# POSTCONVICTION REMEDIES NOTE

**A Biannual Review of Significant Postconviction Review Decisions**

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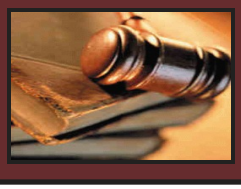

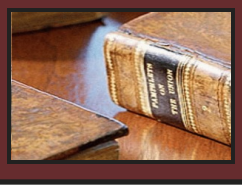


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"Don't let yesterday take up too much of today." — Will Rogers.

## RECENT FEDERAL DECISIONS

## JURISDICTION AND SIMILAR MATTERS

Chapter 8 of *Postconviction Remedies*
Chapter 1 of *Federal Habeas Manual*
Chapter Six of *Introduction to Habeas Corpus*

***Synopsis*: AEDPA deferential review standard applied to petitioner's claim that he was deprived of his due process right to present a complete defense.**

*Hinkle v. Neal*, 51 F.4th 234 (7th Cir. 2022)

Petitioner was convicted of sexually molesting his minor nephew, who testified against him at trial. Petitioner sought to impeach the nephew with evidence of the nephew's prior drug use, but the trial court refused. Petitioner argued on appeal that the trial court had violated his constitutional right to present a complete defense. The Indiana appellate court affirmed.

In the 28 U.S.C. § 2254 proceeding, petitioner argued that although he had raised his constitutional right to present a complete defense claim to the state appellate court, that court had not decided the claim on the merits. Therefore, he contended, the federal habeas court was required to review the claim de novo, as opposed to applying AEDPA's deferential review standards. According to petitioner, the

## Supreme Court Decisions

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*Jones v. Hendrix*, 21-857. In a 6-3 decision, the Court held that a federal inmate may not invoke the federal habeas statute, 28 U.S.C. § 2241, to collaterally attack his conviction by asserting an intervening change in statutory law, a

*Continued on page 13*

Indiana appellate court's decision relied wholly on state evidentiary rules, as indicated by the standard of review used by the Indiana appellate court. He maintained that, under state law, evidentiary issues are left to the trial court's discretion, but Indiana appellate courts review alleged constitutional violations de novo. Because the Indiana appellate court applied a "clear evidence" deferential standard of review, he argued, it must have ignored his constitutional argument.

The Seventh Circuit disagreed, holding that petitioner failed "to 'very clearly' show that his constitutional claim was overlooked." *Hinkle v. Neal*, 51 F.4th 234, 240 (7th Cir. 2022) (quoting *Johnson v. Williams*, 568 U.S. 289, 303, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013)). To begin with, although petitioner couched his claim as a constitutional issue before the state court, in his briefing he instructed the Indiana appellate court to review the constitutional claim for abuse of discretion. "It is therefore entirely plausible that the state appellate court applied a deferential standard of review because [petitioner] invited the court to do so—not because it ignored his constitutional claim." *Id.* The Seventh Circuit pointed out that "a party cannot complain of errors which it has committed, invited, induced the court to make, or to which it consented." *Id.* (internal quotation marks omitted). The court stated that this possibility alone foreclosed petitioner's ability to "very clearly" show that his constitutional claim was ignored. *Id.* at 240-41.

In any event, the Seventh Circuit doubted that the Indiana appellate court applied the wrong review standard. Petitioner was correct that although Indiana appellate courts review a trial court's decisions on the admissibility of evidence for abuse of discretion, de novo review generally applies where a constitutional violation is made. But, importantly, Indiana courts review for abuse of discretion evidentiary decisions that a defendant claims violated his constitutional right to present a complete defense. If evidence is excluded as unfairly prejudicial, confusing, or potentially misleading, a decision that is reviewed deferentially under AEDPA, the exclusion cannot violate the right to present a complete defense. Therefore, the Seventh Circuit concluded, the state appellate court's application of a deferential standard of review did not "clearly show it ignored [petitioner's] constitutional claim." *Hinkle*, 51 F.4th at 242.

## Logic Puzzle

There are three crates, one with apples, one with oranges, and one with both apples and oranges mixed. Each crate is closed and labeled with one of three labels: Apples, Oranges, or Apples and Oranges. The label maker broke and labeled all of the crates incorrectly. How could you pick just one fruit from one crate to figure out what's in each crate?

Answer on page 12.

**Further research:** *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, § 29:8 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:10 (Thomson Reuters 2023 ed.).

***Synopsis*: Florida's registration and reporting requirements for sex offenders did not substantially limit offender's actions or movements and, thus, offender was not "in custody" for purposes of the habeas statute.**

*Clements v. Florida*, 59 F.4th 1204 (11th Cir. 2023).

Sex offenders in Florida are subject to registration and reporting requirements for life. Upon initial registration, which must be in person, sex offenders must provide the state with all of their personal and identifying information, secure a state driver's license or state identification card, and provide a set of fingerprints. This information—including the offender's picture, date of birth, addresses, vehicles, and sexual offense convictions—is available to the public unless exempt or confidential.

In addition, sex offenders have an obligation to keep their registration up to date. At a minimum, they must report to their local sheriff's office in person every six months. Any changes with respect to a vehicle or residence must be reported in person within 48 hours. Sex offenders who become transient or homeless must report in person within 48 hours to any shelter or location (including those with no specific address) at which they spend more than three days in aggregate in a calendar year and report in person every 30 days thereafter. Sex offenders must update their driver's licenses within 48 hours of the renewal date or of any change in name or address. Sex offenders who plan to leave the state must report in person 48 hours beforehand or at least 21 days before any international trip of five days or more. Any changes to employment, telephone numbers, email addresses, or internet identifiers must be made online within 48 hours. Failure to report is generally a third-degree felony offense, with violations of certain reporting requirements related to residency being second-degree felonies.

Although conceding that Supreme Court and Eleventh Circuit cases made it a hard question to answer, the Eleventh Circuit held that these reporting and registration requirements did not constitute a sufficient restraint on the personal liberty of sex offenders in Florida to render someone like petitioner "in custody" for purposes of 28 U.S.C. § 2254(a). The court explained:

> First, though [petitioner] has to report in person to the authorities periodically and provide them with all sorts of information and updates, he knows exactly when he must do so: during his birthday month and six months thereafter. He is not at the beck and call of state officials, and those officials cannot demand his presence at any time and without a moment's notice. Under the circumstances, the periodic in-person reporting did not place [petitioner] "in custody."
>
> Second, [petitioner] is not required to live in a certain community or home and does not need permission to hold a job or drive a car. And he can engage in legal activities without prior approval or supervision.
>
> Third, [petitioner] has to provide in-person advance notice of trips outside the state and outside the country, but the trips themselves do not require permission or approval by state officials. [Petitioner] can—subject to the residency restrictions which we leave for another day—generally come and go as he pleases, and his freedom of movement does not rest[ ] in the hands of state officials.

