed his initial Rule 32 petition until well after time ran out for appealing the trial court’s denial of that petition, Maples had only three attorneys of record: Munanka, Ingen-

⁷ *Holland v. Florida*, 560 U. S. 631 (2010), involved tolling of a federal time bar, while *Coleman v. Thompson*, 501 U. S. 722 (1991), concerned cause for excusing a procedural default in state court. See *Holland*, 560 U. S., at 650–651. We see no reason, however, why the distinction between attorney negligence and attorney abandonment should not hold in both contexts.

Housz, and Butler. Unknown to Maples, not one of these lawyers was in fact serving as his attorney during the 42 days permitted for an appeal from the trial court's order.

The State contends that Sullivan & Cromwell represented Maples throughout his state postconviction proceedings. Accordingly, the State urges, Maples cannot establish abandonment by counsel continuing through the six weeks allowed for noticing an appeal from the trial court's denial of his Rule 32 petition. We disagree.

* * *

[It is undisputed that Munanka and Ingen-Housz severed their relationship with Maples long before the default occurred. Both left Sullivan & Cromwell in summer 2002, at least nine months before the Alabama trial court denied Rule 32 relief. Their new employment—Munanka as a federal law clerk, Ingen-Housz with the European Commission in Belgium—prevented them from continuing to represent Maples due to ethical restrictions. Under agency law, their departure and acceptance of conflicting employment ended their agency relationship with Maples, and the attorneys failed to seek the trial court's permission to withdraw as required by Alabama Rule of Criminal Procedure 6.2. By remaining listed as attorneys of record, they became the designated recipients of court orders under Alabama's service rules.

Although the State acknowledged the severed relationship, it argued Maples was not abandoned because other Sullivan & Cromwell attorneys continued representing him. However, the record was unclear about these other attorneys' roles. Partner Marc De Leeuw stated he had been "involved in [Maples'] case since summer 2001," and attorney Felice Duffy said she "worked on [Maples'] case since October 2002." But neither described what their involvement entailed or identified which lawyers worked on the case after Munanka and Ingen-Housz departed.]

The slim record on activity at Sullivan & Cromwell, however, does not warrant a remand to determine more precisely the work done by firm lawyers other than Munanka and Ingen-Housz. For the facts essential to our decision are not in doubt. At the time of the default, the Sullivan & Cromwell attorneys who later came forward--De Leeuw, Duffy, and Kathy Brewer--had not been admitted to practice law in Alabama, had not entered their appearances on Maples' behalf, and had done nothing to inform the Alabama court that they wished to substitute for Munanka and Ingen-Housz. Thus, none of these attorneys had the legal authority to act on Maples' behalf before his time to appeal expired. Cf. 1 Restatement (Second) §111 (The "failure to acquire a qualification by the agent without which it is illegal to do an authorized act . . . terminates the agent's authority to act.")⁹ What they did or did not do in their New York offices is therefore beside the point. At

⁹ The dissent argues that the Sullivan & Cromwell attorneys had no basis "to infer that Maples no longer wanted them to represent him, simply because they had not yet qualified before the Alabama court," *Post*, at 297, 181 L. Ed. 2d, at 832. While that may be true, it is irrelevant. What the attorneys could have inferred is that Maples would not have wanted them to file a notice of appeal on his behalf prior to their admission to practice in Alabama, for doing so would be "illegal," *ibid.* (internal quotation marks omitted). See also 1 Restatement (Second) §111, Comment *b*,

the time critical to preserving Maples' access to an appeal, they, like Munanka and Ingen-Housz, were not Maples' authorized agents.

2

Maples' only other attorney of record, local counsel Butler, also left him abandoned. Indeed, Butler did not even begin to represent Maples. Butler informed Munanka and Ingen-Housz that he would serve as local counsel only for the purpose of enabling the two out-of-state attorneys to appear *pro hac vice*. Lacking the necessary "resources, available time [and] experience," Butler told the two Sullivan & Cromwell lawyers, he would not "deal with substantive issues in the case." That the minimal participation he undertook was inconsistent with Alabama law underscores the absurdity of holding Maples barred because Butler signed on as local counsel.

[*Author's summary*: When Butler received the trial court's order denying Maples' petition, he took no action and didn't contact Sullivan & Cromwell to ensure they were responding. He assumed the out-of-state attorneys would handle the appeal, demonstrating his passive role.

Notably, the State did not treat Butler as Maples' actual representative. Assistant Attorney General Hayden wrote directly to Maples in prison about the missed deadline, bypassing all attorneys of record including Butler. This violated ethical rules against communicating directly with represented parties, suggesting Hayden believed Maples was effectively unrepresented. Additionally, the State had previously served documents only on Munanka in New York, not on Butler, indicating recognition of Butler's minimal role from the outset.¹⁰]

In sum, the record admits of only one reading: At no time before the missed deadline was Butler serving as Maples' agent "in any meaningful sense of that word." *Holland*, 560 U. S., at 659 (opinion of Alito, J.).

3

Not only was Maples left without any functioning attorney of record, the very listing of Munanka, Ingen-Housz, and Butler as his representatives meant that he had no right personally to receive notice. He in fact received none or any other warning that he had better fend for himself.

quoted *supra*, at 284, 181 L. Ed. 2d, at 822. For the critical purpose of filing a notice of appeal, then, the other Sullivan & Cromwell attorneys had no authority to act for Maples.

¹⁰ It bears note, as well, that the State served its response to Maples' Rule 32 petition only on Munanka at Sullivan & Cromwell's New York address, not on Butler. App. 26. While the State may not be obligated to serve more than one attorney of record, its selection of New York rather than local counsel is some indication that, from the start, the State was cognizant of the limited role Butler would serve. Conforming the State's Rule to common practice, in 2006, the Alabama Supreme Court amended the provision on appearances by out-of-state counsel to eliminate the requirement that such attorneys associate local counsel when representing indigent criminal defendants *pro bono* in postconviction proceedings. See *supra*, at 274, n. 3, 181 L. Ed. 2d, at 817.

Had counsel of record or the State's attorney informed Maples of his plight before the time to appeal ran out, he could have filed a notice of appeal himself¹¹ or enlisted the aid of new volunteer attorneys.¹² Given no reason to suspect that he lacked counsel able and willing to represent him, Maples surely was blocked from complying with the State's procedural rule.

C

“The cause and prejudice requirement,” we have said, “shows due regard for States’ finality and comity interests while ensuring that ‘fundamental fairness [remains] the central concern of the writ of habeas corpus.’” *Dretke v. Haley*, 541 U. S. 386, 393 (2004) (quoting *Strickland v. Washington*, 466 U. S. 668, 697 (1984)). In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples’ procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court’s denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to *pro se* status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

III

Having found no cause to excuse the failure to file a timely notice of appeal in state court, the District Court and the Eleventh Circuit did not reach the question of prejudice. See *supra*, at 279. That issue, therefore, remains open for decision on remand.

For the reasons stated, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

¹¹ The notice is a simple document. It need specify only: the party taking the appeal, the order or judgment appealed from, and the name of the court to which appeal is taken. Ala. Rule App. Proc. 3(c) (2000).

¹² Alabama grants out-of-time appeals to prisoners proceeding *pro se* who were not timely served with copies of court orders. See *Maples v. Allen*, 586 F.3d 879, 888, and n. 6 (CA11 2009) (*per curiam*) (citing *Ex parte Miles*, 841 So. 2d 242, 243 (Ala. 2002), and *Ex parte Robinson*, 865 So. 2d 1250, 1251-1252 (Ala. Crim. App. 2003) (*per curiam*)). Though Maples was not a *pro se* petitioner on the record, he was, in fact, without authorized counsel.

Questions and Comments:

1. **Lifting a procedural bar—the attorney abandonment equitable exception:** Since recognizing attorney abandonment as an equitable exception in *Maples*, the Supreme Court continues to identify other extraordinary circumstances when state prisoners’ attempts to pursue their rights in postconviction are thwarted by counsel. In *Christeson v. Roper*,¹³¹⁷ attorneys were appointed for a death row prisoner to file a federal habeas petition, however, appointed counsel missed the filing deadline. The attorneys could have acknowledged their failure to file timely Christeson’s habeas petition and used Federal Rule of Civil Procedure 60(b) to reopen the case based on equitable tolling, but they did not do so. Moreover, Christeson’s first habeas attorneys refused to allow successor counsel access to the client’s files.

The *Maples* rule has thus far been confined to habeas corpus cases when the stakes involve fundamental rights such as liberty or life. Courts have declined to extend the rule to civil cases, reasoning that other remedies like malpractice suits are available in those contexts. See, e.g., *Cadet v. Fla. Dep’t of Corr.*,¹³¹⁸ (tolling not available for attorneys’ miscalculation of limitations period to file habeas petition); *Raplee v. U.S.*,¹³¹⁹ (*Maples* inapplicable to excuse missing filing deadline in civil federal tort claim case).

2. **Statutory provisions for state postconviction counsel:** For non-capital cases, federal law provides for the appointment of counsel for indigent prisoners seeking relief when a district court determines that the interests of justice require representation under § 2241 (power to grant writ), § 2254 (habeas for state prisoners), or § 2255 (prisoners in federal custody).¹³²⁰ AEDPA introduced other reforms to federal habeas corpus procedures in capital cases. Under 28 U.S.C. § 2254, in exchange for expedited federal habeas review of capital cases, states must appoint and compensate competent counsel for indigent capital prisoners in state postconviction proceedings.¹³²¹ States that have been certified by the U.S. Attorney General to have met the AEDPA’s statutory requirements may “opt in” to expedited federal habeas review procedures, including shortened filing deadlines and greater deference to state court decisions.

IV. Funds for Postconviction Litigation Expenses

Prisoners in federal habeas proceedings often present newly discovered evidence that requires extensive legal research, investigation, and potentially, expert testimony to prove. Most state prisoners are indigent and cannot afford litigation expenses, and even those with retained

¹³¹⁷ 574 U.S. 373 (2015).

¹³¹⁸ 853 F.3d 1216 (11th Cir. 2017).

¹³¹⁹ 842 F.3d 328 (4th Cir. 2016).

¹³²⁰ 28 U.S.C. § 3006A.

¹³²¹ 28 U.S.C. § 2265. § 2265 is part of Chapter 154, added by the AEDPA to Title 28 of the U.S. Code.

counsel in state court trials may have exhausted any resources for legal expenses by the time they reach postconviction proceedings.¹³²² In *Ake v. Oklahoma* below, the Supreme Court established that the Fourteenth Amendment’s due process guarantee means that criminal defendants must have access to the “basic tools of an adequate defense.”¹³²³

AKE V. OKLAHOMA¹³²⁴

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist “for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation.” The examining psychiatrist reported: “At times [Ake] appears to be frankly delusional. . . . He claims to be the ‘sword of vengeance’ of the Lord and that he will sit at the left hand of God in heaven.” He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his “present sanity,” *i. e.*, his competency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

“[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia -- chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . . [Because] of the severity of his mental illness and because of the intensities of his rage, his poor

¹³²² See Caroline Wolf Harlow, U.S. Dep’t of Justice, NCJ 179023, Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases (Nov. 2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (noting that publicly-financed counsel represented about 66 percent of federal felony defendants in 1998 as well as 82 percent of state felony defendants in the 75 most populous counties in 1996).

¹³²³ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

¹³²⁴ 470 U.S. 68 (1985)

control, his delusions, he requires a maximum security facility within -- I believe --the State Psychiatric Hospital system.” *Id.*, at 11-12.

The court found Ake to be a “mentally ill person in need of care and treatment” and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his condition would remain stable. The State then resumed proceedings against Ake.

At a pretrial conference in June, Ake’s attorney informed the court that his client would raise an insanity defense. To enable him to prepare and present such a defense adequately, the attorney stated, a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense. During Ake’s 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one. The trial judge rejected counsel’s argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense, and he denied the motion for a psychiatric evaluation at state expense on the basis of this Court’s decision in *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953).

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. At the guilt phase of trial, his sole defense was insanity. Although defense counsel called to the stand and questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none had examined him on that point. The prosecution, in turn, asked each of these psychiatrists whether he had performed or seen the results of any examination diagnosing Ake’s mental state at the time of the offense, and each doctor replied that he had not. As a result, there was no expert testimony for either side on Ake’s sanity at the time of the offense. The jurors were then instructed that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were further told that Ake was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time. If he raised such a doubt in their minds, the jurors were informed, the burden of proof shifted to the State to prove sanity beyond a reasonable doubt.¹³²⁵ The jury rejected Ake’s insanity defense and returned a verdict of guilty on all counts.

¹³²⁵ Oklahoma Stat., Tit. 21, § 152 (1981), provides that “[all] persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against

At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist. The court rejected this argument, observing: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." 663 P. 2d 1, 6 (1983). Finding no error in Ake's other claims, ²the court affirmed the convictions and sentences. We granted certiorari. 465 U.S. 1099 (1984).

* * *

We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Accordingly, we reverse.

* * *

III

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

* * *

them they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has held that there is an initial presumption of sanity in every case, "which remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." 663 P. 2d 1, 10 (1983) (case below); see also *Rogers v. State*, 634 P. 2d 743 (Okla. Crim. App. 1981).

Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to “an adequate opportunity to present their claims fairly within the adversary system,” *id.*, at 612. To implement this principle, we have focused on identifying the “basic tools of an adequate defense or appeal,” *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

* * *

A

The private interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State’s effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

We consider, next, the interest of the State. Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State. We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State’s interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist’s expertise.⁵ For example, in subsection (e) of the Criminal Justice Act, 18 U.S.C. § 3006A, Congress has

provided that indigent defendants shall receive the assistance of all experts “necessary for an adequate defense.” Numerous state statutes guarantee reimbursement for expert services under a like standard. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue.

These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant’s mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant’s mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party’s psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant’s mental state, psychiatrists can identify the “elusive and often deceptive” symptoms of insanity, *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and “a virtual necessity if an insanity plea is to have any chance of success.”⁷ By organizing a defendant’s mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.

* * *

The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.⁹

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

* * *

Accordingly, we reverse and remand for a new trial.

It is so ordered.

Questions and Comments:

1. **The Court's shift from equal protection to due process:** *Ake* establishes that funding litigation expenses are thus required by the Fourteenth Amendment's due process guarantee of fundamental fairness. *Ake's* reliance on the Fourteenth Amendment is part of

a continuing shift towards due process and away from Equal Protection Clause analysis.¹³²⁶ The Supreme Court began emphasizing the Due Process Clause to establish indigent defense rights, determining that due process was a more appropriate constitutional foundation to evaluate fairness in the relationship between the state and a criminal defendant.¹³²⁷

2. **Meaningful access to the raw materials of justice:** The Court’s opinion notes that “[m]eaningful access to justice cannot be achieved without access to the raw materials integral to the building of an effective defense.” Imagine defending a murder charge. What tools, people, or information would a client need to be treated fairly? Rank the top five resources by importance. Which of those materials may be difficult to access for an indigent defendant?

V. Defining “Reasonably Necessary” Services

The Court in *Ake* insisted that states must provide access to necessary resources and representation to assure meaningful access to justice. Congress has also taken steps to assure meaningful access by providing indigent capital defendants with a mandatory right to legal counsel in federal habeas proceedings.¹³²⁸ That statute also provides for “investigative, expert, or other reasonably necessary services” in post-conviction proceedings.

In *McFarland v. Scott*,¹³²⁹ below, the Court emphasized that funds for certain legal expenses are considered “reasonably necessary” when they are essential to ensuring adequate representation in federal habeas corpus proceedings, particularly in cases involving death sentences. As you read *McFarland*, ask when and why these services are necessary before a habeas petition is filed.