*Clements v. Florida*, 59 F.4th 1204, 1215 (11th Cir. 2023) (citations and internal quotation marks omitted).

The court rejected petitioner's argument that it should consider the stigma of being labeled a sex offender, reasoning that "any fear or embarrassment that he may suffer as a result of his sex offender designation is not in itself a restraint on his liberty." *Clements*, 59 F.4th at 1217 (citing

*Carter v. Att'y Gen.*, 782 F.2d 138, 140 n.1 (10th Cir. 1986) (explaining that a habeas applicant "must labor under liberty restraints more severe than the stigma of a prior criminal conviction")). "The stigma is not a condition imposed by Florida and is a practical consequence of the nature of [petitioner's] conviction." *Clements*, 59 F.4th at 1217.

The Eleventh Circuit declined to follow the Third Circuit's contrary decision in *Piasecki v. Ct. of Common Pleas, Bucks Cnty., Pa.*, 917 F.3d 161, 177 (3d Cir. 2019), which held that Pennsylvania's sex offender statute satisfied § 2254's "in custody" requirement. The Eleventh Circuit noted that *Piasecki* was distinguishable on its facts because Pennsylvania imposed more onerous reporting and registration requirements on sex offenders than Florida. In addition, the Third Circuit in *Piasecki* acknowledged that its prior precedent concerning a sentence of community service supported an "in custody" finding due to Mr. Piasecki's obligation to report his travel, even in the absence of a pre-approval requirement. There was no such analogous precedent in the Eleventh Circuit. *Clements*, 59 F.4th at 1217.

**Further research:** *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, § 7:12 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:22 (Thomson Reuters 2023 ed.).

***Synopsis*: Federal appeal was rendered moot by expiration of sentence and period of supervised release.**

*U.S. v. Rydle*, 58 F.4th 14, 17 (1st Cir. 2023).

Petitioner pleaded guilty to various offenses and was sentenced to a term of imprisonment of time served and seven days, to be followed by a three-year term of supervised release. During petitioner's period of incarceration, the district court sealed portions of the record pertaining to his cooperation with the government. The court ordered the seal to be lifted once petitioner's imprisonment ended. Petitioner objected on the ground that unsealing the record would place him in jeopardy if he violated the terms of his supervised release and was resentenced to prison. The district court overruled petitioner's objection but left the seal in place while petitioner appealed.

During the pendency of that appeal, petitioner violated his terms of supervised release. The district court revoked his release and sentenced him to a new three-month prison term, to be followed by a new 24-month term of supervised release. The district court ordered that the relevant portions of the record remain sealed. Petitioner was later released yet again on supervision, and again he violated the conditions of his supervised release. Ultimately, the district court sentenced petitioner to a term of imprisonment of time served, with no supervised release to follow.

The First Circuit held that the appeal was rendered moot by the expiration of the sentence and period of supervised release. "[G]iven that the appellant's sentence is now complete and that he is no longer either incarcerated or subject to supervision, there is no longer a live issue present in the case." *U.S. v. Rydle*, 58 F.4th 14, 17 (1st Cir. 2023).

**Further research:** *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, § 8:6 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:73 (Thomson Reuters 2023 ed.).

## AEDPA REVIEW STANDARDS

Chapter 29 of *Postconviction Remedies*
Chapter 3 of *Federal Habeas Manual*
Chapter Fourteen of *Introduction to Habeas Corpus*

***Synopsis*: State court's denial of defendant's request for a state-funded**

**toxicology expert was not an unreasonable application of clearly established federal law, as determined by the Supreme Court in *Ake v. Oklahoma.***

*Bergman v. Howard*, 54 F.4th 950 (6th Cir. 2022).

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that the Due Process Clause requires states to provide psychiatric experts to indigent defendants who have a credible insanity defense. *Id.* at 74, 105 S.Ct. 1087. Petitioner relied on *Ake* to claim that she should have been provided with an expert toxicologist at her criminal trial. The trial evidence showed that petitioner drove into an oncoming truck and killed its occupants. Scientists testified that she had prescription drugs in her system at the time of this crash (and at the time of several prior accidents), and the state's expert opined that these drugs impaired her driving. Defense counsel moved the trial court to provide petitioner with a state-funded toxicologist. Defense counsel explained that he needed an expert both to explain the tests conducted by the state's experts and to confirm the state's test results. The trial court held that *Ake* did not require the state to provide petitioner with a defense toxicologist because she failed to show a sufficient need for one notwithstanding the state's expert evidence. The state appellate court affirmed.

The Sixth Circuit held that, "[g]iven the Supreme Court's lack of clarity over *Ake*'s scope," petitioner failed to overcome the stringent standards for relief in 28 U.S.C. § 2254(d). *Bergman v. Howard*, 54 F.4th 950, 953 (6th Cir. 2022). The court explained that *Ake*'s precise holding—that a state must provide an expert psychiatrist to an indigent defendant who makes a substantial showing of an insanity defense—did not directly control. Petitioner did not claim to be insane. Instead, she wanted an expert to review the testing methods and results of the state's forensic scientists and to rebut an expert's opinions about the effects of drugs in her system on her driving.

The court was not persuaded by petitioner's quotes from Supreme Court cases, noting the Constitution entitles defendants to the "basic tools" of their defense, or to a "meaningful opportunity" to participate in a case. The circuit court stated that by treating this broad language as the holding of the decisions, petitioner "asks us to do what the Supreme Court has told us not to: 'transform' narrow decisions into broad ones by framing their holdings at a 'high level of generality.'" *Bergman*, 54 F.4th at 960 (quoting *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013) (per curiam)).

Although she conceded she was relying on Supreme Court dicta, petitioner argued that circuit court cases suggested that lower courts should follow Supreme Court dicta. But, as the Sixth Circuit stated, the decisions on which petitioner relied addressed "only our *common-law* rules of precedent, which suggest that Supreme Court dicta might sometimes allow us to depart from our prior decisions." *Bergman*, 54 F.4th at 960. These decisions said nothing about what qualifies as "clearly established" law within the meaning of § 2254(d)(1). "On that *statutory* front, the Supreme Court could not be clearer. Dicta does not count." *Id.* (citing *White v. Woodall*, 572 U.S. 415, 419, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014)).

Next, petitioner argued that the state appellate court made an "unreasonable" factual finding when it rejected her claim. *See* 28 U.S.C. § 2254(d)(2). If true, the circuit court recognized, this error would allow it to address the legal merits of the claim without giving deference to the state court's decision. According to petitioner, the factual error was that the state court, when holding that defense counsel failed to show a sufficient need for a defense toxicologist, purportedly ignored or overlooked defense counsel's explanations why she needed the expert.

The Sixth Circuit held that the argument "mistakes the *legal* question that the state appellate court resolved for a *factual* one that it did not."

*Bergman,* 59 F.4th at 961. For example, in the context of a claim of ineffective assistance of counsel, sometimes defendants raise purely legal questions about this right, and other times they raise purely factual ones. But sometimes they raise neither. "Instead, they raise the question whether the 'historical facts' about counsel's conduct violated the 'legal test' for ineffective assistance." *Id.* "The Supreme Court has interchangeably referred to this application-of-law-to-fact inquiry as a 'mixed' or 'ultimate' question." *Id.* at 962. The Sixth Circuit held that both text and precedent show that this type of decision generally qualifies as a legal one subject to § 2254(d)(1):

> To begin with, the question falls squarely within 2254(d)(1)'s text. That text does not ask only whether a state court's decision was "contrary to" "clearly established" law; it also asks whether the decision was "an unreasonable application" of that law. 28 U.S.C. § 2254(d)(1). The provision thus gets triggered whenever a "state court identifies the correct governing legal rule ... but unreasonably applies it to the facts of the particular state prisoner's case [.]" *Woodall*, 572 U.S. at 425, 134 S.Ct. 1697 (citation omitted). In this way, the text tracks the Supreme Court's very definition of a mixed question: "the application of a legal standard to settled facts." *Guerrero-Lasprilla* [*v. Barr*, ___ U.S. ___, 140 S.Ct. 1062, 1068, 206 L.Ed.2d 271 (2020)].
>
> Precedent points the same way. We have long explained that mixed questions fall within § 2254(d)(1) rather than § 2254(d)(2). This caselaw also comports with Supreme Court decisions in related contexts. The Court, for example, has often held that appellate courts should review mixed questions about constitutional provisions (such as whether probable cause exists) under the de novo standard that governs legal issues. The Court has also held that a statute discussing "questions of law" (similar to § 2254(d)(1)) can reach mixed questions.

*Bergman*, 59 F.4th at 962 (citations omitted).

Here, petitioner conceded her claim presented a "mixed" question about whether her attorney "presented adequate facts to show why an expert was needed" under the state's sufficient-nexus test for *Ake* claims. *Bergman,* 59 F.4th at 962. "Just as a state court answers a mixed question governed by § 2254(d)(1) when it holds that counsel's conduct was not ineffective under *Strickland*, so too the Michigan court here answered a mixed question subject to that provision when it held that counsel's explanation did not meet the nexus test under *Ake*." *Id.* (citations omitted). Although petitioner argued that the state court unreasonably applied this nexus test for various reasons—for example, because the court did not account for several factors that her counsel provided, the Sixth Circuit responded that whether right or wrong, the state court's ultimate application of the nexus test "ranked as a legal determination governed by § 2254(d)(1), not one of fact governed by § 2254(d)(2)." *Id.*

The Sixth Circuit concluded with one caveat: "The Supreme Court has suggested that appellate courts might treat some fact-bound 'mixed' or 'ultimate' questions as factual rather than legal. *See U.S. Bank* [*Nat'l Ass'n ex rel. CWCapital Mgmt. LLC v. Vill. at Lakeridge, LLC*, ___ U.S. ___, 138 S. Ct. 960, 966-68, 200 L.Ed.2d 218 (2018)]; *cf.* [*Thompson v.*] *Keohane*, [516 U.S. 99, 110, 111 S.Ct. 457, 133 L.Ed.2d 383 (1995)]. We do not foreclose that possibility. We hold only that [petitioner's] *Ake* question falls within § 2254(d)(1), not § 2254(d)(2)." *Bergman*, 59 F.4th at 963.

**Further research:** *Introduction to Habeas Corpus*, Chapter Seven (2022 ed.); *Postconviction Remedies*, §§ 29:24, 29:31, 29:48 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:33, 3:41, 3:70 (Thomson Reuters 2023 ed.).

**California state court decision not to make specific factual findings in support of its denial of state habeas ruling was not an unreasonable factfinding procedure, nor was its decision not to conduct an evidentiary hearing before denying the petition.**

*Prescott v. Santoro*, 53 F.4th 470 (9th Cir. 2022)

Following his murder conviction, petitioner filed a state habeas petition arguing that two handwritten letters allegedly written by his codefendant exonerated him. The first letter was unsigned and asserted that the shooter was "Nick," a third person who was ultimately found in possession of the murder weapon. The second letter, which identified the codefendant as the author, represented that he, the codefendant, was the shooter.

Petitioner alleged that his due process rights were violated by his attorney's failure to introduce the letters and that his attorney provided ineffective assistance by failing to investigate and authenticate the letters. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review.

Petitioner then filed a § 2254 petition asserting the same two claims. He first argued that the state appellate court made an unreasonable determination of the facts under § 2254(d)(2) by rejecting his actual innocence claim. According to petitioner, by summarily denying his petition, the state court necessarily found that he failed to allege facts that, if true, stated a prima facie actual innocence claim. This, petitioner argued, constituted an implicit unreasonable determination of the facts given the two letters, if credited as true—which the state court was required to do in ruling that petitioner had not made a prima facie case—demonstrated that he was not the shooter.

The Ninth Circuit disagreed. The court held that petitioner could not challenge the state court's factual findings because the state court made no factual findings. Instead, it summarily denied petitioner's state habeas petition in a one-sentence order. That summary denial constituted a determination by the state court that the claims made in that petition did not state a prima facie case entitling him to relief. Thus, the state court's decision that petitioner's new factual allegations, taken as true, were insufficient to state an actual innocence claim constituted a legal determination, not a factual one.