¹³²⁶ Early in the Warren Court incorporation era of the 1950s-60s, the Supreme Court frequently relied on the Equal Protection Clause to establish indigent defendants’ rights to counsel and litigation expenses. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring trial transcript be made available to indigent defendants); *Burns v. Ohio*, 360 U.S. 252 (1959) (an indigent defendant may not be required to pay a filing fee for appeal); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendants entitled to appointed counsel on first direct appeal as of right).

¹³²⁷ Compare *Griffin v. Illinois*, 351 U.S. 12 (1956) (denying appellate review to indigent defendants solely because of their inability to pay for trial transcripts violated both the Due Process and Equal Protection Clauses) with *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that states not required to provide counsel to indigent defendants in discretionary appeals relied on Fourteenth Amendment due process analysis emphasizing fairness between the state and the individual).

¹³²⁸ 18 U.S.C. § 3599.

¹³²⁹ 512 U.S. 849 (1994).

JUSTICE BLACKMUN delivered the opinion of the Court.

In establishing a federal death penalty for certain drug offenses under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e), Congress created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings. § 848(q)(4)(B). This case presents the question whether a capital defendant must file a formal habeas corpus petition in order to invoke this statutory right and to establish a federal court's jurisdiction to enter a stay of execution.

[Author's fact Frank McFarland was convicted of capital murder in Texas and sentenced to death. After his conviction was affirmed and certiorari denied, his execution was scheduled for September 23, 1993. On September 19, McFarland filed a pro se motion requesting a stay to allow the Texas Resource Center (a nonprofit organization that provided legal assistance and resources to Texas capital prisoners) to recruit volunteer counsel for his state habeas proceeding. The trial court refused to appoint counsel but moved his execution date to October 27, 1993. When the Resource Center reported it couldn't find volunteer counsel, the trial court again refused to appoint counsel or modify the execution date. The Texas Court of Criminal Appeals denied McFarland's motion for a stay and remand.]

On October 22, 1993, McFarland filed a pro se motion in federal district court seeking appointment of counsel and a stay of execution to prepare a habeas petition. The District Court denied the motion, concluding it lacked jurisdiction because no actual habeas proceeding had been initiated.

The month before McFarland's scheduled execution, another Texas capital defendant facing imminent execution filed a similar pro forma habeas petition to McFarland's in federal district court. *Gosch v. Collins*, No. SA-93-CA-731 (W.D. Tex., Sept. 15, 1993). The district court dismissed Gosch's petition on the merits, which the Fifth Circuit Court of Appeals affirmed. The district court later dismissed Gosch's subsequent, substantive habeas petition, as successive and abusive.

In a letter supporting McFarland's motion in the district court, the Texas Resource Center indicated that the *Gosch* case presented a catch-22: if a capital defendant filed a pro forma habeas petition to obtain counsel, courts would dismiss it on the merits, making any subsequent substantive petition subject to dismissal as successive and abusive.

On October 26, the eve of McFarland's scheduled execution, the Fifth Circuit denied McFarland's stay application. Despite a last-minute effort by a magistrate judge to locate counsel who filed a pro forma petition, the district court denied a stay of execution on the merits, even though Texas did not oppose the filing.]

¹³³⁰ 512 U.S. 849 (1994)

On October 27, 1993, this Court granted a stay of execution in McFarland’s original suit pending consideration of his petition for certiorari. 510 U.S. 938. The Court later granted certiorari, 510 U.S. 989 (1993), to resolve an apparent conflict with *Brown v. Vasquez*, 952 F.2d 1164 (CA9 1991).

II

A

Section 848(q)(4)(B) of Title 21 provides:

“In any *post conviction proceeding* under *section 2254* or *2255* of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)” (emphasis added).

On its face, this statute grants indigent capital defendants a mandatory right to qualified legal counsel¹³³¹ and related services “in any [federal] post conviction proceeding.” The express language does not specify, however, how a capital defendant’s right to counsel in such a proceeding shall be invoked.

Neither the federal habeas corpus statute, 28 U.S.C. § 2241 et seq., nor the rules governing habeas corpus proceedings define a “post conviction proceeding” under § 2254 or § 2255 or expressly state how such a proceeding shall be commenced. Construing § 848(q)(4)(B) in light of its related provisions, however, indicates that the right to appointed counsel adheres prior to the filing of a formal, legally sufficient habeas corpus petition. Section 848(q)(4)(B) expressly incorporates 21 U.S.C. § 848(q)(9), which entitles capital defendants to a variety of expert and investigative services upon a showing of necessity:

“Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, . . . the court shall authorize the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore” (emphasis added).

¹³³¹ Counsel appointed to represent capital defendants in postconviction proceedings must meet more stringent experience criteria than attorneys appointed to represent noncapital defendants under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. At least one attorney appointed to represent a capital defendant must have been authorized to practice before the relevant court for at least five years, and must have at least three years of experience in handling felony cases in that court. 21 U.S.C. § 848(q)(6).

The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital defense counsel will have been appointed under § 848(q)(4)(B) before the need for such technical assistance arises, since the statute requires “the defendant’s attorneys to obtain such services” from the court. § 848(q)(9). In adopting § 848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

This interpretation is the only one that gives meaning to the statute as a practical matter. Congress’ provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of “the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.” § 848(q)(7). An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because “the complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.” *Murray v. Giarratano*, 492 U.S. 1, 14, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (KENNEDY, J., joined by O’CONNOR, J., concurring in judgment); see also *id.*, at 28 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting) (“This Court’s death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master”).

Habeas corpus petitions must meet heightened pleading requirements, see 28 U.S.C. § 2254 Rule 2(c), and comply with this Court’s doctrines of procedural default and waiver, see *Coleman v. Thompson*, 501 U.S. 722 (1991). Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, see 28 U.S.C. § 2254 Rule 4, and to deny a stay of execution where a habeas petition fails to raise a substantial federal claim, see *Barefoot v. Estelle*, 463 U.S. 880, 894, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983). Moreover, should a defendant’s pro se petition be summarily dismissed, any petition subsequently filed by counsel could be subject to dismissal as an abuse of the writ. See *McCleskey v. Zant*, 499 U.S. 467, 494, (1991). Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits. Congress legislated against this legal backdrop in adopting § 848(q)(4)(B), and we safely assume that it did not intend for the express requirement of counsel to be defeated in this manner.

The language and purposes of § 848(q)(4)(B) and its related provisions establish that the right to appointed counsel includes a right to legal assistance in the preparation of a habeas corpus application. We therefore conclude that a “post conviction proceeding” within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant’s motion requesting the

appointment of counsel for his federal habeas corpus proceeding.¹³³² McFarland filed such a motion and was entitled to the appointment of a lawyer.

B

Even if the District Court had granted McFarland's motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless McFarland's execution also was stayed. We therefore turn to the question whether the District Court had jurisdiction to grant petitioner's motion for stay.

Federal courts cannot enjoin state-court proceedings unless the intervention is authorized expressly by federal statute or falls under one of two other exceptions to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 226 (1972). The federal habeas corpus statute grants any federal judge "before whom a habeas corpus proceeding is pending" power to stay a state-court action "for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251 (emphasis added). McFarland argues that his request for counsel in a "post conviction proceeding" under § 848(q)(4)(B) initiated a "habeas corpus proceeding" within the meaning of § 2251, and that the District Court thus had jurisdiction to enter a stay. Texas contends, in turn, that even if a "post conviction proceeding" under § 848(q)(4)(B) can be triggered by a death row defendant's request for appointment of counsel, no "habeas corpus proceeding" is "pending" under § 2251, and thus no stay can be entered, until a legally sufficient habeas petition is filed.

The language of these two statutes indicates that the sections refer to the same proceeding. Section 848(q)(4)(B) expressly applies to "any post conviction proceeding under section 2254 or 2255" -- the precise "habeas corpus proceedings" that § 2251 involves. The terms "post conviction" and "habeas corpus" also are used interchangeably in legal parlance to refer to proceedings under §§ 2254 and 2255. We thus conclude that the two statutes must be read in *pari materia* to provide that once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution. Because § 2251 expressly authorizes federal courts to stay state-court proceedings "for any matter involved in the habeas corpus proceeding," the exercise of this authority is not barred by the Anti-Injunction Act.

This conclusion by no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court. Under ordinary circumstances, a capital

¹³³² JUSTICE THOMAS argues in dissent that reading § 848(q)(4)(B) to allow the initiation of a habeas corpus proceeding through the filing of a motion for appointment of counsel ignores the fact that such proceedings traditionally have been commenced by the filing of a habeas corpus petition and creates a divergent practice for capital defendants. *Post*, at 872, n. 3. As JUSTICE O'CONNOR agrees, *post*, at 860, however, § 848(q)(4)(B) bestows upon capital defendants a mandatory right to counsel, including a right to preapplication legal assistance, that is unknown to other criminal defendants. Because noncapital defendants have no equivalent right to the appointment of counsel in federal habeas corpus proceedings, it is not surprising that their habeas corpus proceedings typically will be initiated by the filing of a habeas corpus petition.

defendant presumably will have sufficient time to request the appointment of counsel and file a formal habeas petition prior to his scheduled execution. But the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is not afforded, "approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper." *Barefoot*, 463 U.S. at 889. On the other hand, if a dilatory capital defendant inexcusably ignores this opportunity and flouts the available processes, a federal court presumably would not abuse its discretion in denying a stay of execution.

III

A criminal trial is the "main event" at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to "relitigate state trials." 463 U.S. at 887. At the same time, criminal defendants are entitled by federal law to challenge their conviction and sentence in habeas corpus proceedings. By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

We conclude that a capital defendant may invoke this right to a counseled federal habeas corpus proceeding by filing a motion requesting the appointment of habeas counsel, and that a district court has jurisdiction to enter a stay of execution where necessary to give effect to that statutory right. McFarland filed a motion for appointment of counsel and for stay of execution in this case, and the District Court had authority to grant the relief he sought.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Questions and Comments:

1. **Statutory vs. constitutional right to counsel in habeas:** *Murray v. Giarratano* and *McFarland v. Scott* address different legal questions—*Murray* concerns constitutional rights in state proceedings and *McFarland* addresses statutory rights in federal proceedings. In *Murray v. Giarratano*, the U.S. Supreme Court held that there is no constitutional right to counsel for indigent prisoners, including death row inmates, in state postconviction proceedings, and *McFarland* recognized a statutory right under federal law.¹³³³
2. **The timing of appointment of counsel:** The Court ruled in *McFarland* that indigent death-

¹³³³ 21 U.S.C. § 848(q)(4)(B) (now codified at 18 U.S.C. § 3599).

row inmates are entitled to the appointment of federally funded counsel to assist in the preparation of a federal habeas corpus petition. How did the Court justify the necessity of appointing counsel prior to the filing of a formal habeas corpus petition in capital cases? Why was this timing significant, and how might delayed appointment undermine effective representation?

3. **Resource disparities between capital versus non-capital prisoners:** *McFarland* highlights the disparities in access to legal representation available to prisoners in capital versus non-capital cases. Because *McFarland* specifically pertains to capital cases, it does not extend the mandatory right to appointed counsel to indigent defendants in non-capital cases. In non-capital cases, indigent petitioners often proceed *pro se* without access to counsel, legal resources, or investigative funds. Could *McFarland*'s reasoning be extended to non-capital cases where complex legal or factual issues require substantial resources? Why or why not?
4. **Counsel for non-capital indigent defendants in habeas proceedings:** Because there is no constitutional right to counsel in postconviction proceedings, appointment of counsel is guided by statutory provisions and judicial discretion. The Criminal Justice Act gives federal judges the authority to appoint counsel for indigent non-capital prisoners when "the interests of justice so require" or when an evidentiary hearing is ordered under 8 U.S.C. § 3006A. This provision applies to various proceedings, including habeas corpus petitions filed under 28 U.S.C. §§ 2241, 2254, or 2255. When an evidentiary hearing is required, the appointment of counsel becomes mandatory under Rule 8(c) of the Rules Governing Section 2254 and Section 2255 Cases. This rule mandates that the judge must appoint counsel for a petitioner who qualifies under 18 U.S.C. § 3006A. Courts have consistently held that this requirement is not discretionary in such circumstances, as counsel is essential for effective representation during evidentiary hearings. *See, e.g., Swazo v. Wyoming Dep't of Corr. State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994) (noting that federal circuits that have discussed the issue agree that the rule makes the appointment of counsel mandatory in habeas cases brought by federal or state prisoners when evidentiary hearings are required); *accord, Rauter v. United States*, 871 F.2d 693, 695 (7th Cir.1989) (because evidence was presented during hearing on the petitioner's legal claims, the hearing was construed to be a § 2255 habeas for which appointment of counsel was required).

In cases where no evidentiary hearing is necessary, the decision to appoint counsel remains within the court's discretion. Federal courts evaluate factors such as the complexity of the legal issues, the petitioner's ability to articulate claims *pro se*, and whether the interests of justice or due process require representation. For example, in discretionary cases, courts may appoint counsel if the petitioner has presented a non-frivolous claim but lacks the ability to adequately investigate or present the claim. *See, e.g., United States v. Suris*, 625 F. Supp. 3d 1040, 1052 (court has discretion to appoint counsel for "any financially eligible person" seeking § 2255 relief "when the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B)).

5. **"Reasonable necessity" standard:** The statutory entitlement to paid counsel for capital defendants is subject only to a narrow exception when potential procedural bars would foreclose habeas relief. Thus, to deny appointment of counsel, it must be "plain that any

subsequent motion that [appointed] counsel might file ... would be futile.”¹³³⁴

6. **Recodification under 18 U.S.C. § 3599:** The relevant provisions about the appointment and compensation of counsel and support services for indigent prisoners in capital cases, which were previously contained in 21 U.S.C. § 848(q), were recodified into the Criminal Justice Act, 18 U.S.C. § 3599 in 2006.

VI. Chapter Summary

This chapter examines the limited and uneven legal assistance available to postconviction prisoners in which availability of resources depends on the severity of the prisoner’s punishment and if the prisoner is challenging a constitutional violation at trial.

The capital/non-capital divide. A striking feature in the availability of legal resources in postconviction proceedings is the disparity between death penalty and non-death cases. Capital prisoners receive mandated counsel and supportive services in preparation of their habeas corpus petitions, while most indigent non-capital prisoners navigate the complex postconviction process largely unrepresented. This reflects the Supreme Court’s approach of preventing only the most extreme unfairness while preserving state control over the finality of criminal convictions. This, however, creates a patchwork system where some indigent prisoners obtain meaningful assistance while most others do not.

Right to postconviction counsel. The Constitution guarantees effective counsel only through the first appeal as of right. Beyond that point, there is generally no constitutional right to counsel in postconviction or habeas proceedings, but the Court has permitted equitable exceptions in extraordinary cases. The main exception to the no-counsel presumption is the narrow equitable rule in *Martinez v. Ryan*, which allows ineffective assistance of initial postconviction counsel to excuse procedural defaults when postconviction is the first opportunity to challenge trial counsel’s effectiveness.

Available legal resources to postconviction prisoners. Some statutory and case law provisions provide for litigation assistance in specific circumstances. *Ake v. Oklahoma* established that states must provide essential expert assistance when mental health issues are genuinely at stake. Federal law guarantees capital prisoners pre-petition counsel to help investigate and draft habeas petitions, along with funding for necessary experts and investigators under 18 U.S.C. § 3599. Non-capital prisoners may receive similar resources only when federal courts permit evidentiary hearings and appointment of counsel for them remains largely discretionary.