But petitioner contended that in the absence of substantive factual findings by the state courts, the state court's factfinding process was unreasonable because no court could have reasonably found that petitioner's allegations failed to establish a prima facie case of actual innocence. That is, the state court's summary denial was necessarily and implicitly based on a factual determination that the confession in the letters allegedly written by his codefendant was not credible, and that the state court could not reasonably make this finding without first holding an evidentiary hearing.

The Ninth Circuit was unpersuaded. In assessing petitioner's actual innocence claim, the state court did not view petitioner's evidence in a vacuum. Thus, the state court would not consider petitioner's second letter, in which the codefendant claimed to be the shooter, in isolation when assessing whether petitioner had presented a prima facie case of his innocence. Rather, the state court had to consider the fact that the two letters from the codefendant each identified a different person as the shooter. Crediting the assertions made in both letters as true was impossible.

The state court was also required to consider the other compelling evidence of petitioner's guilt. This included credible eyewitness testimony that petitioner was the shooter, as well as a letter written by petitioner when he was in jail admitting he was the shooter. "The California Court of Appeal could have reasonably held that [petitioner's] allegations, even if credited, did not 'undermine the entire

prosecution case and point unerringly to innocence of reduced culpability.'" *Prescott v. Santoro*, 53 F.4th 470, 481 (9th Cir. 2022) (quoting *In re Lawley*, 42 Cal.4th 1231, 1239 (2008)). Thus, the state court's decision not to make specific factual findings did not constitute an unreasonable factfinding procedure under § 2254(d)(2).

The Ninth Circuit further concluded that the state court's decision not to conduct an evidentiary hearing to assess petitioner's contentions was not unreasonable. As already decided, the state court could have reasonably found that it did not need to make a credibility finding to reject petitioner's claims of actual innocence based on the circumstances.

In any event, even assuming the state court made an unreasonable determination of the facts—entitling petitioner to de novo review of his actual innocence claim—and even assuming the claim was cognizable in a non-capital context, petitioner's new evidence did not meet the extraordinarily high threshold showing of actual innocence necessary to prevail on such a claim.

The Ninth Circuit pointed to its en banc decision in *Carriger v. Stewart*, 132 F.3d 463, 467-77 (9th Cir. 1997) (en banc), to illustrate the extraordinarily high standard a petitioner must meet to establish actual innocence. Carriger was convicted of murder. The prosecution's chief witness was a man named Robert Dunbar, who claimed that Carriger "had confessed the crime to him immediately after it happened." *Id.* at 466. But during Carriger's postconviction proceedings, Dunbar's wife at the time of the murder testified that Dunbar had told her that he had committed the crime. *Id.* at 467. During these proceedings, Dunbar recanted his trial testimony and confessed under oath to committing the murder. *Id.* at 467. The record also contained evidence that Dunbar had boasted to others about framing Carriger and that Dunbar knew details of the crime that only a participant would have known. *Id.* at 478-79. Complicating matters, Dunbar later recanted the confession he made at the postconviction hearing and claimed his original trial testimony (accusing Carriger of the murder) was truthful. *Id.* at 467.

The Ninth Circuit en banc rejected Carriger's actual innocence claim. The court held that while Carriger's new evidence "cast[ ] a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove [his] innocence." *Carriger*, 132 F.3d at 477. The court noted that Carriger had not introduced any other evidence "demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of [his] guilt." *Id.* The court further stated that while Dunbar's confession was relevant, "we cannot completely ignore the contradictions in Dunbar's stories and his history of lying." *Id.* The court in the present case held that petitioner's actual innocence claim did not come close to meeting the demanding standard announced in *Carriger*.

Finally, the Ninth Circuit rejected petitioner's claim that defense counsel provided ineffective assistance by failing to adequately investigate and establish before trial that the codefendant authored the two letters confessing to the crime and exculpating petitioner. Counsel had retained a handwriting expert with 30 years of experience who had testified as an expert in over 300 cases. This was a sufficient and reasonable basis for the state court to have found that the retained handwriting expert was qualified, or that at least counsel did not act deficiently in believing the expert to be qualified and relying on his conclusions. Counsel "did not have an obligation to seek out multiple experts until he found one that would give him the answer he was looking for." *Prescott v. Santoro*, 53 F.4th 470, 484 (9th Cir. 2022).

**Further research:** *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 28:5, 35:6 n.158 (Thomson Reuters 2023 ed.); *Federal Habeas*

*Manual*, §§ 3:84, 9A:146 (Thomson Reuters 2023 ed.).

***Synopsis*: State court's determination that jury's experiment did not violate petitioner's right to an impartial jury was contrary to clearly established federal law.**

*Fields v. Jordan*, 54 F.4th 871 (6th Cir. 2022).

Petitioner was charged with capital murder. In the course of deliberations, the jury conducted an experiment using a flat-tipped knife that had been submitted as evidence. The experiment consisted of removing a cabinet door in the jury room in order to test the plausibility of the prosecution's theory that petitioner had removed a storm window with a knife in order to enter the victim's home. Petitioner was ultimately convicted and sentenced to death.

Petitioner argued that the jury's experiment violated his right to an impartial jury verdict based upon evidence developed at trial. The state court rejected the claim and affirmed the conviction and sentence. Petitioner then sought federal habeas relief.

The Sixth Circuit, in a 2-1 decision, ruled that the state court's decision was contrary to clearly established federal law in *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), and *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), for purposes of 28 U.S.C. § 2254(d)(1). The Supreme Court in *Turner* held that a testifying officer's continuous and intimate association with the jurors outside of the courtroom violated the defendant's constitutional rights. And in *Parker*, the Supreme Court cited *Turner* in holding that a bailiff's prejudicial comments to jurors during deliberations violated the defendant's constitutional rights.

The state argued that petitioner had framed the rule of law at an exceptionally high level of generality and contended that neither *Turner* nor *Parker* purported to apply that rule in the context of a jury experimenting with evidence during deliberations. Thus, the state contended, the petitioner's proposed broad rule did not meet the "clearly established" constraint of AEDPA.

The Sixth Circuit majority rejected the state's argument, explaining that the Sixth Circuit had already "recognized in the context of jury experiments that jury exposure to extrinsic evidence or other extraneous influence violates a defendant's Sixth Amendment rights, and a state court decision that conflicts with this rule may justify habeas relief under the standard set forth in the AEDPA." *Fields v. Jordan*, 54 F.4th 871, 877 (6th Cir. 2022) (citing *Doan v. Brigano*, 237 F.3d 722, 729-36 (6th Cir. 2001)). While the court recognized that circuit precedent itself cannot constitute clearly established federal law, it was bound by the Sixth Circuit's determination in *Doan* that the subject rule had been clearly established by the Supreme Court.

The dissent argued that petitioner's claim was barred by the absence of clearly established Supreme Court precedent. "No U.S. Supreme Court case states a rule that prohibits the jury, in its entirety, from experimenting with admitted evidence during deliberations in the jury room." *Fields*, 54 F.4th at 883 (*Batchelder*, J., dissenting).

**Note**: A majority of the active judges on the Sixth Circuit voted for rehearing en banc of this case. *Fields v. Jordan*, 60 F.4th 1023 (Mem.) (6th Cir. 2023).

**Further research:** *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, § 29:31 (Thomson Reuters 2022 ed.); *Federal Habeas Manual*, § 3:41 (Thomson Reuters 2023 ed.).

## PROCEDURAL DEFAULT

Chapter 26 of *Postconviction Remedies*
Chapter 7 of *Federal Habeas Manual*
Chapter Thirteen of *Introduction to Habeas Corpus*

***Synopsis*: Ineffectiveness of state postconviction counsel in failing to raise on initial state habeas review claim of ineffective assistance of counsel excused procedural default of petitioner's ineffective assistance of trial counsel claim.**

*Michaels v. Davis*, 51 F.4th 904 (9th Cir. 2022)

Petitioner argued that trial counsel provided ineffective assistance by disclosing to prosecutors a confidential note from petitioner to his lawyers. The note was presented as aggravating evidence during the penalty phase.

On direct appeal, petitioner argued that the trial court erred in admitting the note because it had been disclosed in violation of the attorney-client privilege. The state supreme court held that the introduction of the note violated the attorney-client privilege but was harmless.

Petitioner raised this issue again on state postconviction review in his *second* state habeas petition, this time as an ineffectiveness-of-counsel claim. The state supreme court summarily denied the claim as untimely and successive, and also because it could have been raised in petitioner's first state habeas petition.

On federal habeas review, the government argued that petitioner had defaulted on his ineffectiveness claim by failing to properly raise it in state court. The Ninth Circuit rejected this argument applying *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

The district court had rejected the ineffectiveness claim on the merits for lack of prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). But the Ninth Circuit pointed out that a conclusion on the merits of an ineffectiveness claim under *Strickland* held petitioner to a higher burden than required in the *Martinez* procedural default context, which only requires a showing that the ineffective assistance of trial counsel claim is "substantial." That was especially true here, where AEDPA deference applied to the state court's merits decision on the ineffectiveness claim, but not to the question of whether the procedural default of that claim is excused under *Martinez*.

Additionally, the court had previously held "that ineffectiveness claims that sufficiently demonstrate counsel's deficient performance under *Strickland* but are insufficient to establish *Strickland* prejudice under AEDPA review are considered for their prejudicial effect in a cumulative error analysis." *Michaels v. Davis*, 51 F.4th 904, 930 (9th Cir. 2022) (citing *Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018)); *see also Alcala v. Woodford*, 334 F.3d 862, 893-94 (9th Cir. 2003) (holding it proper to consider prejudice of deficient performance, along with trial court errors, in a cumulative error analysis without reaching the prejudice of each ineffectiveness of counsel claim individually).

Here, petitioner raised a cumulative error argument with regard to the penalty phase. His present ineffectiveness claim, therefore, was relevant, not only as an isolated claim. If petitioner "satisfied the *Martinez* requirements and applying AEDPA deference, his counsel's performance was constitutionally deficient on the merits, that error is also potentially relevant in the context of cumulative error, independent of any isolated *Strickland* prejudice analysis under AEDPA." *Michaels*, 51 F.4th at 930.

The court then proceeded to (1) address the prejudice prong of *Martinez* to determine whether petitioner's claim of ineffective assistance of trial counsel was "substantial," and then (2) evaluate the actions of petitioner's postconviction counsel with regard to the trial-counsel-note-ineffectiveness claim under *Strickland* to determine whether petitioner satisfied the cause requirement of *Martinez*.

Applying this analysis, the court held that the ineffectiveness of postconviction counsel in failing

to raise on initial state habeas review the claim of ineffective assistance of trial counsel (based on the disclosure to the prosecution of the damaging confidential communication) excused the procedural default of petitioner's ineffective assistance of trial counsel claim. The court explained that California law provided no exception to the attorney-client privilege that could justify disclosure, the prosecution devoted a significant part of the penalty phase to emphasizing the note as demonstrating petitioner would be a danger in prison were he not executed, there was no conceivable strategic reason why postconviction counsel did not raise the claim, and the failure to raise the claim likely undermined an otherwise viable cumulative error claim. *Michaels*, 51 F.4th at 930.

**Further research:** *Introduction to Habeas Corpus*, Chapter Twelve (2022 ed.); *Postconviction Remedies*, § 24:17 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 9B:62, 9B:65 (Thomson Reuters 2023 ed.).

## STATUTE OF LIMITATIONS

Chapter 25 of *Postconviction Remedies*
Chapter 9A of *Federal Habeas Manual*
Chapter Eleven of *Introduction to Habeas Corpus*

***Synopsis*: Petitioner's claims in his amended petition that he was denied effective assistance of counsel did not relate back to his original petition, even though original petition asserted ineffective assistance claim; ineffective assistance claim in original petition concerned counsel's failure to introduce evidence of unspecified defense that had no factual connection with his amended claims.**

*Watkins v. Stephenson*, 57 F.4th 576 (6th Cir. 2023).

Petitioner was convicted of murder and various other offenses. In 2008, he filed a pro se habeas petition under 28 U.S.C. § 2254. The district court ordered him to pay the filing fee or apply for leave to proceed *in forma pauperis*. Petitioner did neither, and the court dismissed the petition without prejudice for failure to prosecute.