¹³³⁴ *Christeson v. Roper*, 574 U.S. 373, 380 (2015).

CHAPTER 11: REDUCTION-IN-SENTENCING, AKA COMPASSIONATE RELEASE

In previous chapters, you’ve explored how individuals challenge constitutional violations and trial errors that impact a person’s liberty. We now turn to a different avenue of postconviction relief: compassionate release under 18 U.S.C. § 3582(c)(1)(A). This chapter traces the legal development of compassionate release, from its origins as part of the Sentencing Reform Act of 1984 (SRA) to its transformation through the First Step Act of 2018 (FSA) and recent United States Sentencing Commission (USSC revisions), which together opened the door for thousands of federal prisoners to seek sentence reductions.

I. Federal Compassionate Release: Background and Evolution

A. Structure of 3582(c)(1)(A)

Section 3582(c)(1)(A) authorizes courts to reduce a sentence based on an “extraordinary and compelling reason,” a standard that has evolved significantly over time. Commonly referred to as “compassionate release,”¹³³⁵ this form of relief was initially narrowly applied. But recent legislative and regulatory developments—most notably the FSA¹³³⁶ and the U.S. Sentencing Commission’s 2023 amendments¹³³⁷—have expanded access and reshaped the legal landscape.

To meet their burden in a compassionate release request, an incarcerated individual must show the following:

1. The defendant fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the defendant’s behalf OR have provided a request to the warden thirty days prior to the filing of their motion;¹³³⁸
2. One or more extraordinary and compelling reasons warranting a sentence reduction;
3. Such a reduction is consistent with the USSC’s applicable policy statements;¹³³⁹
4. The § 3553(a) sentencing factors warrant resentencing;

¹³³⁵ See 18 U.S.C. § 3582(c)(1)(A).

¹³³⁶ First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

¹³³⁷ U.S. SENT’G GUIDELINES MANUAL § 1B1.13.

¹³³⁸ See 18 U.S.C. § 3582(c)(1)(A) (“[T]he court . . . after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment . . .”).

¹³³⁹ *Id.* § (c)(1)(A)(ii) (a request must be “consistent with applicable policy statements issued by the Sentencing Commission”); see also 28 U.S.C. § 994(t) (ordering the Commission to “describe what should be considered extraordinary and compelling reasons for [a] sentence reduction”).

5. Poses no danger to the community if released.¹³⁴⁰

The incarcerated individual “bears the burden of proof by a preponderance of the evidence.”¹³⁴¹

B. History and Evolution of the Compassionate Release Statute

Created by the SRA and codified as 18 U.S.C. § 3582(c)(1)(A), the compassionate release statute was intended as a “safety valve” for people whose continued incarceration would be inequitable—even if their conviction and sentence were legally valid.¹³⁴² It is one of the few instances where courts may revisit a final sentence and re-evaluate a person’s imprisonment in light of equity and changed circumstances.

However, for decades after the statute’s enactment, meaningful relief was nearly impossible to obtain. Congress¹³⁴³ and the USSC¹³⁴⁴ made the Bureau of Prisons (BOP) the gatekeeper for compassionate release. Only the BOP could file a motion on behalf of the incarcerated person, and courts had no authority to act unless the BOP initiated the legal process.¹³⁴⁵ As a result, people in federal prison were denied the opportunity to petition sentencing judges directly, and courts could not review the BOP’s refusals to file or inaction on behalf of the incarcerated person.

Though the statute authorized relief for any “extraordinary and compelling reasons,” the BOP interpreted it narrowly—typically limiting compassionate release to people with terminal illnesses expected to cause death within a year or those with severely debilitating medical conditions.¹³⁴⁶ The USSC, which was supposed to define what counted as “extraordinary and

¹³⁴⁰ U.S. SENT’G GUIDELINES MANUAL § 1B1.13(a) (U.S. SENT’G COMM’N 2023); 18 U.S.C. § 3142(g).

¹³⁴¹ *See, e.g.*, *United States v. Grasha*, 489 F. Supp. 3d 403, 406 (W.D. Pa. 2020); *United States v. Cole*, No. 04-109, 2022 WL 1082480, at *3 (W.D. Pa. Apr. 9, 2022); *United States v. Aruda*, 472 F. Supp. 3d 847, 854 (D. Haw. 2020), *vacated on other grounds*, 993 F.3d 797 (9th Cir. 2021); *United States v. Gonzales*, 547 F. Supp. 3d 1083, 1085–86 (D.N.M. 2021).

¹³⁴² S. REP. No. 98-225, at 121 (1983).

¹³⁴³ A person could only possibly be granted relief upon a motion requesting such be done by the Director of the BOP. *See id.* at 1998 (“The court may not modify a term of imprisonment once it has been imposed except that. . . (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment”).

¹³⁴⁴ Even when the Commission got around to defining “extraordinary and compelling,” in 2007, its definition was toothless. As late as 2016, the Commission reiterated that its statements were “not legally binding” on the BOP and “did not confer any rights” on incarcerated individuals. U.S. SENT’G GUIDELINES MANUAL Amend. 799 (U.S. SENT’G COMM’N 2016).

¹³⁴⁵ *See Fernandez v. United States*, 941 F.2d 1488, 1492-93 (11th Cir. 1991) (declining to review BOP’s denial of inmate’s request for relief via 18 U.S.C. § 4205(g), a statute also allowing sentence reduction upon motion by BOP); Pub. L. No. 98-473, § 224(a), 98 Stat. 2030 (1984).

¹³⁴⁶ EVALUATION & INSPECTIONS DIV., OFF. OF THE INSPECTOR GEN., DEP’T OF JUST., FED. BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 19–20 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf>.

compelling” reasons, took twenty-three years to issue guidance.¹³⁴⁷ In the meantime, the BOP adopted its own restrictive criteria and routinely denied meritorious claims.¹³⁴⁸

The outcome of vesting discretionary power for compassionate release to the BOP for decades meant that almost all federally incarcerated people seeking resentencing were denied access to relief.¹³⁴⁹ Even when faced with severely ill individuals, the BOP rarely filed compassionate release motions on their behalf.¹³⁵⁰ Kevin Zeich and Anthony Bell’s cases highlight the human cost of the BOP’s rigid discretion. Kevin Zeich, serving twenty-seven years for dealing methamphetamine, was blind, battling cancer, and virtually unable to eat.¹³⁵¹ Three times he requested compassionate release and three times the BOP turned him down, claiming he was not sick enough. Anthony Bell, after serving fifteen years of a sixteen-year sentence for selling cocaine, asked to be released because his liver was failing him and was told he had eighteen months to live.¹³⁵² He died two days after the BOP denied his request to file a compassionate release motion. These stories were not rare. Between 1992 and 2012, the BOP averaged fewer than two dozen compassionate release filings per year across the entire federal system.¹³⁵³

As discussed in *Booker* below, in 2018, Congress passed the FSA amid growing bipartisan support for reforming the harsh sentencing laws of the 1980s and 1990s.¹³⁵⁴ One of the FSA’s most significant provisions amended § 3582(c)(1)(A) by removing the BOP’s exclusive authority to file compassionate release motions.¹³⁵⁵ Incarcerated individuals could now petition the court

¹³⁴⁷ 18 U.S.C. § 3582(c)(1)(A)(i); 28 U.S.C. § 994(t) (tasking the Commission with describing what may be considered an extraordinary and compelling reason for compassionate release).

¹³⁴⁸ FEDERAL BUREAU OF PRISONS, DEP’T OF JUST., PROGRAM STATEMENT 5050.49 COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G).

¹³⁴⁹ Evaluation & Inspections Div., U.S. Dep’t of Just., I-2013-006, The Federal Bureau of Prisons’ Compassionate Release Program 19–20 (2013) (citation omitted), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/Z8ZM-7TPJ>].

¹³⁵⁰ EVALUATIONS & INSPECTIONS DIV., OFF. OF THE INSPECTOR GEN., DEP’T OF JUST., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 41-42 (May 2015, Revised Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

¹³⁵¹ Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html>.

¹³⁵² *Id.*

¹³⁵³ *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sent’g Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, Off. of Inspector Gen., Dep’t of Just.), https://oig.justice.gov/sites/default/files/2019-12/t160217_0.pdf.

¹³⁵⁴ See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (DEC. 18, 2018).

¹³⁵⁵ *United States v. Bucci*, 409 F.Supp.3d 1, 2 (D. Mass. 2019) (quoting *United States v. Fox*, No. 2:14-cr-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) (“the Bureau of Prisons is no longer an obstacle to a court’s consideration of whether compassionate release is appropriate”).

directly—either after exhausting administrative remedies or after waiting thirty days following a request to the warden.¹³⁵⁶

For the first time, people in federal prison had a pathway to seek compassionate release without the BOP’s approval. But this shift introduced new complications. In reviewing a compassionate release motion, courts were required to consider the USSC’s policy statements on § 3582(c)(1)(A).¹³⁵⁷ However, the USSC’s existing policy statement—U.S.S.G. § 1B1.13—still framed the BOP as the decision-maker on what constituted extraordinary and compelling reasons.¹³⁵⁸ A legal issue arose where courts considered whether they had to consider an outdated policy that did not reflect the FSA’s changes.

The problem was structural: from 2019 to 2023, the USSC lacked a quorum and could not revise its policy statements and guidelines.¹³⁵⁹ As a result, courts were left to interpret whether they could independently determine what qualified as an extraordinary and compelling reason warranting a new sentence, even though the governing USSC policy statement still deferred to the BOP.¹³⁶⁰ This gap created a widespread disagreement among federal courts. Some courts found they had discretion to define extraordinary and compelling reasons themselves;¹³⁶¹ others concluded they were bound by the outdated language of § 1B1.13.¹³⁶²

¹³⁵⁶ See FSA § 603; see also *United States v. McCoy*, 981 F.3d 271, 283 (4th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (noting Congress’ “clear intention” in passing FSA was to remove BOP from its gatekeeper role).

¹³⁵⁷ 18 U.S.C. § 3582(c)(1)(A)(i); 28 U.S.C. § 994(t) (tasking the Commission with describing what may be considered an extraordinary and compelling reason for compassionate release).

¹³⁵⁸ *United States v. Beck*, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019). (“While the old policy statement provides helpful guidance, it does not constrain the Court’s independent assessment of whether ‘extraordinary and compelling reasons’ warrant a sentence reduction . . .”).

¹³⁵⁹ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2021); see 28 U.S.C. § 994(a) (requiring an affirmative vote).

¹³⁶⁰ See, e.g., *United States v. McCoy*, 981 F.3d 271, 283 (4th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

¹³⁶¹ *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (Second Circuit recognized courts are not bound by BOP or the 2006 policy statement when defining extraordinary and compelling reasons); *United States v. Ruvalcaba*, 26 F.4th 14, 26–28 (1st Cir. 2022) (First Circuit concluded district courts could consider “any complex of circumstances,” including sentencing errors, in the absence of a current policy statement); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021) (Tenth Circuit similarly held courts may independently define extraordinary and compelling reasons).

¹³⁶² *United States v. Bryant*, 996 F.3d 1243, 1253–55 (11th Cir. 2021) (holding district courts are bound by the Sentencing Commission’s policy statement, even post-FSA, and are required to apply the BOP’s restrictive definition).

In 2023, the USSC set out to update its guidelines to reflect the FSA’s impact. The USSC held extensive public hearings,¹³⁶³ inviting testimony from formerly incarcerated individuals, crime victims, federal defenders, law professors, advocacy organizations, and the Department of Justice (DOJ). Stakeholders—across ideological lines—agreed that without guidance, disparities in sentencing outcomes had occurred and would continue to occur.¹³⁶⁴ The testimony revealed how courts used their discretion to grant release in a broader range of cases than the BOP had ever recognized.¹³⁶⁵ The USSC had proof of the life-changing effect release had by moving beyond the BOP’s extremely limited view of advocating release for only the dying and incapacitated. The Commissioners heard how incarcerated people were released for a variety of extraordinary and compelling reasons.¹³⁶⁶

After the testimony and letters of incarcerated survivors and their attorneys, the USSC fulfilled its duty.¹³⁶⁷ Effective November 1, 2023, it issued major revisions to its policy statement on § 3582(c)(1)(A), expanding the definition of “extraordinary and compelling reasons.”¹³⁶⁸ These amendments aimed to “better account for and reflect the plain language of section 3582(c)(1)(A), its legislative history, and decisions by courts made in absence of a binding policy statement,” and to account for what happened to our incarcerated community during the pandemic.¹³⁶⁹

First, the medical category now includes two new sub-categories: (1) serious medical conditions requiring long-term care that is not being provided while in custody; and (2) language to address the unique and devastating circumstances of the COVID-19 pandemic.¹³⁷⁰ These new medical categories reflected medical circumstances most often cited to by courts in granting

¹³⁶³ See generally U.S. SENT’G COMM’N, PUBLIC MEETING (Feb. 23, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0223_Transcript.pdf.

¹³⁶⁴ Comment Letter from Jonathan Wroblewski, Crim. Div., U.S. Dep’t of Just., to Hon. Carlton W. (Feb. 15, 2023), <https://Commission.Commission.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf>.

¹³⁶⁵ U.S. SENT’G GUIDELINES MANUAL Amend. 814 (U.S. SENT’G COMM’N 2023) (explaining reasoning for amendment was “informed by Commission data, including its analysis of the factors identified by courts in granting sentence reduction motions in the years since the [FSA] was signed into law” recognizing that “district courts around the country based sentence reductions on dozens of reasons and combinations of reasons”).

¹³⁶⁶ See generally U.S. Sent’g Comm’n, Public Meeting (2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0223_Transcript.pdf [<https://perma.cc/L3CY-ETES>].

¹³⁶⁷ 28 U.S.C. § 994(t) (“The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”).

¹³⁶⁸ Amendment 814, *supra* note 31.

¹³⁶⁹ *Id.*

¹³⁷⁰ U.S. SENT’G GUIDELINES MANUAL §§ 1B1.13(b)(1)(C), (D)(i)-(iii) (U.S. SENT’G COMM’N 2023).

compassionate release motions during the pandemic.¹³⁷¹ The previous extraordinary and compelling medical categories remained the same: (1) suffering from a terminal illness; (2) suffering from a serious physical/medical condition or serious functional/cognitive impairment, or experiencing deteriorating physical/mental health because of the ageing process that substantially diminishes the ability to self-care and from which he/she is not expected to recover.¹³⁷²

Second, the family circumstances category was expanded. Previously, individuals could only be considered for release to care for a minor child or incapacitated spouse.¹³⁷³ Now, an incarcerated person can be resentenced to care for a child older than seventeen who is incapable of caring for themselves due to a mental or physical disability.¹³⁷⁴ Additionally, family circumstances include release to care for an incapacitated parent or person whose relationship is similar in kind to that of an immediate family member.¹³⁷⁵

Third, a new “Victim of Abuse” category applies when a BOP employee sexually or physically abuses a person in their custody or control.¹³⁷⁶ This provision was in response to the rampant carceral sex abuses revealed through media coverage¹³⁷⁷ and investigations¹³⁷⁸ of numerous BOP facilities.

Fourth, the USSC created an “unusually long sentence” category. This amendment permits courts to consider nonretroactive changes in law that produce gross disparities between the sentence a person is currently serving and a sentence they would receive today if sentenced for the identical crime and conviction.¹³⁷⁹

¹³⁷¹ See U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT FISCAL YEARS 2020 TO 2022 tbls. 10, 12 & 14 (2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

¹³⁷² U.S. SENT’G GUIDELINES MANUAL §§ 1B1.13(b)(1)(A)-(B)(i)-(iii) (U.S. SENT’G COMM’N 2023).

¹³⁷³ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. 1(C) (U.S. SENT’G COMM’N 2021).

¹³⁷⁴ U.S. SENT’G GUIDELINES MANUAL §§ 1B1.13(b)(3)(A)-(D), (U.S. SENT’G COMM’N 2023).

¹³⁷⁵ *Id.*

¹³⁷⁶ *Id.* § 1B1.13(b)(4).

¹³⁷⁷ See, e.g., Muri Assunção, 6th ‘Rape Club’ Arrest Made in Sexual Abuse of Inmates at California Women’s Prison, N.Y. DAILY NEWS (May 13, 2023), <https://www.nydailynews.com/2023/05/13/6th-rape-club-arrest-made-in-sexual-abuse-of-inmates-at-california-womens-prison/>.

¹³⁷⁸ See, e.g., STAFF OF S. SUBCOMM. ON INVESTIGATION, S. COMM. ON HOMELAND SEC. & GOV’T AFFS., 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS (Comm. Print 2022).

¹³⁷⁹ U.S. SENT’G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT’G COMM’N 2023).

Last, the USSC maintained a broad catch-all provision that allows for consideration of circumstances “similar in gravity” to the enumerated categories within the policy.¹³⁸⁰ The USSC also kept the age of the defendant category.¹³⁸¹

These revisions marked a significant shift in the federal sentencing framework. The USSC’s policy amendment embraced the judiciary’s broader understanding of what circumstances qualified as extraordinary and compelling. To understand how courts interpreted their authority during the USSC’s years of silence, we turn to one of the most influential early appellate decisions interpreting the FSA: *United States v. Brooker*. In *Brooker*, the Second Circuit addressed a central question that had divided federal courts—whether judges were still bound by the outdated policy statement in U.S.S.G. § 1B1.13. The court’s answer empowered courts to provide and individuals to seek meaningful relief.

UNITED STATES V. BROOKER¹³⁸²

Calabresi, Circuit Judge:

The First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 (“First Step Act”), was simultaneously monumental and incremental. Monumental in that its changes to sentencing calculations, mandatory minimums, good behavior credits and other parts of our criminal laws led to the release of thousands of imprisoned people whom Congress and the Executive believed did not need to be incarcerated. Incremental, in that, rather than mandating more lenient outcomes, it often favored giving discretion to an appropriate decisionmaker to consider leniency.

This case reflects that dichotomy. The First Step Act provision we analyze overturned over 30 years of history, but at the same time it often did no more than shift discretion from the Bureau of Prisons (“BOP”) to the courts. We must today decide whether the First Step Act empowered district courts evaluating motions for compassionate release to consider *any* extraordinary and compelling reason for release that a defendant might raise, or whether courts remain bound by U.S. Sentencing Guidelines Manual (“Guidelines” or “U.S.S.G.”) § 1B1.13 Application Note 1(D) (“Application Note 1(D)”), which makes the Bureau of Prisons the sole arbiter of whether most reasons qualify as extraordinary and compelling. Because we hold that Application Note 1(D) does not apply to compassionate release motions brought directly to the court by a defendant under the First Step Act, we vacate and remand the district court’s contrary decision.

BACKGROUND

A. Zullo’s Offense, Conviction, and Sentencing

¹³⁸⁰ *Id.* § 1B1.13(b)(5).

¹³⁸¹ *Id.* § 1B1.13(b)(2).

¹³⁸² 976 F.3d 228 (2d Cir. 2020)

Jeremy Zullo became involved in serious crimes at a young age. He joined the drug trafficking conspiracy that would land him in prison at 17; he was indicted at 20; and he was convicted and sentenced at 22. On May 26, 2010, Zullo pleaded guilty to conspiring to traffic marijuana and more than five kilograms of cocaine, possessing a gun in furtherance of a drug crime, and using criminally derived property in a transaction valued at more than \$10,000. These crimes required the district court to sentence Zullo to, at a minimum, separate 10-year and 5-year mandatory minimum sentences.

At that time, however, we had held that the sentencing court had discretion to run these sentences concurrently. *See United States v. Williams*, 558 F.3d 166, 176 (2d Cir. 2009), *abrogated by Abbott v. United States*, 562 U.S. 8, 131 S.Ct. 18, 178 L.Ed.2d 348 (2010). And at Zullo's sentencing that is exactly what happened. The district court heard how Zullo had no criminal background before this set of crimes, and how, even while released pre-trial, he had seemingly begun to turn his life around. It then remarked,

[y]ou know, a sentence like this it's difficult for me to sentence somebody like you to 10 years in prison frankly. You know, I look back at the number of people I've sentenced to 10 years or more. Most of them have been pretty experienced criminals with a lot of past criminal behavior. So you are a little bit unique in that sense. So I'm not going to give you much more than the 120 months [mandatory minimum] because I don't, because I frankly think 120 months is enough.

App'x 113. True to its word, the district court sentenced Zullo to 126 months imprisonment. It ran the five-year mandatory minimum required for Zullo's gun conviction concurrently with the ten-year minimum required for his drug trafficking conviction.

The government appealed. While that appeal was pending the Supreme Court decided *Abbott*, holding that mandatory sentences under 18 U.S.C. § 924(c), like the one Zullo received, must run consecutively to any other mandatory minimum sentence. 562 U.S. at 13, 131 S.Ct. 18. Recognizing that Zullo's sentence was now contrary to law, we vacated and remanded for resentencing. *See United States v. Brooker*, No. 10-4764-cr, 2011 WL 11068864, at *1 (2d Cir. Dec. 22, 2011). On remand, the district court, repeating its belief that the required now-15-year sentence was excessive, imposed that sentence. Zullo's conviction and sentence were then affirmed on direct appeal and on habeas review. *United States v. Zullo*, 581 F. App'x 70 (2d Cir. 2014) (direct appeal); *United States v. Zullo*, No. 1:09-CR-00064-JGM-2, 2015 WL 6554783 (D. Vt. Oct. 29, 2015) (habeas review).

B. A Brief History of Statutory Compassionate Release

The statute authorizing compassionate release as it exists today was first enacted as part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, 98 Stat. 1837, 1998-1999

(1984).¹³⁸³ That statute created the substantive standard that we still apply: whether “extraordinary and compelling reasons” exist for compassionate release. *Id.* (codified at 18 U.S.C. § 3582(c)(1)(A)).

That original statute, unlike the current law, gave BOP exclusive power over all avenues of compassionate release. For over 30 years any motion for compassionate release had to be made by the BOP Director. *See* 18 U.S.C. § 3582(c)(1)(A) (2017). No matter what other changes Congress made to the compassionate release statute over the years, the BOP's absolute control over this mechanism for lenity remained. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 § 70002, 108 Stat. 1796, 1984-85 (codified at 18 U.S.C. § 3582(c)(1)(A)(ii)) (providing for the release, upon BOP motion, of some imprisoned persons at least 70 years of age who have served at least 30 years in prison).

BOP used this power sparingly, to say the least. A 2013 report from the Office of the Inspector General revealed that, on average, only 24 incarcerated people per year were released on BOP motion. *See* U.S. Dep't of Just. Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program 1* (2013), <https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf>. That report concluded that BOP did “not properly manage the compassionate release program,” that its “implementation of the program ... [was] inconsistent and result[ed] in ad hoc decision making,” and that it “ha[d] no timeliness standards for reviewing ... requests.” *Id.* at 11. These failures were not without consequence. Of the 208 people whose release requests were approved by *both* a warden and a BOP Regional Director, 13% died awaiting a final decision by the BOP Director. *Id.*

As a result of this report and other criticisms, BOP revamped portions of its compassionate release procedures. This included expanding the population it would consider eligible for release to people over the age of 65 who had served a significant portion of their sentences. *See Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf>. And, in the first 13 months after these changes, 83 people were granted compassionate release. *Id.* But these 83 were still only a small part of a potential release pool of over 2000 people who met the BOP's revised criteria of being over 65 and having served at least half of their sentence. *Id.*

The Sentencing Commission has also played a role in compassionate release, though its work has been constrained by the BOP's absolute gatekeeping authority. 28 U.S.C. § 994(t) requires the Commission to “describe what should be considered extraordinary and

¹³⁸³ Before 1984 compassionate release existed alongside the now-abolished federal parole system, although it appears to have been used in much the same fashion as it is today. *See* Shon Hopwood, *Second Looks & Second Chances*, 41 *Cardozo L. Rev.* 83, 100 (2019) (detailing this history).

compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” And 28 U.S.C. § 994(a)(2)(C) requires the Commission to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing ... including ... the sentence modification provisions set forth in section[] ... 3582(c).” The above-mentioned section 994 was passed in 1984, but it was not until 2006 that the Commission finally acted on this mandate and issued a new policy statement, Guideline § 1B1.13.

Despite the seeming statutory command, this policy statement did not define “extraordinary and compelling reasons.” Instead, it stated in an application note only that “[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of [the policy statement].” U.S.S.G. § 1B1.13 n.1(A) (U.S. Sentencing Comm'n 2006). The next year, however, the Commission updated that Guideline to explain that extraordinary and compelling reasons for a sentence reduction exist if “the defendant is suffering from a terminal illness,” from significant decline related to the aging process that would make him unable to care for himself within a prison, or upon “the death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.” *Id.* § 1B1.13 n.1(A)(i)-(iii) (U.S. Sentencing Comm'n 2007). This 2007 guideline amendment also introduced what has come to be known as the catch-all clause: compassionate release is warranted if, “[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in [the other parts of the Guideline].” *Id.* § 1B1.13 n.1(A)(iv) (U.S. Sentencing Comm'n 2007).

By 2018, when the latest amendment to section 1B1.13 was made, the Sentencing Commission had expanded its own definition of extraordinary and compelling circumstances more broadly to cover events relating to the traditional categories of the imprisoned person's health, age, or family circumstances, and to clarify that such circumstances did not have to be unforeseen at the time of sentencing. *See id.* § 1B1.13 nn.1, 2 (U.S. Sentencing Comm'n 2018). But, importantly for this case, it had maintained, nearly word-for-word, the catch-all provision allowing for other unidentified extraordinary and compelling reasons “[a]s determined by the Director of the Bureau of Prisons.” *Id.* § 1B1.13 n.1(D).

The current version of the Guideline also includes an application note, added in 2016, titled “Motion by the Director of the Bureau of Prisons.” *Id.* § 1B1.13 n.4. That note states that “[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons,” and goes on to “encourage[] the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1.” *Id.* This 2016 addition, however, also explains that, in the Commission's view, “[t]he court is in a unique position to determine whether the circumstances [in the motion] warrant a reduction” *Id.*

C. The First Step Act

It was against this backdrop that Congress passed the First Step Act. The First Step Act, among numerous other reforms, made the first major changes to compassionate release since its

beginnings in 1984. Chief among these changes was the removal of the BOP as the sole arbiter of compassionate release motions. While BOP is still given the first opportunity to decide a compassionate release motion, and may still bring a motion on a defendant's behalf, under Congress' mandate a defendant now has recourse if BOP either declines to support or fails to act on that defendant's motion. As the Act states, a defendant may go to court "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier" 18 U.S.C. § 3582(c)(1)(A).

One co-sponsor of the bill described this provision as both "expand[ing]" and "expedit[ing]" compassionate release. 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin). Another representative stated that the First Step Act was "improving application of compassionate release" 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler). Sentiments like these were apparently so widely shared that Congress titled this portion of the First Step Act, "Increasing the Use and Transparency of Compassionate Release." See P.L. 115-391 § 603(b), 132 Stat. 5194, 5239.

This change—though seemingly only procedural in its modification of the decisionmaker—quickly resulted in significant substantive consequences. In 2018 only 34 people received compassionate release sentence reductions. See U.S. Dep't of Just., *Department Of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment System* (July 19, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>. After the First Step Act became law in December 2018, BOP reports that over 1000 motions for compassionate release or sentence reduction have been granted. Federal Bureau of Prisons, *First Step Act*, <https://www.bop.gov/inmates/fsa/> (last visited July 27, 2020). What Congress seems to have wanted, in fact occurred.

* * *

It is in this context that the instant case arises. For, despite the material changes Congress made to compassionate release procedures in the First Step Act, the Sentencing Commission has not updated its policy statement on compassionate release. Thus, section 1B1.13 still refers in multiple places to BOP having the exclusive authority to bring a compassionate release motion before the court. See U.S.S.G. § 1B1.13 & n.4. And no update to that Guideline appears forthcoming because, as the Government notes here, the Commission currently lacks a quorum of voting members.

D. Procedural History

On July 25, 2019, Zullo, in accordance with the language of the First Step Act, sought compassionate release and, having exhausted his administrative remedies, moved for release or a

sentence reduction in the district court. A few days later, on July 31, Zullo asked the lower court to amend his motion to add the argument that the government had violated his plea agreement.¹³⁸⁴

On September 23, 2019, the district court denied Zullo's motion for compassionate release and his motion to amend.¹³⁸⁵ It did so relying on Guideline § 1B1.13, which seemingly still required a motion by the BOP. Zullo timely appealed a week later.

DISCUSSION

A. U.S.S.G. § 1B1.13 Application Note 1(D) and the First Step Act

And so we turn to the question at the heart of this case: whether the First Step Act allows courts independently to determine what reasons, for purposes of compassionate release, are “extraordinary and compelling,” or whether that power remains exclusively with the BOP Director as stated in Application Note 1(D). Because this is a legal question, we review the district court's decision *de novo*. See *United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020).

This question has split district courts across the country. A majority has concluded that, despite Application Note 1(D), the First Step Act freed district courts to exercise their discretion in determining what are extraordinary circumstances. See, e.g., *United States v. Young*, 458 F.Supp.3d 838, 844–45 (M.D. Tenn. 2020) (reaching this conclusion and collecting similar cases). A sizable minority, including the district court below, has reached the opposite conclusion, holding that Application Note 1(D)'s language continues to preclude court action, absent a motion by the BOP. See *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *2 (D. Me. July 11, 2019) (collecting cases). We agree with the majority position, and so vacate and remand the district court's decision.

1. *The First Step Act and Application Note 1(D)'s Text*

As with most cases of statutory interpretation, we begin with the text. See *Bostock v. Clayton Cnty., Georgia*, — U.S. —, 140 S. Ct. 1731, 1737, 207 L.Ed.2d 218 (2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.”). 18

¹³⁸⁴ While his motions were pending, someone named Maria Houston sought leave to file an amicus brief. Her motion was a single paragraph long, and did not identify her profession, expertise, or why she had an interest in the case. It stated only that she wished to present data that would show Zullo was a lower recidivism risk than the government alleged and to identify social issues in criminal justice reform relevant to the case.

¹³⁸⁵ It also denied Houston's motion to file an amicus brief.

U.S.C. § 3582(c)(1)(A)(i), after being amended by the First Step Act, currently reads in relevant part:

the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, *if [the court] finds that ... extraordinary and compelling reasons warrant such a reduction ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission* (emphasis added).

As we have described, the major difference between this statute and its prior incarnations is that an imprisoned person moving for compassionate release can now bring a claim before the courts even if the BOP opposes the claim. Congress clearly did not view this—a break with over 30 years of procedure—as a minor or inconsequential change. Congresspersons called it “expand[ing],” “expedit[ing],” and “improving” compassionate release.¹³⁸⁶ 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin); 164 Cong. Rec. H10346, H10362 (Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

Significantly, the statute's text, while it requires courts when adjudicating compassionate release motions to consider the Guidelines, requires such courts to consider only “applicable” guidelines. 18 U.S.C. § 3582(c)(1)(A). It follows that the question before us is whether Guideline § 1B1.13, and specifically Application Note 1(D), remains “applicable” after the changes made in the First Step Act.