In 2010, petitioner returned to federal court, filing a document the district court construed as a second § 2254 petition. The petition alleged four grounds for relief: that the trial court committed two sentencing errors, that his counsel provided ineffective assistance by failing "to investigate and raise a defense," and that the prosecutor committed misconduct. The district court stayed the case to allow petitioner to exhaust his claims.

In 2014, after the state court denied relief, petitioner filed a "supplemental" petition in the federal case alleging six amended claims: (1) that counsel provided ineffective assistance by failing to seek a fifth competency evaluation at trial; (2) that counsel provided ineffective assistance by failing to request self-defense jury instructions; (3) that the trial court's verdict form violated his jury-trial right; (4) that the court violated his right to represent himself; (5) that a communication breakdown between petitioner and his counsel deprived him of the assistance of counsel; and (6) that the trial court and defense counsel wrongly allowed a biased juror to sit. The district court ultimately dismissed the action because it was untimely. Petitioner appealed.

It was undisputed that petitioner's 2008 and 2010 petitions were timely filed, but the 2014 amendment was not. The question for purposes of appeal was whether the 2014 amended claims related-back to either the 2008 or 2010 timely-filed petitions under Fed.R.Civ.P. 15(c)(1)(B).

Initially, petitioner argued that all claims in his 2014 petition related back to the claims in his *2008 petition*. This raised the question of whether an "amendment" under Rule 15 can relate back to a dismissed petition. The Sixth Circuit concluded

that it could not, observing that "every circuit court to address this issue (nine, by our count) has interpreted Rule 15 to bar prisoners from relying on the date of a dismissed petition." *Watkins v. Stephenson*, 57 F.4th 576, 580 (6th Cir. 2023) (citing *Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001); *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160–61 (3d Cir. 1999); *Graham v. Johnson,* 168 F.3d 762, 779-80 (5th Cir. 1999); *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008); *White v. Dingle*, 616 F.3d 844, 847 (8th Cir. 2010); *Rasberry v. Garcia*, 448 F.3d 1150, 1155 (9th Cir. 2006); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000) (per curiam)).

Alternatively, petitioner argued that the claims in his 2014 amendment related back to the 2010 timely-filed petition. The Sixth Circuit disagreed. The court stated that its decisions in *Cowan v. Stovall*, 645 F.3d 815, 818 (6th Cir. 2011), and *Watkins v. Deangelo-Kipp*, 854 F.3d 846, 849-52 (6th Cir. 2017), demonstrated what Rule 15(c)(1)(B) requires:

> In *Cowan*, we held that an amended ineffective-assistance claim alleging that counsel had failed to interview specific witnesses related back to an original ineffective-assistance claim alleging that counsel had "failed to investigate" and find "witnesses [who] would have supported" the defense. [645 F.3d at 819] (emphasis omitted). The new claim "merely added more detail" to the original. *Id.* In *Watkins*, by contrast, we held that Watkins's amended ineffective-assistance claim that counsel wrongly failed to request another competency evaluation did not relate back to the original ineffective-assistance claim that counsel failed "to investigate and raise a defense." 854 F.3d at 850. The two allegations challenged different "episodes" in that one concerned a defense on the merits and the other concerned Watkins's competency. *Id.* at 850-51.

*Watkins*, 57 F.4th at 581.

The Sixth Circuit held that the claims in the 2014 amendment were different in "kind" (not just "specificity") from the claims alleged in the 2010 petition:

> Watkins does not even attempt to show that three of the amended claims—that the trial court's verdict form violated his jury-trial right, that the trial court violated his right to represent himself at trial, and that the trial court allowed a biased juror—have any factual connection to his original claims whatsoever. Recall that his original petition alleged two sentencing errors, a generic ineffective-assistance claim, and a prosecutorial-misconduct claim. So these

*(Continued on page 16)*

## Solution to logic puzzle from page 2.

Pick a fruit from the crate marked Apples and Oranges. If that fruit is an apple, you know that the crate should be labeled Apples because all of the labels are incorrect as they are. Therefore, you know the crate marked Apples must be Oranges (if it were labeled Apples and Oranges, the Oranges crate would be labeled correctly, and we know it isn't), and the one marked Oranges is Apples and Oranges. Alternately, if you picked an orange from the crate marked Apples and Oranges, you know that crate should be marked Oranges, the one marked Oranges must be Apples, and the one marked Apples must be Apples and Oranges.

*(Continued from page 1)*

ground not authorized for second or successive collateral motions under § 2255(h). This case involved two federal statutes that provide postconviction relief for prisoners. Section 2241 is the "general habeas corpus statute" that permits federal courts to issue the writ. Federal prisoners, however, generally must use a different statute, § 2255, for postconviction relief. There is an exception: under § 2255(e)'s saving clause, a federal prisoner may file a habeas petition if § 2255 "is inadequate or ineffective to test the legality of his detention." Section 2255 also limits the number of motions a prisoner may make. Under § 2255(h) (added by AEDPA), a prisoner may file a second or successive motion only if it is based on either: (1) "newly discovered evidence," or (2) "a new rule of constitutional law." "A federal prisoner may not, therefore, file a second or successive § 2255 motion based solely on a more favorable interpretation of statutory law adopted after his conviction became final and his initial § 2255 motion was resolved."

In 2000, petitioner Marcus Jones was convicted of various offenses in federal district court, including two counts of unlawful possession of a firearm by a felon. The court sentenced him to serve more than 27 years in prison. He unsuccessfully appealed his convictions. He filed a postconviction motion to vacate, set aside, or correct his sentence under § 2255 and was partially successful; the court found that he was deprived the effective assistance of counsel and vacated one of his convictions. Many years later, the Supreme Court decided *Rehaif v. U.S.*, 588 U.S. __ (2019). There, the Court held that to convict a defendant of unlawfully possessing a firearm as a felon, the government must prove that the defendant knew that he was disqualified from owning a firearm. This abrogated the Eighth Circuit precedent that lower courts had applied to convict Jones and deny his appeal. Jones filed another § 2255 motion to challenge his conviction. He argued that, although his motion did not fall under § 2255(h)'s provision for second or subsequent motions—*Rehaif* was a new statutory rule, not a constitutional one—he qualified for habeas relief under § 2255(e)'s saving clause. The district court dismissed his motion for lack of jurisdiction, and the Eighth Circuit affirmed. In an opinion by Justice Thomas, the Court affirmed.