Turning to the text of Guideline § 1B1.13, it is manifest that its language is clearly outdated and cannot be fully applicable. The very first words of the Guideline are “[u]pon motion of the Director of the Bureau of Prisons.” U.S.S.G. § 1B1.13. And this is precisely the requirement that the First Step Act expressly removed. *See* 18 U.S.C. § 3582(c)(1)(A). We could, therefore, read the Guideline as in effect abolished. And that would settle the case before us, absent an unlikely

¹³⁸⁶ These statements are reflected in the bill's title: “Increasing the use and transparency of compassionate release.” P.L. 115-391 § 603(b), 132 Stat. 5194, 5239. And the Supreme Court has recognized that titles can be “especially valuable” as “devices to resolve ‘doubt about the meaning of a statute.’” *Yates v. United States*, 574 U.S. 528, 552, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (Alito, J. concurring) (quoting *Porter v. Nussle*, 534 U.S. 516, 527–528, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)).

severability of the Application Note. *See infra* —. But we prefer to save as much of the Guideline language and policy as possible. *See Advocate Health Care Network v. Stapleton*, — U.S. —, 137 S. Ct. 1652, 1659, 198 L.Ed.2d 96 (2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (noting that courts’ usual practice is to avoid the creation of surplusage, instead attempting “to ‘give effect, if possible, to every clause and word of a statute.’ ”)). As a result, though motions by the BOP still remain under the First Step Act, they are no longer exclusive, and we read the Guideline as surviving, *236 but now applying only to those motions that the BOP has made.

In doing so, we look also to Application Note 4, which says that “[a] reduction *under this policy statement* may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A).” U.S.S.G. § 1B1.13, n.4 (emphasis added). And we conclude that after the First Step Act, this language must be read not as a description of the former statute’s requirements, but as defining the motions to which the policy statement applies. A sentence reduction brought about not “upon motion by the Director of the Bureau of Prisons” is not a reduction “under this policy statement.” *Id.* In other words, if a compassionate release motion is not brought by the BOP Director, Guideline § 1B1.13 does not, by its own terms, apply to it. Because Guideline § 1B1.13 is not “applicable” to compassionate release motions brought by defendants, Application Note 1(D) cannot constrain district courts’ discretion to consider whether any reasons are extraordinary and compelling.

This reading not only saves as much of the existing Guideline as is possible, given the First Step Act, but it also aligns with Congress’ intent in passing that Act. After watching decades of the BOP Director’s failure to bring any significant number of compassionate release motions before the courts, Congress allowed people seeking compassionate release to avoid BOP if BOP rejects their motions or fails to act on them within a short time period, only 30 days. *See* 18 U.S.C. § 3582(c)(1)(A) (allowing for the filing of a motion with the court when administrative options are exhausted or 30 days pass, “whichever is earlier”). When the BOP fails to act, Congress made the courts the decision maker as to compassionate release. *Id.*

2. Severability

The government seeks to retain BOP power to define extraordinary and compelling circumstances by urging us to sever the explicitly conflicting portions of the Guideline from Application Note 1(D). It argues that Application Note 1(D) can remain in force because Congress made only procedural changes to compassionate release, and the statutory requirement that the Commission promulgate a definition of “extraordinary and compelling reasons” went unchanged. *See* 28 U.S.C. § 994(t). But even if we assume, as the government does, that traditional severability principles apply to the Guidelines, the government’s argument fails.

First, because we do not abrogate Guideline § 1B1.13—but only read its applicability to be limited to cases in which the BOP has made a motion—severability does not come up. There is nothing to sever. Neither the Guideline nor its application notes have been eliminated. Second, even were we to abrogate Guideline § 1B1.13, the government’s severability argument would be

unsuccessful, for as we have explained, Application Note 4's text places motions not made by the BOP Director outside of section 1B1.13's scope.

More generally, severability, as the government recognizes, is largely a question of legislative intent. *United States v. Smith*, 945 F.3d 729, 738 (2d Cir. 2019). “An ‘invalid part’ of a statute or regulation ‘may be dropped if what is left is fully operative as a law,’ absent evidence that ‘the Legislature would not have enacted those provisions which are within its power, independently of that which is not.’ ” *Id.* (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984)). Here, the long history of the compassionate release provisions, the statements of Congresspersons, including a First Step Act co-sponsor, and the text of both the First Step Act and the Guideline, make the intent of everyone involved clear. When the BOP does not timely act or administrative options are exhausted, “whichever is earlier,” discretion to decide compassionate release motions is to be moved from the BOP Director to the courts. 18 U.S.C. § 3583(c)(1)(A). Significantly, even before passage of the First Step Act, the Sentencing Commission, while it “encourage[d]” the Director to file more compassionate release motions, believed that, “[t]he *court* is in a unique position to determine whether the circumstances warrant a reduction....” U.S.S.G. § 1B1.13, n. 4 (emphasis added).

The government presents nothing from the legislative history of either Guideline § 1B1.13 or the First Step Act suggesting an alternative intent. Given this clear intention, we see no reason to believe that Congress would also wish for BOP to retain a significant rein on the courts’ discretion through Application Note 1(D) when the BOP had made no motion.

For all of these reasons, the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion.

B. Zullo's Motion

The government makes two alternative arguments in the instant case. First, it argues that even if Application Note 1(D) no longer applies and the district court has discretion to consider all possible reasons for compassionate release, remand is unnecessary here because the district court did exercise discretion in denying Zullo's motion. Second, it argues that, regardless of whether the district court exercised discretion, a remand is not needed because any district court granting a compassionate release motion on the facts before us would necessarily abuse its discretion. We reject both arguments.

The district court's order did not use the language of discretion. It said that it “reject[ed] Zullo's argument that the amendment of 18 U.S.C. § 3852(c)(1)(A) removing the requirement of a BOP motion also removed the substantive effect of [Guideline] § 1B1.13.” App'x 215. The court then quoted Application Note 1(D), including the language that “other reasons” for compassionate release applied only “[a]s determined by the Director of the Bureau of Prisons.” App'x 215-16. It concluded by stating that “[t]he court denies defendant's motion because his primary complaint that his sentence was too long in the first place *cannot qualify* as an extraordinary and compelling

circumstance.” App’x 216 (emphasis added). This is the language of a court applying a rule that constrains it. It is not the language of discretion.

Nor can we say, as a matter of law, that a court would abuse its discretion by granting someone compassionate release on this record. It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant’s prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place. *Id.* Beyond this, a district court’s discretion in this area—as in all sentencing matters—is broad. *See United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008) (en banc) (noting a district court’s “very wide latitude” in sentencing). The only statutory limit on what a court may consider to be extraordinary and compelling¹³⁸⁷ is that “[r]ehabilitation ... *alone* shall not be considered an extraordinary and compelling reason.” 28 U.S.C. § 994(t) (emphasis added).

In the instant case, Zullo does not rely *solely* on his (apparently extensive) rehabilitation. Zullo’s age at the time of his crime and the sentencing court’s statements about the injustice of his lengthy sentence might perhaps weigh in favor of a sentence reduction. Indeed, Congress seemingly contemplated that courts might consider such circumstances when it passed the original compassionate release statute in 1984. *See* S. Rep. No. 98-225, at 55-56 (1984) (noting that reduction may be appropriate when “other extraordinary and compelling circumstances justify a reduction of an *unusually long* sentence” (emphasis added)); *see also United States v. Maumau*, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *6-*7 (D. Utah Feb. 18, 2020) (further discussing this history and collecting cases where district courts have reduced sentences in part because they were overly long).

Moreover, these arguments may also interact with the present coronavirus pandemic, which courts around the country, including in this circuit, have used as a justification for granting some sentence reduction motions. *See, e.g., United States v. Zukerman*, 451 F.Supp.3d 329, 336 (S.D.N.Y. 2020) (granting compassionate release because of the risk of Covid-19); *United States v. Colvin*, 451 F.Supp.3d 237, 241-42 (D. Conn. 2020) (same); *United States v. Rodriguez*, 451 F.Supp.3d 392, 406-07 (E.D. Pa. 2020) (same).

We list these possibilities not to indicate that Zullo should be granted compassionate release, or even to suggest that they necessarily apply—we state no opinion either way on these questions. We merely believe that the consideration of these factors and of their possible relevance, whether in isolation or combination, is best left to the sound discretion of the trial court in the first

¹³⁸⁷ Because Application Note 1(D) does not bind district courts, they are similarly not bound by BOP’s updated guidance on what counts as an extraordinary and compelling reason. *See* Federal Bureau of Prisons, Program Statement No. 5050.50, Compassionate Release/Reduction in Sentence (2019) available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf. The government has not identified, and we have not found, any statute, Guideline, or other document beyond Application Note 1(D) that would require courts to defer to the BOP on this question.

instance. We therefore vacate and remand to allow the district court to consider the possible relevance of these and any other factors, and then to exercise the discretion that the First Step Act gives to it.¹³⁸⁸

CONCLUSION

We **VACATE** the district court's decision and **REMAND** for further proceedings not inconsistent with this opinion.

Questions and Comments:

1. **“Extraordinary and compelling” circumstances and judicial discretion:** *Brooker* marked a critical turning point in compassionate release litigation—and its impact was swift and far-reaching. After *Brooker*, nearly every federal appellate court (with one exception) adopted the view that the USSC’s outdated policy did not govern motions filed by incarcerated individuals.¹³⁸⁹ This interpretation remained controlling until the USSC finally regained a quorum and issued a revised policy statement on November 1, 2023.¹³⁹⁰ In the gap between the FSA and the USSC’s updated guidance, this broadening of judicial discretion opened the door for district courts to consider a broad range of facts and circumstances as “extraordinary and compelling.” During this period, creative and holistic arguments led to meaningful relief for hundreds of individuals. District courts across the country found extraordinary and compelling circumstances due to young age at the time of the offense,¹³⁹¹ draconian trial penalties,¹³⁹² extraordinary acts of character while

¹³⁸⁸ Because we vacate and remand the district court's decision, we have no reason to opine on whether it abused its discretion by denying Zullo's attempted amendment. As we have previously said, “our vacation ... le[aves] the district court free to change its prior ruling on [a] matter, for until there is a final judgment in a case, an interlocutory ruling generally remains subject to reconsideration or modification.” *United States v. Uccio*, 940 F.2d 753, 757-58 (2d Cir. 1991).

We do note, however, that Houston's attempted appeal of the denial of a motion to file an amicus brief is beyond our jurisdiction. *See Boston & Providence R.R. Stockholders Dev. Grp. v. Smith*, 333 F.2d 651, 652 (2d Cir. 1964) (“A denial of a motion to intervene as amicus curiae is not appealable.”).

¹³⁸⁹ *See supra.*, note 27 and 28.

¹³⁹⁰ 28 U.S.C. § 994(t); Amendment 814, note 31.

¹³⁹¹ *McCoy v. United States*, No. 2:03-cr-197, 2020 WL 2738225, at *1, *6 (E.D. Va. May 26, 2020) (court denied *pro se* motion and then granted after counsel filed motion for reconsideration); *United States v. Johnson*, No. 05-CR-00167-WHA-5, 2021 WL 5037679, at *2 (N.D. Cal. Oct. 30, 2021); *United States v. Golding*, No. 05-cr-538 (JSR), 2022 WL 2985014, at *2 (S.D.N.Y. July 27, 2022); *United States v. Cruz*, No. 3:94-CR-112 (JCH), 2021 WL 1326851, at *4 (D. Conn. Apr. 9, 2021).

¹³⁹² *United States v. Haynes*, 456 F. Supp. 3d 496, 502, 514 (E.D.N.Y. Apr. 22, 2020); *United States v. Carrington*, No. 3:09cr160, 2022 WL 617617, at *7 (E.D. Va. Mar. 2, 2022).

incarcerated,¹³⁹³ childhood abuse,¹³⁹⁴ unjust prosecutorial misconduct that affected sentencing,¹³⁹⁵ lack of access for much-needed mental health and substance abuse services,¹³⁹⁶ and long-term solitary confinement.¹³⁹⁷

2. **Scope of “extraordinary and compelling” circumstances:** *Brooker* focuses on how district courts can use their discretion when deciding whether an incarcerated individual’s circumstances warrant as extraordinary and compelling. While the USSC provides examples of extraordinary and compelling circumstances, neither the statute nor the USSC provides a fixed definition. Importantly, the updated guidelines also retain a catch-all category, allowing courts to consider circumstances that are “similar in gravity” to the listed examples.¹³⁹⁸ This catch-all reinforces the idea that judges are not bound by a rigid checklist and may evaluate the totality of a person’s situation. One key statutory limitation, however, remains: under the SRA, rehabilitation “alone” cannot serve as the basis for compassionate release.¹³⁹⁹ But what does that mean in practice?

- To what extent can courts consider rehabilitation—such as educational achievements, mentoring others, or maintaining a clean disciplinary record—as part of the broader set of circumstances?
- How extraordinary or compelling must the combination of factors be when rehabilitation is one of them?
- Why did Congress include a restriction on rehabilitation alone—and do you agree with that limitation?

II. Federal Compassionate Release: Factors Considered

A. Unusually Long Sentences as Extraordinary and Compelling

Among the newly codified categories in the USSC’s 2023 policy statement, the “unusually long sentence” provision—found in § 1B1.13(b)(6)—has generated the most legal controversy.

¹³⁹³*United States v. Meeks*, No. 1:97-cr-00169-4, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021).

¹³⁹⁴*United States v. Evans*, No. 2:01-CR-603-DAK, 2021 WL 1929798, at *3–4 (D. Utah May 13, 2021).

¹³⁹⁵*United States v. Conley*, No. 11 CR 0779-6, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021); *Haynes*, 456 F. Supp. 3d at 506, 518.

¹³⁹⁶*United States v. Hatcher*, No. 18 Cr. 454–10 (KPF), 2021 WL 1535310, at *5 (S.D.N.Y. Apr. 19, 2021); *United States v. Schafer*, No. 6:18-CR-06152 EAW, 2020 WL 2519726, at *7 (W.D.N.Y. May 18, 2020); *United States v. Derricoatte*, No. 1:11-cr-91-10, 2020 WL 5629095, at *5 (N.D. Ohio Sept. 21, 2020).

¹³⁹⁷*United States v. Marshall*, 604 F.Supp.3d 277, 287 (E.D. Pa. 2022).

¹³⁹⁸ *Id.* § 1B1.13(b)(5).

¹³⁹⁹ USSG §1B1.13, comment. (n.3) (“Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.”); 28 U.S.C. § 994(t) (“Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”).

This category allows courts to consider nonretroactive changes in sentencing law when assessing whether an incarcerated person has shown extraordinary and compelling circumstances warranting a new sentence.¹⁴⁰⁰ The legislative history of the SRA expressly identified “unusually long sentences” as an appropriate ground for relief.¹⁴⁰¹ However, appellate courts remain sharply divided on whether this is permitted under the statute.¹⁴⁰²

To uphold one’s burden under the “unusually long sentence” provision, the motion must satisfy all four criteria: (1) the incarcerated person has served at least 10 years of their sentence; (2) the person is serving an unusually long sentence, meaning a sentence that is significantly above what is typical for similar conduct today; (3) there has been an intervening change in law that has created a gross disparity between the sentence originally imposed and the sentence that would likely be imposed today for the same offense; and (4) the court has given full individualized consideration to the person’s case.¹⁴⁰³

An example of an intervening change in law is FSA’s changes to mandatory minimums for drug offenses.¹⁴⁰⁴ Prior to the FSA, individuals convicted of certain drug offenses with two prior qualifying drug felonies faced a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A).¹⁴⁰⁵ The FSA dramatically narrowed what qualifies as a prior conviction and reduced the mandatory minimum to twenty-five years.¹⁴⁰⁶ However, these reforms were not made retroactive, so many people remain incarcerated under sentencing schemes Congress has since rejected.¹⁴⁰⁷

¹⁴⁰⁰ U.S. Sent’g Guidelines Manual § 1B1.13(b)(6) (U.S. Sent’g Comm’n 2023).

¹⁴⁰¹ U.S. Sent’g Guidelines Manual, Supplement to Appendix C 208 (U.S. Sent’g Comm’n 2023); see also S. Rep. No. 98-225, at 55–56 (1983).

¹⁴⁰² *Compare* United States v. Ruvalcaba, 26 F.4th 14, 16, 26–28 (1st Cir. 2022) (holding that nonretroactive changes in sentencing law may be considered in light of an individual’s “particular circumstances”); United States v. McCoy, 981 F.3d 271, 286–88 (4th Cir. 2020) (same); United States v. Chen, 48 F.4th 1092, 1098 (9th Cir. 2022) (same); *and* United States v. McGee, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (same), *with* United States v. Andrews, 12 F.4th 255, 260–62 (3d Cir. 2021) (holding nonretroactive changes in law are not permissible considerations); United States v. McMaryion, No. 21-50450, 2023 WL 4118015, at *2 (5th Cir. June 22, 2023) (same); United States v. McCall, 56 F.4th 1048, 1066 (6th Cir. 2022) (en banc) (same); United States v. King, 40 F.4th 594, 595 (7th Cir. 2022) (same); United States v. Crandall, 25 F.4th 582, 585–86 (8th Cir. 2022) (same); *and* United States v. Jenkins, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (same).

¹⁴⁰³ U.S.S.G. § 1B1.13(b)(6) (Nov. 1, 2023).

¹⁴⁰⁴ First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(i), 132 Stat. 5194, 5220.

¹⁴⁰⁵ 21 U.S.C. § 841(b)(1)(A)(viii).

¹⁴⁰⁶ U.S. Sent’g Comm’n, *The First Step Act of 2018: One Year of Implementation* (Aug. 2020) (describing narrowing of § 841(b)(1)(A) prior-conviction definition and reduction from life to 25-year minimum).

¹⁴⁰⁷ *Id.* at 41.

B. Circuit Split on Nonretroactive Sentencing Reforms as Extraordinary and Compelling

The First, Fourth, Ninth, and Tenth Circuits allow district courts to factor in the kind of sentence disparity created by nonretroactive sentencing reforms—such as those in the FSA.¹⁴⁰⁸ They reason that when someone is serving a sentence far longer than what they would receive today for the same conduct, that disparity can be part of an “extraordinary and compelling” case.

In contrast, the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits take the opposite view. They prohibit courts from considering nonretroactive changes in sentencing law—even if those changes would significantly reduce a person’s sentence today.¹⁴⁰⁹ These courts held that because Congress did not make the change retroactive, courts are barred from using compassionate release to achieve that result indirectly. The government successfully opposed certiorari petitions asking the Supreme Court to resolve the split.”¹⁴¹⁰ In declining to resolve this circuit split, the U.S. Supreme Court accepted the government’s position that the issue should be left to the USSC. Responding to that position, the USSC amended its guidelines in spring of 2023 to include § 1B1.13(b)(6), explicitly allowing courts to consider nonretroactive changes in limited but meaningful circumstances.¹⁴¹¹

Understanding how a motion might be received in a particular circuit is critical for effective advocacy. In *United States v. Rutherford*, the Third Circuit reaffirmed its position that courts may not consider nonretroactive changes in law when evaluating compassionate release motions—even after the USSC’s 2023 amendment. This case highlights a growing divide between judicial and administrative interpretations of § 3582(c)(1)(A).

¹⁴⁰⁸ *United States v. Ruvalcaba*, 26 F.4th 14, 16, 26–28 (1st Cir. 2022) (holding that nonretroactive changes in sentencing law may be considered in light of an individual’s particular circumstances); *United States v. McCoy*, 981 F.3d 271, 286–88 (4th Cir. 2020) (holding the same), *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) (holding the same), and *United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (holding the same).

¹⁴⁰⁹ *United States v. Andrews*, 12 F.4th 255, 260–62 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 1446 (2022) (holding nonretroactive changes in law are not permissible considerations), *United States v. McMaryion*, No. 21-50450, 2023 WL4118015, at *2 (5th Cir. June 22, 2023) (holding the same), *United States v. McCall*, 56 F.4th 1048, 1061 (6th Cir. 2022) (en banc) (holding the same), *United States v. King*, 40 F.4th 594, 595 (7th Cir. 2022) (holding the same), *United States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022) (holding the same), and *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (holding the same).

¹⁴¹⁰ U.S. Br. In Opp. 16, *Jarvis v. United States*, No. 21-568 (U.S. Dec. 8, 2021).

¹⁴¹¹ Notice, SENTENCING GUIDELINES FOR UNITED STATES COURTS, 88 Fed. Reg. 28,254, 28,258 (May 3, 2023).

Jordan, Circuit Judge:

Daniel Rutherford seeks a reduction of the nearly 42.5-year sentence he received for committing two armed robberies. He argues that he is eligible for compassionate release because, if he were sentenced for those crimes today, his sentence would be at least eighteen years less than the one he received. That sentencing disparity results from changes effected by the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), which, among other things, made a nonretroactive change to the penalties for violating 18 U.S.C. § 924(c), the federal statute that forbids using or carrying a firearm in furtherance of drug trafficking or a crime of violence. The District Court denied Rutherford's sentence-reduction motion, holding that our precedent in *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), prohibits the change to § 924(c) from being a consideration when determining eligibility for compassionate release.

After the Court denied Rutherford's motion, the United States Sentencing Commission amended its policy statement on compassionate release. It said, for the first time, that courts could consider nonretroactive changes in law, like the amendment to § 924(c), when making a decision about a prisoner's eligibility for compassionate release. Rutherford now argues that we must be guided by the Commission's policy statement, notwithstanding our *Andrews* precedent and the nonretroactive character of the statutory change. In *Andrews*, however, we held that allowing prisoners to be eligible for compassionate release because of the First Step Act's change to § 924(c) would conflict with Congressional intent on nonretroactivity. That conclusion remains true. Accordingly, we will affirm the District Court's order denying Rutherford's compassionate-release motion.

I. BACKGROUND

A. Legal Background

3. The 2023 Amendment to the Policy Statement

In April 2023, the Sentencing Commission, by then reconstituted with a quorum, amended the Policy Statement to define “extraordinary and compelling reasons” for prisoner filed motions for compassionate release. 88 Fed. Reg. 28,254. It issued the amendment in “respon[se] to [the] circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons within the meaning of section 3582(c)(1)(A).” 8 *Id.* at 28,258.

The amended Policy Statement provides that, as a general matter, a law change cannot be considered an extraordinary and compelling reason to grant compassionate release: “[A] change in the law (including an amendment to the Guidelines Manual that has not been made retroactive)

¹⁴¹² 120 F.4th 360 (3rd Cir. 2024)

shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement.” U.S.S.G. § 1B1.13(c). But the Statement provides an exception to that rule. Through the following new provision, § 1B1.13(b)(6) (hereinafter “(b)(6)”), the Commission explained that nonretroactive changes in law can be considered if certain conditions are met:

If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances. U.S.S.G. § 1B1.13(b)(6).

In promulgating subsection (b)(6), the Commission agreed with the “circuits that authorize a district court to consider non-retroactive changes in the law as extraordinary and compelling circumstances[,] ... [but] only in narrowly circumscribed circumstances.” 88 Fed. Reg. at 28,258. Breaking it down, the newly revised Policy Statement provides that a nonretroactive change in law “may be considered in determining whether the defendant presents an extraordinary and compelling reason” when (1) “a defendant received an unusually long sentence[,]” (2) the defendant “has served at least 10 years of the term of imprisonment,” (3) an intervening law change has produced a “gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed,” and (4) after the court gives “full consideration of the defendant's individualized circumstances.” U.S.S.G. § 1B1.13(b)(6).

Notably, because (b)(6) states that changes in law may (not must) be considered, judges are not required to consider a change in law when determining a prisoner's eligibility for compassionate release. Thus, (b)(6) gives judges the opportunity, but not a mandate, to consider changes in the law under the defined circumstances. Judges therefore have two levels of discretion under (b)(6): first, whether to consider a change in law when determining a prisoner's eligibility for compassionate release, and second, the usual discretion when deciding if an eligible prisoner should receive a sentence reduction after considering the § 3553(a) factors.

The amended Policy Statement went into effect on November 1, 2023, 88 Fed. Reg. at 28,254, but not without controversy. The Commission adopted the amendment by a 4-3 vote. See April 5, 2023 United States Sentencing Commission Public Meeting Transcript at 82, available at https://www.ussc.gov/sites/default/files/pdf/amendment-\process/public-hearings-andmeetings/20230405/20230405_transcript.pdf [https:// perma.cc/E9W7-KB6N]. The three dissenting members delivered a joint statement opposing the amendment because, in their view, the Policy Statement “goes further than the Commission's legal authority extends[,]” “make[s] a seismic structural change to our criminal justice system without congressional authorization or directive[,]” and causes “separation of powers problem[s.]” *Id.* at 60-61. They said,

Today's amendment allows compassionate release to be the vehicle for retroactively applying the very reductions that Congress has said by statute should not apply retroactively. To be sure, it doesn't do so automatically, but it makes any nonretroactive change in law potential grounds for re-sentencing once the defendant has served ten years. In practical effect, it provides a second look to *368 revisit duly imposed criminal sentences at the tenyear mark based on intervening legal developments that Congress did not wish to make retroactive. *Id.*

The Department of Justice also opposed the change, saying, “[T]he Department has taken the position ... that Section 3582(c)(1)(A)(i) does not authorize sentence reductions based on nonretroactive changes in sentencing law. In particular, the Department has repeatedly argued in litigation that the fact that a change in sentencing law is not retroactive is not ‘extraordinary’ within the meaning of the statute.... The Commission's proposal thus conflicts with the Department's interpretation [of] Section 3582(c) (2).” Department of Justice Comment Letter, available at <https://www.ussc.gov/sites/default/files/pdf/amendmentprocess/public-hearings-and-meetings/20230223-24/DOJ1.pdf> [<https://perma.cc/P8A8-5ZYX>].

B. Factual Background and Procedural History

In 2003, 22-year-old Daniel Rutherford committed two armed robberies at a chiropractic office in a five-day period. During the first robbery, he pulled a gun on the chiropractor and stole \$390 and a watch. Four days later, he returned to the same office with an accomplice and again brandished a gun and stole \$900 in cash and jewelry. Rutherford was arrested, tried, and convicted of one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1). At sentencing, Rutherford faced a 100-to 125- month sentence, plus mandatory minimum consecutive terms of 7 years for the first § 924(c) offense, and 25 years for the second. The District Court sentenced Rutherford to a top-of-the-guidelines term of imprisonment of 125 months in addition to the 32-year mandatory sentence, for a total sentence of nearly 42 and a half years. On appeal, we affirmed Rutherford's conviction. *United States v. Rutherford*, 236 F. App'x 835, 844 (3d Cir. 2007). He did not appeal his sentence. *Id.* at 838. Because of the First Step Act's amendment to § 924(c), if Rutherford were sentenced today, he would be subject to a 14-year mandatory minimum sentence for his two § 924(c) convictions (7 years for each), 18 years less than 32- year mandatory minimum he received.

Acting *pro se*, Rutherford has attempted to seek compassionate relief before. He says that he sent a motion for compassionate release to the federal public defender's office in 2020, apparently believing the motion would be filed for him. He later asked the District Court if it had received the motion, and he claims the Court did not respond. In February 2021, he filed with the District Court another handwritten motion for compassionate release. According to Rutherford, the District Court never addressed that motion either.

His third pro se motion for compassionate release came in April 2021. That is the motion at issue here. In it, Rutherford argued to the District Court that the First Step Act's enactment presents an “extraordinary and compelling” reason to grant him compassionate release. He further contended that the § 3553(a) factors support a sentence reduction because, among other things, he had completed over 50 educational courses in prison, he had secured employment upon release, and in the last decade he had committed only two minor infractions in prison. He also said that he has medical conditions – obesity and hypertension – that could “increase[] severity of illness and likelihood of lethality from COVID-19.” (J.A. at 83.)

Before the District Court ruled on Rutherford's latest compassionate release motion, we decided *Andrews*, in which, as we shall discuss, we held that the First Step Act's amendment to § 924(c) does not constitute an extraordinary and compelling reason to be eligible for compassionate release. In April 2023, the District Court denied Rutherford's motion, holding that *Andrews* foreclosed his argument that the First Step Act could constitute an extraordinary and compelling reason to justify eligibility for compassionate release.

Rutherford timely appealed. We instructed the parties to discuss in their briefing

(1) whether this Court should consider the impact of amendments to the Sentencing Guidelines on an 18 U.S.C. § 3582(c) motion in the first instance on appeal; and, assuming so, (2) to what extent, if any, the 2023 amendment to § 1B1.13(b) of the Sentencing Guidelines Manual abrogates this Court's decision in *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021). (3d Cir. D.I. 16.)

II. DISCUSSION

On appeal, Rutherford argues that, even though the District Court did not have an opportunity to consider it, we should address the effect of the new (b)(6) provision of the Policy Statement on his compassionate release motion, including whether it abrogates our holding in *United States v. Andrews*. He asserts that *Andrews* is not in conflict with the amended Policy Statement and that, ultimately, we should remand the case so he has “an opportunity to show the [D]istrict [C]ourt that he qualifies for compassionate release under the new [P]olicy [S]tatement.” (Opening Br. at 50.) The government, on the other hand, argues that we should not consider the amended Policy Statement for the first time on appeal and that the (b)(6) provision is invalid, both as applied to the First Step Act and on its face, because the “provision exceeds the Commission's statutory authority to define the bases of compassionate release[.]” (Answering Br. at 11.)

A. *Andrews*

We begin with a review of our *Andrews* decision. Eric Andrews was sentenced in 2006 and was serving a 312-year sentence for a series of armed robberies. *Andrews*, 12 F.4th at 257. He filed a compassionate release motion, arguing that his case presented “extraordinary and compelling reasons” warranting a reduced sentence under 18 U.S.C. § 3582(c)(1) (A)(i). *Id.* The gist of his motion was that he would have received a 91-year sentence had he been sentenced after the First Step Act's passage. *Id.*

Before we addressed the specific reasons *Andrews* advanced for his assertion that he was entitled to compassionate release, we first concluded that the Policy Statement, in its then existing form, was “not applicable – and not binding – for courts considering prisoner-initiated motions” because “the text of the [P]olicy [S]tatement explicitly limit[ed] its application to Bureau-initiated motions.” *Id.* at 259. We then said it was not error for the district court to “consult[] the text, dictionary definitions, and the [P]olicy [S]tatement to form a working definition of ‘extraordinary and compelling reasons[,]’ ” in part, because the Policy Statement, even if not binding, “still sheds light” on the meaning of that phrase. *Id.* at 260. Furthermore, “[b]ecause Congress reenacted the compassionate-release statute without any alterations to the phrase ‘extraordinary and compelling reasons,’ ” we believed “it was reasonable ... to conclude that the phrase largely retained the meaning it had under the previous version of the statute[,]” which did not mention nonretroactive changes in the law. *Id.*

After resolving those preliminary questions, we turned to the specific arguments *Andrews* advanced for why he was entitled to compassionate release. He claimed his case presented six reasons that, in combination, “were extraordinary and compelling under the compassionate release statute”: (1) “the duration of his sentence,” (2) the First Step Act’s changes to the mandatory minimums in his case, (3) “his rehabilitation in prison,” (4) “his relatively young age at the time of his offense,” (5) the abusive prosecutorial “decision to charge him with thirteen § 924(c) counts,” and (6) “his alleged susceptibility to COVID-19.” *Id.* at 258 (cleaned up).