The Court began by tracing the history of federal postconviction relief. Until 1948, federal prisoners could file habeas corpus petitions under the predecessors to § 2241. But because those statutes granted jurisdiction to the district courts in the judicial districts where the petitioner was confined, this practice created "serious administrative problems"—witnesses and trial records were often elsewhere, and a few districts were swamped with virtually all federal habeas petitions. Congress enacted § 2255 to provide a speedier and more convenient process, giving sentencing courts jurisdiction over postconviction proceedings. In the Court's view, § 2255(e)'s saving clause operates only when, due to "unusual" circumstances like "the sentencing court's dissolution," it cannot grant a movant relief. It also preserves the role of habeas petitions for challenging the conditions of confinement, as opposed to the validity of a sentence. Given this view, the saving clause does not permit a movant to do an "end-run" around § 2255(h)'s restrictions on second or successive motions by authorizing § 2241 habeas petitions for second or

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successive statutory claims. "Any other reading would make AEDPA curiously self-defeating. It would mean that, by expressly excluding second or successive § 2255 motions based on nonconstitutional legal developments, Congress accomplished nothing in terms of actually limiting such claims. Instead, it would have merely rerouted them from one remedial vehicle and venue to another."

The Court rejected Jones' arguments to the contrary. Jones claimed that § 2255 is "inadequate or ineffective" whenever a court applies the law incorrectly or when subsection (h) would bar a second or subsequent motion. The Court rejected that interpretation as calling for "unbounded error correction." Although Jones argued that "inadequate" was a term of art in equity jurisprudence, the Court did not think that shed light on the plain text of § 2255. Jones argued that barring relief would violate the Suspension Clause, which prohibits Congress from suspending the writ of habeas corpus under most circumstances. The Court rejected this because Jones would not have been able to bring his claim at all when the Suspension Clause was adopted. "At the founding," the Court wrote, "a sentence after conviction 'by a court of competent jurisdiction' was 'in itself sufficient cause' for a prisoner's continued detention." The Court did not recognize a right to challenge substantive statutory errors in habeas proceedings until 1974. The Court quickly disposed of Jones' remaining constitutional arguments: that denying him a new opportunity to challenge his conviction threatened Congress' exclusive powers to define crimes (the majority held that courts do not usurp this power by misapplying the law in a single case); deprived him of due process (that right does not guarantee the right to collaterally attack a final sentence); and constituted cruel and unusual punishment (the Eighth Amendment governs the infliction of punishments, not collateral review).

The Court also rejected the government's position. The government took a broad view of § 2255's saving clause. It "begins with the premise that the words 'inadequate or ineffective' imply reference to a 'benchmark' of adequacy and effectiveness. It proceeds to identify that benchmark as the ability to test the types of claims cognizable under the general habeas statutes—specifically, those governing federal habeas petitions by *state* prisoners. The Government then reasons that § 2255(h)'s limitations on second or successive motions asserting newly discovered evidence or new rules of constitutional law do not trigger the saving clause because Congress has imposed analogous limitations on analogous claims by state prisoners and—by doing so—has redefined § 2255(e)'s implicit habeas benchmark with respect to such 'factual' and 'constitutional' claims. Since, the Government asserts, Congress has imposed no analogous limitation on statutory claims by state prisoners, it has not redefined the implicit habeas benchmark with respect to statutory claims like Jones'." (Citation omitted.) Rejecting that reasoning, the Court stated that "[i]ts most striking flaw is the seemingly arbitrary linkage it posits between the saving clause and state prisoners' statutory postconviction remedies." The Court further noted that "a state prisoner could never bring a pure statutory-error claim in federal habeas, because federal habeas corpus relief does not lie for errors of state law. As a result, it is unclear what work the

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*(Continued from page 14)*

Government's state-prisoner-habeas benchmark is even doing in its answer to the question presented here." (Citations and quotation marks omitted.) Finally, the Court declined the government's invitation to impose a clear-statement rule and believed that, in any event, § 2255(h) was clear as written.

Justice Sotomayor, joined by Justice Kagan, dissented. They pointed to the "disturbing" implications of the decision—an inmate "who is actually innocent" would be "forever . . . barred" from challenging his conviction "merely because he previously sought postconviction relief." The saving clause was designed to address "mismatch[es]" like this—when an inmate could bring a claim as a habeas petition but could not use § 2255. The majority's interpretation "assigns it almost no role." The dissenters would have adopted the government's position and remanded the case for further consideration.

Justice Jackson wrote a lengthy separate dissent. She saw no reason to read the saving clause as narrowly as the majority. She agreed with most of the majority's recitation of the history of § 2255, but believed that the saving clause evinced an intent to "afford[] the same rights" that were previously available with habeas proceedings "in another and more convenient forum." "Accordingly, Congress inserted the saving clause to ensure that certain pre-existing postconviction claims (say, a claim of statutory innocence) could still be heard even if the statutory language Congress was adopting inadvertently barred them."

Justice Jackson further maintained that the Court should not have drawn a "negative inference" from Congress not excepting new statutory claims under § 2255(h). In her view, such inferences are "notoriously unreliable" and could not be squared with prior decisions that effectively applied a clear-statement rule to restrictions on habeas relief. Legislative history suggested an intent to balance finality and combating "manipulative filing practices" with fairness. In Justice Jackson's view, Congress did not intentionally choose to bar successive motions based on statutory innocence—it "simply overlooked" them.

Justice Jackson also asserted that the majority's interpretation would create not only a "quirky procedural anomaly" but "stunningly disparate results" among similarly-situated prisoners. Justice Jackson believed that the most "straightforward" way to resolve Jones' claim would be to apply a clear-statement rule to attempts to limit habeas relief. She also believed that the majority's reasoning implicated the Eighth Amendment and the Suspension Clause. As to the former, she wrote that "[t]here is a nonfrivolous argument that the Constitution's protection against 'cruel and unusual punishment' prohibits the incarceration of innocent individuals." As to the latter, she disagreed with the majority's historical understanding of the scope of the habeas writ, saying that at its founding "a court lacked 'jurisdiction'—and thus the writ could issue—when a person was incarcerated for noncriminal behavior." (She also "reject[ed] the majority's suggestion that the Suspension Clause protects only the scope of the great writ as it existed in the founding era. Historical habeas practice provides the floor, and not the ceiling, of Suspension Clause protection.") Reflecting that the Court's interpretations of AEDPA had transformed postconviction

*(Continued on page 35)*

**Today I Learned . . .**

TIL that Martin Luther King Jr. was a huge fan of Star Trek. He loved that it showed a future with people of all colors working together in harmony. He bumped into Uhura, Nichelle Nichols, at a convention. She said she was quitting. She ended up staying after MLK urged her to, saying she was a role model.