Taking up those contentions, we first considered whether the duration of *Andrews*’s sentence could constitute an extraordinary and compelling reason and so allow a sentence reduction. *Id.* We held that “[t]he duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance[,]” *id.* at 260-61, because “there is nothing extraordinary about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute[,]” *id.* at 261 (quoting *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021) (internal quotation marks omitted)). “Moreover,” we said, “considering the length of a statutorily mandated sentence as a reason for modifying a sentence would infringe on Congress’s authority to set penalties.” *Id.* at 261.

Next, we concluded that the second reason *Andrews* advanced – namely, the First Step Act’s nonretroactive changes to the § 924(c) mandatory minimums – “also cannot be a basis for compassionate release.” *Id.* at 261. We explained that, “[i]n passing the First Step Act, Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced.” *Id.* at 261. And nonretroactive sentencing changes are “conventional[,]” because, as the Supreme Court has observed, “in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.” *Id.* (quoting *Dorsey v. United States*, 567 U.S. 260, 280, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012)). So, “ ‘[w]hat the Supreme Court views as the ordinary practice cannot also be an extraordinary and compelling reason to deviate from that practice.’ ” *Id.* (quoting *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021) (internal quotation marks omitted)).

We went on to say that, “when interpreting statutes, we work to ‘fit, if possible, all parts’ into a ‘harmonious whole.’ ” *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Thus, we would “not construe Congress’s nonretroactivity directive [in the First Step Act] as simultaneously creating an extraordinary and compelling reason for early release” because “[s]uch an interpretation would sow conflict within the [First Step Act].” *Id.* (citing *United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) (“Why would the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean to use a general sentencing statute from 1984 to unscramble that approach?”)). We added this caveat: nonretroactive sentencing reductions may be relevant to a prisoner’s compassionate release motion, but only if and after “a prisoner successfully shows extraordinary and compelling circumstances,” because “the current sentencing landscape may be a legitimate consideration for courts ... when they weigh the § 3553(a) factors.” *Id.* at 262.

Finally, we held that the district court did not abuse its discretion in determining “that Andrews’s four remaining reasons collectively fell short of being extraordinary and compelling under the statute.” *Id.* at 259. Therefore, we affirmed the denial of his compassionate-release motion. *Id.* at 262.

C. The Amended Policy Statement Does Not Abrogate Andrews.

1. Subsection (b)(6) of the Amended Policy Statement Is Inconsistent with the First Step Act.

The government does not dispute that the Commission possesses the authority to promulgate policy statements for prisoner-initiated compassionate-release motions, at least not to the extent such statements relate to the traditional bases for compassionate release. (Answering Br. 25 n.5 (“As a general rule, ... the Commission’s new policy statement, that clarifies eligibility based on medical, family, and other traditional bases for compassionate release, is binding.”).) The government “objects only to the new ‘change in law’ provision [i.e., (b)(6)] as exceeding statutory authority.” (Answering Br. at 25-26 n.5.) Thus, we consider only whether (b)(6) is binding on a court’s compassionate release eligibility determinations when deciding a motion based in whole or in part on the First Step Act’s change to § 924(c).

As explained previously (*see supra* Section I.A.2.), a sentencing court may grant a compassionate release motion if, “after considering the factors set forth in section 3553(a) to the extent that they are applicable, it finds that extraordinary and compelling reasons warrant such a reduction ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). Congress instructed “[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions ... [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” 2028 U.S.C. § 994(t).

When Congress expressly delegates the power to an agency to “prescribe standards for determining” the meaning of a particular term or phrase, as it did here for the phrase “extraordinary

and compelling.” “Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term.” *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977). Consistent with that principle, the Supreme Court said in *Concepcion v. United States* that, in sentence reduction proceedings like those involving compassionate release, Congress has “cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements.” 597 U.S. 481, 495, 142 S.Ct. 2389, 213 L.Ed.2d 731 (2022). We thus do not gainsay that the Commission's policy statements are generally binding on us. *United States v. Berberena*, 694 F.3d 514, 522 (3d Cir. 2012) (“Congress contemplated that the Commission would have the power to impose limits on ... sentence reductions, by making the Commission's policy statements binding.”).

That said, the Commission's authority to issue binding policy statements is not unlimited. The Supreme Court has also explained that, although “Congress has delegated to the Commission significant discretion[,]” “it must bow to the specific directives of Congress” and accurately reflect Congressional intent when it fulfills its responsibilities. *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (internal quotation marks omitted). Indeed, Congress has granted the Commission power to promulgate only those policy statements that are “consistent with all pertinent provisions of any Federal statute.” 28 U.S.C. § 994(a). It is the job of the courts to ensure that the Commission's amendments to its policy statements do not go beyond what Congress intended. *United States v. Adair*, 38 F.4th 341, 359 (3d Cir. 2022) (concluding that a particular amendment set forth by the Commission “ha[d] no force of law” because it “exceed[ed] the Commission's delegated powers); cf. *Loper Bright Enterprises v. Raimondo*, — U.S. —, 144 S. Ct. 2244, 2263, 219 L.Ed.2d 832 (2024) (explaining that “the role of the reviewing court under the [Administrative Procedures Act] is ... to independently interpret the statute and effectuate the will of Congress subject to constitutional limits” and that “the court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.” (cleaned up)).

We agree with the government that subsection (b)(6) in the amended Policy Statement, as applied to the First Step Act's modification of § 924(c), conflicts with the will of Congress and thus cannot be considered in determining a prisoner's eligibility for compassionate release. Congress explicitly made the First Step Act's change to § 924(c) *nonretroactive*. Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222. And, in *Andrews*, we held that it would be inconsistent “with [the] pertinent provisions of [the First Step Act],” 28 U.S.C. § 994(a), to allow the amended version of § 924(c) to be considered in the compassionate release context because “Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced.” *Andrews*, 12 F.4th at 261.

Just as we said in *Andrews*, we will “not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release[,]” because “[s]uch an interpretation would sow conflict within the statute.”²¹ *Id.* Simply put, allowing the change to § 924(c) to be considered when determining compassionate release eligibility does not

align with “the specific directives [that] Congress” set forth in the First Step Act. *LaBonte*, 520 U.S. at 757, 117 S.Ct. 1673.

2. *Andrews* and the Amended Policy Statement are in Conflict.

Rutherford argues, however, that, in reality, “there is no conflict” between the amended Policy Statement and *Andrews* because our holding there was relatively narrow. (Opening Br. at 28.) He asserts that “[t]he argument *Andrews* rejected was that a nonretroactive change, *by itself*,” could create an extraordinary and compelling reason. (Opening Br. at 28 (emphasis added).) The government retorts that *Andrews* “determined that a change in the law, whether considered alone or in combination with other factors,” cannot be considered when making a compassionate-release eligibility determination. (Answering Br. at 23.) We do not have to rule as broadly as the government might like; it is enough to say that the government is right in this instance. The question we are addressing calls for an examination of § 924(c), not a far-ranging examination of all changes in laws affecting criminal sentences. And we have already thoroughly examined the § 924(c) change in *Andrews*.

As a reminder, the defendant in *Andrews* advanced six reasons that he claimed, “*together*, ... were extraordinary and compelling under the compassionate-release statute.” *Andrews*, 12 F.4th at 258 (emphasis added). We noted that the district court in that case “concluded that two of the proposed reasons – the duration of *Andrews*'s sentence and the nonretroactive changes to mandatory minimums [in § 924(c)] – could not be extraordinary and compelling as a matter of law.” *Id.* at 258. We upheld that conclusion. And we clarified that, although the district court appropriately excluded those two reasons from the eligibility analysis, “we [were] not saying that they are always irrelevant to the sentence-reduction inquiry” because they “may be a legitimate consideration for courts at the next step of the analysis when [a court] weigh[s] the § 3553(a) factors.” *Id.* at 262. We also upheld the district court's decision that “*Andrews*'s four remaining reasons *collectively* fell short of being extraordinary and compelling under the statute.” *Id.* at 259 (emphasis added). Therefore, at bottom, our holding in *Andrews* was that the nonretroactive change to § 924(c), whether by itself or in combination with other factors, cannot be considered in the compassionate release eligibility context.

We stand by that ruling today. When it comes to the modification of § 924(c), Congress has already taken retroactivity off the table, so we cannot rightly consider it. See *United States v. Jean*, 108 F.4th 275, 295 (5th Cir. 2024) (Smith, J., dissenting) (“[P]resenting two insufficient things is different from presenting an insufficient thing together with something we are legally prohibited from considering because it is outside the scope of, or prohibited by, the statute.”).

3. Even if an Ambiguity Analysis is Required in this Case, Our Holding in *Andrews* Trumps the Amended Policy Statement in the § 924(c) Context.

Rutherford argues that even if there were a conflict between the amended Policy Statement and *Andrews*, “the Commission's reading would control” because, in his view, “[t]he government [did not show] that the compassionate release statute unambiguously forecloses the policy statement.” (Opening Br. at 28, 30.) He says that “[t]he government cannot make that showing

because *Andrews* already recognized that the phrase ‘extraordinary and compelling’ is ‘amorphous’ and ‘ambiguous.’ ” (Opening Br. at 31 (quoting *Andrews*, 12 F.4th at 60).) The government responds that, “while the full reach of the term is doubtless imprecise, necessitating action of the Commission, the term is not at all ambiguous as applied to the specific context of a nonretroactive change in law.”²⁵ (Answering Br. at 36.) The government again has the better of the arguments, at least insofar as it addresses the change in § 924(c).

Whatever else the Commission may be empowered to do, it plainly “may not replace a controlling judicial interpretation of an *unambiguous* statute with its own construction (even if that construction is based on agency expertise)[.]” *Adair*, 38 F.4th at 361 (emphasis added). And on retroactivity, the change to § 924(c) is not the least ambiguous. Congress made the change non-retroactive. No matter how well-intentioned, the Policy Statement cannot change that.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the long-standing rule that courts must defer to agency interpretations of statutes within an agency's expertise. The Court said such so-called *Chevron* deference was the “antithesis” of “the traditional conception of the judicial function[.]” especially when “it forces courts to [defer] even when a pre-existing judicial precedent holds that the statute means something else – unless the prior court happened to also say that the statute is ‘unambiguous.’ ” — U.S. —, 144 S. Ct. 2244, 2263, 2265, 219 L.Ed.2d 832 (2024) (citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)). That ruling was made when considering the Administrative Procedures Act, which, admittedly, is not what we look to when considering actions of the Commission. *See United States v. Berberena*, 694 F.3d 514, 527 (3d Cir. 2012) (“Congress decided that the ... Commission would not be an ‘agency’ under [that Act] when it established the Commission as an independent entity in the judicial branch.” (internal quotation marks omitted)). But *Loper Bright* is still instructive as we assess the assertion that the Commission's view of a statute should trump our own.

The Supreme Court has explained that the “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case.*” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (emphasis added). The particular dispute in *Andrews* was whether the “nonretroactive changes to the § 924(c) mandatory minimums [could] be a basis for compassionate release[.]” or in other words, whether such changes could be considered “extraordinary and compelling.” *Andrews*, 12 F.4th at 261. We did not use the terms “amorphous” and “ambiguous” to describe that particular question; we used them only to explain that the district court did not err in using traditional methods of statutory interpretation to come to its own conclusion that “extraordinary and compelling” did not encompass that change in the law. *Andrews*, 12 F.4th at 260. And while it is true that we did not say that the phrase “extraordinary and compelling” was “unambiguous” as applied to the § 924(c) change, we need not make such an explicit statement to communicate the point. *See Bastardo-Vale v. Attorney General*, 934 F.3d 255, 259 n.1 (3d Cir. 2019) (en banc) (“[The] use of words like ‘suggest’ or ‘implies,’ when viewed in context ... conveys that [the court] viewed the statute as clear.”).

In sum, the amended Policy Statement conflicts with *Andrews*, and *Andrews* controls. Therefore, the First Step Act's change to § 924(c) cannot be considered in the analysis of whether extraordinary and compelling circumstances make a prisoner eligible for compassionate release.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court order denying Rutherford's compassionate release motion.

Questions and Comments:

- 1. Retroactivity of statutory changes:** In a post-amendment case, the Fourth Circuit described the USSC's new § 1B1.13(b)(6) as “amplifying” its earlier view that courts may consider nonretroactive changes in law when evaluating compassionate release motions.¹⁴¹³
 - How does *Rutherford*'s strict, text-based approach to § 3582(c)(1)(A)(i) differ from the more flexible approach adopted by the Fourth Circuit?
 - As an advocate how might you frame an argument for considering nonretroactive legal changes in a circuit that permits judicial discretion?
 - If you are in the Third Circuit, and your client also has another basis for relief, like a serious medical condition, how might you incorporate a gross disparity into the overall argument to strengthen your case?
- 2. Congressional intent:** After the USSC submitted its amended policy statement—including § 1B1.13(b)(6)—to Congress in April of 2023, Congress took no action.¹⁴¹⁴ As a result, the amendment took effect on November 1, 2023. Despite this, the Third Circuit in *Rutherford* held that courts could not apply the new provision, arguing that it conflicted with congressional intent.
 - How might you use the legislative history of § 3582(c)(1)(A) and the amendment process to support a compassionate release motion?
- 3. Discretion to consider intervening changes in law:** Although the Supreme Court has not

¹⁴¹³ *United States v. Davis*, 99 F.4th 647, 658 (4th Cir. 2024). In 2024, the Fifth Circuit agreed with the First, Fourth, Ninth, and Tenth Circuits finding nonretroactive changes in the law may be considered. *See, United States v. Jean*, 108 F.4th 275, 288, 290 (5th Cir. 2024). A subsequent panel disagreed with *Jean*, limiting *Jean* to decisional changes in law but not statutory changes in law, and held that the First Step Act's nonretroactive changes may never be considered. *See United States v. Austin*, --- F.4th ---, 2025 WL 78706, at *2-3 (5th Cir. Jan. 13, 2025).

¹⁴¹⁴ Under 28 U.S.C. § 994(p), amendments become effective **180 days** after submission unless Congress disapproves. Congress **did not act** to disapprove the April 2023 submission, resulting in the amendments taking effect on **November 1, 2023**.

yet addressed the validity of § 1B1.13(b)(6) directly, its 2022 decision in *Concepcion v. United States*,¹⁴¹⁵ offers important guidance on how courts should evaluate sentence-reduction motions. While *Concepcion* was not a compassionate release case, the Court emphasized that district courts have broad discretion to consider a wide range of information—including intervening changes of law—when deciding whether to reduce a sentence.¹⁴¹⁶ The Court emphasized that judges must consider “the whole person before them” and are not limited to specific categories of evidence.¹⁴¹⁷

- How might this reasoning apply in the compassionate release context, even though *Concepcion* did not address § 3582(c)(1)(A) directly?

C. The § 3553(a) Sentencing Factors and the Danger-to-the-Community Analysis

Even if a court finds that an incarcerated person has presented an extraordinary and compelling reason—or combination of reasons—for compassionate release, that does not end the inquiry.¹⁴¹⁸ The court must also determine whether the sentence should be reduced by evaluating the factors listed in 18 U.S.C. § 3553(a).¹⁴¹⁹ These are the same sentencing factors courts must consider in all sentencings and resentencings, and they ensure that any reduction is consistent with the purposes of federal sentencing law. The § 3553(a) factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from future crimes, and provide defendant with needed training and treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range;
- (5) any pertinent policy statement;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records; and

¹⁴¹⁵ 597 U.S. 481

¹⁴¹⁶ *Concepcion v. United States*, 597 U.S. 481, 142 S. Ct. 2389, (2022).

¹⁴¹⁷ *Id.* at 491.

¹⁴¹⁸ 18 U.S.C. § 3582(c)(1)(A).

¹⁴¹⁹ U.S. Sent’g Guidelines Manual § 1B1.13(a) (U.S. Sent’g Comm’n 2023); 18 U.S.C. § 3142(g).

(7) the need to provide restitution.¹⁴²⁰

The statute also requires that the sentence be “sufficient, but not greater than necessary” to achieve the purposes of sentencing.¹⁴²¹ In addition to the § 3553(a) analysis, courts must also evaluate whether the person presents a danger to the safety of any other person or the community, as outlined in 18 U.S.C. § 3142(g).

For clinic advocates, understanding how courts justify compassionate release denials based on § 3553(a) is critical. In *Tinker*, the Eleventh Circuit reviewed how a district court evaluated a compassionate release motion and clarified what constitutes an adequate § 3553(a) analysis on appeal.

UNITED STATES V. TINKER¹⁴²²

Per Curiam

Delvin Tinker is a federal prisoner serving a 180-month sentence for possessing a firearm while a convicted felon. In the district court, Tinker contended that his medical conditions—obesity, hypertension, a congenitally narrowed spinal canal, and mental illness—increased his risk of developing a severe illness should he contract Covid-19 and that such increased risk qualified him for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Assuming that Tinker could present “extraordinary and compelling reasons” for early release, as required by § 3582, the district court decided, after considering the sentencing factors enumerated in 18 U.S.C. § 3553(a), as well as the requirements set forth in U.S.S.G. § 1B1.13, to deny Tinker's compassionate-release motion.

On appeal, Tinker asserts that the district court erred when it assumed that he satisfied § 3582's “extraordinary and compelling reasons” criterion without making explicit factual findings to that effect. He further argues that the court erred in treating U.S.S.G. § 1B1.13 as binding and in failing to consider his mitigating evidence when assessing the § 3553(a) factors.

I

We start with Tinker's contention that the district court erred by assuming the existence of “extraordinary and compelling reasons” without making explicit findings.

In relevant part, 18 U.S.C. § 3582(c)(1)(A) states as follows:

[T]he court, upon motion of ... the defendant ... may reduce the term of imprisonment ..., after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that ... extraordinary and compelling reasons warrant such a reduction ...

¹⁴²⁰ 18 U.S.C. § 3553(a).

¹⁴²¹ *Id.*

¹⁴²² 14 F.4th 1234 (2021)

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The “applicable policy statement[]” to which § 3582(c)(1)(A) refers states, in turn, that, the court may reduce a term of imprisonment if, as relevant here, it “determines that ... (2) the defendant is not a danger to the safety of any other person or to the community.” U.S.S.G. § 1B1.13. Section 1B1.13’s policy statement is applicable to all motions under § 3582(c)(1)(A), and, accordingly, “district courts may not reduce a sentence under Section 3582(c)(1)(A) unless a reduction would be consistent with [§] 1B1.13.” *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021).

Therefore, by dint of § 3582(c)(1)(A)’s plain text, a district court may reduce a term of imprisonment if (1) the § 3553(a) sentencing factors favor doing so, (2) there are “extraordinary and compelling reasons” for doing so, and, as relevant here, (3) doing so wouldn’t endanger any person or the community within the meaning of § 1B1.13’s policy statement.

A

As an initial matter, nothing on the face of 18 U.S.C. § 3582(c)(1)(A) requires a court to conduct the compassionate-release analysis in any particular order. Nothing, to be more specifically responsive to Tinker’s contention, requires a court to find “extraordinary and compelling reasons” for release *before* considering the § 3553(a) factors or § 1B1.13’s policy statement.

Consider, by way of analogy, the following sentence with the same syntax as § 3582(c)(1)(A): “Rose can give Joe a cookie, after Joe walks the dog, if he does the dishes, and takes out the trash.” It’s clear to the average speaker of American English that, before Rose can give Joe a cookie, Joe must walk the dog, do the dishes, and take out the trash. But the order in which Joe completes those tasks is immaterial. So long as he completes them all, Rose can give him the cookie.

Just so here. Under § 3582(c)(1)(A), the court must find that all necessary conditions are satisfied before it grants a reduction. Because all three conditions—*i.e.*, support in the § 3553(a) factors, extraordinary and compelling reasons, and adherence to § 1B1.13’s policy statement—are necessary, the absence of even one would foreclose a sentence reduction. Here, two conditions were unsatisfied. First, the district court found that, in its assessment, the § 3553(a) factors did not support a reduction. Second, the court held that a reduced sentence would be inconsistent with § 1B1.13’s policy statement because Tinker presented a danger to others. Because at least one of the compassionate-release conditions was not satisfied, it cannot—as either a syntactical or logical matter—have been error for the district court to skip assessment of another condition.

C

Tinker relies primarily on three cases to argue that the district court was required to make explicit findings: *United States v. Vautier*, 144 F.3d 756 (11th Cir. 1998), *United States v. Johnson*, 877 F.3d 993 (11th Cir. 2017), and *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020). None is on point.

Vautier arose under 18 U.S.C. § 3582(c)(2), which allows a district court to modify a term of imprisonment if (1) the defendant was sentenced “based on a sentencing range that has subsequently been lowered,” (2) the § 3553(a) factors favor a modification, and (3) a modification would be consistent with U.S.S.G. § 1B1.10. *See* 144 F.3d at 761. In *Vautier*, we recognized that when considering a modification request under § 3582(c)(2), a district court “must make two distinct determinations.” *Id.* at 760. First, the court must substitute the amended guideline range for the original one and determine what sentence it would have imposed, and then, second, it must consider the § 3553(a) factors and determine whether to reduce a defendant's sentence in light of the conclusion reached in step one. *Id.*

In *Johnson*, we held that requests for early termination of supervised release pursuant to 18 U.S.C. § 3583(e)(1) were sufficiently analogous to § 3582(c)(2) motions to require district courts to consider the § 3553(a) sentencing factors. *See* 877 F.3d at 997–1000. We remarked that, for a court to grant early termination, it must make two determinations: first, that the defendant completed a year of supervised release as required by the statute; and second, that the § 3553(a) factors counsel in favor of granting relief. *Id.* at 997–98.

Finally, in *Jones*, we applied the same two-part analysis as in *Gonzalez* to determine whether four defendants were entitled to relief under Section 404(b) of the First Step Act. First, we determined which of the four defendants were sentenced for a “covered offense” with a penalty making them eligible for relief. 962 F.3d at 1301–1303. Second, and only after determining that two of the four defendants were eligible for relief, we assessed whether the district court abused its discretion when denying them relief. *Id.* at 1304.

To be sure, the cases that Tinker cites support the contention that to grant statutory relief, all statutory conditions must be satisfied. But none of them addresses—let alone questions—a district court's ability to assume that a condition is satisfied in the first place, or otherwise to assess one necessary condition while skipping over another. Our recent and analogous decision in *Gonzalez* and the resolution of identical issues by our sister circuits convince us that the district court may assume the existence of “extraordinary and compelling reasons” in the § 3582(c)(1)(A) context.

* * *

For these reasons, we hold that a district court doesn't procedurally err when it denies a request for compassionate release based on the § 3553(a) sentencing factors (or § 1B1.13's policy statement) without first explicitly determining whether the defendant could present “extraordinary and compelling reasons.”

II

Separately, Tinker asserts that the district court erred when analyzing the § 3553(a) factors. Essentially, he contends that the court neglected to consider several important factors when making its determination. These factors include the increased risk Covid-19 posed to Tinker given his medical conditions, the types of sentences available, and evidence of Tinker's post-offense rehabilitation.

We recently held, in an appeal where the government acknowledged that a movant had demonstrated extraordinary and compelling reasons, that an order granting or denying compassionate release under § 3582(c)(1)(A) must indicate that the district court has considered “all applicable § 3553(a) factors,” in addition to the question whether a reduction or release would be consistent with U.S.S.G. § 1B1.13’s policy statement. *United States v. Cook*, 998 F.3d 1180, 1184-85 (11th Cir. 2021). While a “district court need not exhaustively analyze” each § 3553(a) factor or articulate its findings in great detail, “it must provide enough analysis that meaningful appellate review of the factors’ application can take place.” *Id.* at 1184–85 (quotation marks omitted).

“The weight given to any specific § 3553(a) factor is committed to the sound discretion of the district court.” *United States v. Croteau*, 819 F.3d 1293, 1309 (11th Cir. 2016). Even so, “[a] district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.” *United States v. Irej*, 612 F.3d 1160, 1189 (11th Cir. 2010) (*en banc*) (quotation marks omitted).

In situations where consideration of the § 3553(a) factors is mandatory, district courts needn't address “each of the § 3553(a) factors or all of the mitigating evidence.” *United States v. Taylor*, 997 F.3d 1348, 1354 (11th Cir. 2021). Instead, an acknowledgement by the district court that it considered the § 3553(a) factors and the parties’ arguments is sufficient. *Id.* at 1354–55. A sentence may be affirmed so long as the record indicates that the district court considered “a number of” the factors such as the “nature and circumstances of the offense,” the defendant's history of recidivism, and the types of sentences available. *See United States v. Dorman*, 488 F.3d 936, 944–45 (11th Cir. 2007) (affirming defendant's sentence because although the district court didn't discuss each of the sentencing factors, the record showed that it considered several of them).

Tinker's contention that the district court erred in its assessment of the § 3553(a) factors is meritless, and his reliance on *Cook* is misplaced. Contrary to Tinker's assertions, the district court was not required to expressly discuss all of his mitigating evidence regarding Covid-19 and his medical conditions, or even every § 3553(a) sentencing factor. *See Taylor*, 997 F.3d at 1354. Furthermore, *Cook* doesn't hold that district courts must address every § 3553(a) factor or every argument in mitigation. To the contrary, *Cook* itself recognizes that district courts are *not* required to do so. *See* 998 F.3d at 1184. Here, the district court provided a thorough discussion of several § 3553(a) factors and emphasized Tinker's extensive criminal history and the need to protect the public, which was within its discretion to do. **[Doc. 72]** It also acknowledged the parties’ filings **[*Id.*]**, which discussed at length the factors that Tinker contends the district court ignored.

For the foregoing reasons, the district court did not abuse its discretion in weighing the § 3553(a) factors.

* * *

The district court did not procedurally err when it assumed, without explicitly finding, that Tinker could present “extraordinary and compelling reasons” before denying his motion based on the § 3553(a) sentencing factors and § 1B1.13’s policy statement. And the district court did not abuse its discretion when it weighed the § 3553(a) factors. Accordingly, we **AFFIRM**.

Questions and Comments:

1. **Abuse of discretion standard:** In *Tinker*, the Eleventh Circuit clarified the standard of review for compassionate release denials: abuse of discretion. Imagine a district court denies a motion based solely on the incarcerated person’s underlying offense, which occurred more than twenty years ago, while ignoring other relevant factors such as substantial rehabilitation, elderly age, and gross sentencing disparities when compared to similarly situated individuals.
 - Under the abuse of discretion standard, how should a court of appeals evaluate a district court’s failure to consider the full range of § 3553(a) factors?
 - Some courts emphasized that the “danger to the community” analysis under § 3142(g) must focus on current dangerousness.¹⁴²³ How should this guide the appellate court’s review?
 - Is it a “clear error of judgment” for a district court to rely exclusively on the nature of the original offense to deny release, despite compelling evidence of rehabilitation?
2. **Summary or unexplained denials:** What if the district court, in denying a compassionate release motion, simply says that it has reviewed the § 3553(a) factors and the parties’ arguments, and concluded that the factors do not support a sentence reduction? Or suppose the court mentions the individual’s rehabilitation, family support, and sentencing disparity with a co-defendant, but fails to explain how those facts weigh against granting relief.
 - How should the court of appeals assess whether the district court’s reasoning is sufficient under the abuse of discretion standard?
3. **Post-sentencing rehabilitation:** In *Pepper v. United States*,¹⁴²⁴ the Supreme Court held

¹⁴²³ See, e.g. *United States v. Daniel*, 2024 WL 3103311, at *4 (S.D. Fla. June 24, 2024) (finding that “the relevant question for the Court is *not* whether the Defendant has ever been dangerousness, but whether he is *currently* dangerousness).

¹⁴²⁴ 562 U.S. 476, 491 (2011).

that post-sentencing rehabilitation is a relevant and important consideration under § 3553(a). Assume the individual demonstrates exceptional rehabilitation—thousands of hours in education and job training, and a clean disciplinary record—but the district court denies release without acknowledging any of this evidence.

- Given *Pepper*, should a district court’s failure to consider post-sentencing rehabilitation be viewed as an abuse of discretion?
 - How should rehabilitation be considered in evaluating whether a person remains a danger to the community?
4. **Pattern of rejection?** Suppose a district court has a pattern of denying compassionate release motions, even where the evidence strongly supports the individual’s rehabilitation and lack of dangerousness. In a particular case, the individual has family support, glowing BOP staff evaluations, and clear evidence of reform—but the court again denies relief, giving minimal weight to those facts.
- Should a court of appeals be allowed to consider a district court’s pattern of denials as relevant in determining whether the judge abused discretion?
5. **BOP failure to file?** Under § 3582(c)(1)(A), either the incarcerated individual or the BOP may bring a compassionate release motion.¹⁴²⁵ However, as discussed above, in practice, the BOP rarely does so, even when strong evidence, such as letters of praise from BOP staff, supports the defendant’s rehabilitation and suitability for release.¹⁴²⁶ Assume a district court diminishes the value of BOP staff praise by citing the BOP’s failure to file a motion as evidence that the person is not deserving of release.
- How can advocates clarify that the BOP’s inaction does not negate strong evidence of rehabilitation?
6. **Nonretroactive changes to mandatory minimum terms:** In the 1990’s, individuals convicted of certain non-violent drug offenses received mandatory life sentences if they had two prior drug felonies.¹⁴²⁷ The FSA reformed this regime, reducing the mandatory minimum for some cases to 15 or 25 years—but the change was not made retroactive.¹⁴²⁸ Many people remain incarcerated under outdated laws that no longer reflect Congress’

¹⁴²⁵ 18 U.S.C. § 3582(c)(1)(A).

¹⁴²⁶ See, e.g. Dep’t of Just., Off. Of Inspector Gen., *The Federal Bureau of Prisons’ Compassionate Release Program* 11 (Apr. 2013) (finding the “BOP [did] not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered”); see also *Hearing on Oversight of the Fed. Bureau of Prisons*, 118th Cong. 8 (2023) (statement of Director of the Bureau of Prisons, Colette S. Peters, noting that of the “4,606 individuals” who were released through compassionate release since December 21, 2018, only “129 were released through compassionate release on a motion initiated by the Bureau”).

¹⁴²⁷ U.S. Sent’g Comm’n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 48–51 tbls.A-1 & A-2 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf [<https://perma.cc/JS4J-DBDN>].

¹⁴²⁸ First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(i), 132 Stat. 5194, 5220.

judgment.

- In evaluating compassionate release, how should a district court assess whether a sentencing disparity between a defendant and similarly situated co-defendants—such as those who took plea deals or were not subjected to the pre-FSA § 851 enhancements—is sufficient to justify a sentence reduction?