TIL that since Brazil could not afford to send a team to the 1932 Olympics, they sent the athletes on a ship full of coffee. The athletes sold the coffee along the way to fund their journey.

TIL that Mississippi did not make child-selling illegal until 2009, after a woman tried to sell her granddaughter for $2,000

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three amended claims alleged errors in the way that the trial court managed the trial procedure, whereas the original claims alleged errors at the later sentencing, by Watkin's trial counsel, or by the prosecutor.

The remaining ineffective-assistance claims in Watkins's amended petition fare no better. Those claims criticized trial counsel for failing to request self-defense jury instructions, failing to object to the allegedly biased juror, and failing to communicate with Watkins before trial. As noted, his original ineffective-assistance claim alleged that his attorney failed "to investigate and raise a defense." The amended claims do not relate back to this assertion because it was "completely bereft of specific fact allegations[.]" The original claim failed to allege any facts, to identify counsel's investigatory failures, or to specify the defense that counsel failed to raise. In addition, to the extent that the original claim had any substance, it concerned counsel's failure to introduce evidence of an unspecified defense. But his amended claims concerned other matters. Two raised objections about trial procedure (allowing a biased juror and failing to request jury instructions), and the other objected to counsel's communications with Watkins. His new claims thus go well beyond merely adding "more detail" to what Watkins previously alleged.

*Watkins*, 57 F.4th at 581 (citations omitted).

**Further research:** *Introduction to Habeas Corpus*, Chapter Eleven (2022 ed.); *Postconviction Remedies*, §§ 25:68, 25:69 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 9A:148, 9A:157 (Thomson Reuters 2023 ed.).

## Exhaustion

Chapter 23 of *Postconviction Remedies*
Chapter 9C of *Federal Habeas Manual*
Chapter Ten of *Introduction to Habeas Corpus*

*Johnson v. Bauman*, 27 F.4th 384 (6th Cir. 2022)

***Synopsis*: Delays in state court did not excuse petitioner from exhausting his remedies.**

Petitioner pleaded guilty to three criminal offenses and was sentenced to state prison. In December 2015, he filed a motion for postconviction relief with the state trial court. The motion requested two forms of relief. First, to withdraw his no-contest plea because trial counsel was ineffective. And second, a resentencing because the trial judge violated his federal constitutional rights by basing his sentence on

a fact not admitted or proved beyond a reasonable doubt. A hearing on the motion was set for June 2016, but when the prosecutor disputed many of the factual claims made in the motion, the hearing was cancelled. In March 2017, petitioner filed a discovery motion, followed by an amended motion. The trial court granted the discovery motion, and petitioner obtained an affidavit from his trial counsel.

Petitioner, however, did not file trial counsel's affidavit (or any other evidence) with the state court. And while the trial court clerk filed petitioner's sentencing and plea transcripts with the trial court, petitioner did not ask the trial court to allow additional discovery, to set a date for an evidentiary hearing, or to rule on his postconviction motion. Instead, in August 2019, just two months after filing his plea and sentencing transcripts, petitioner filed a § 2254 petition. While he acknowledged that the state trial court had yet to rule on his postconviction motion (which would ordinarily mean that he had failed to satisfy 28 U.S.C. § 2254(b)(1)(A)'s exhaustion requirement), petitioner argued that special circumstances existed due to the "inordinate delay on behalf of state courts in addressing [his] claims." *Johnson v. Bauman*, 27 F.4th 384, 387 (6th Cir. 2022). The district court dismissed the petition without prejudice for failure to exhaust.

The Sixth Circuit recognized that § 2254's exhaustion requirement may be excused where "circumstances exist that render [the state's corrective] process ineffective to protect the right of the applicant." *Johnson*, 27 F.4th at 388. The court stated that interpreting Congress's command in § 2254(b)(1)(B)(ii) began with the statute's text, giving the words used their ordinary meaning. The court observed that two terms stood out:

> First, the statute permits excusing failure to exhaust only when the petitioner shows "circumstances" that warrant excusal. "Circumstances," both at the statute's enactment in 1948 and today, are background events that occur independent of one's volitional conduct. . . . Second, a petitioner's failure to exhaust may be excused only if the state court process is "ineffective." As that term has generally been understood, a process is considered "ineffective" if it is "incapable of producing" the intended effect. . . . Putting these terms together, the text of § 2254(b)(1)(B)(ii) indicates that exhaustion is required unless an event beyond the petitioner's control makes the state court process incapable of resolving the petitioner's claim.

*Johnson,* 27 F.4th at 388-89.

**Today I Learned . . .**

and a car and it was discovered that there was no law to punish her under.

TIL that black panthers are not a real species. They are jaguars and leopards who have "melanism," which causes them to have black skin. It's the opposite effect of having albinism.

TIL that Ethiopia has a unique calendar that is 7-8 years behind the rest of the world. The current year in Ethiopia is 2014.

TIL that a grown cat can jump between 5-8 times its height. That would be the equivalent of a human being able to jump from the ground up to the 3rd or 4th floor of a building.

The Sixth Circuit added that its reading of the text was "further informed by background principles of federal habeas jurisprudence that predate the exhaustion requirement's codification in 1948." *Johnson,* 27 F.4th at 389. These background principles made it clear, the court stated, that "the plain text of § 2254(b)(1)(B)(ii) indicates that exhaustion is a prerequisite for habeas review absent exceptional circumstances beyond the petitioner's control that either (1) render the state court process incapable of vindicating federal interests or (2) functionally foreclose state court review." *Id.*

But "[d]espite these straightforward textual commands and a deep body of case law excusing a petitioner's failure to exhaust only in narrow circumstances," the court observed that "over time the federal appellate courts have crafted a test for excusing a failure to exhaust that in many respects is unfaithful to Congress's formulation of § 2254(b)(1)(B)(ii)." *Johnson,* 27 F.4th at 391.

> Rather than ask whether the state court process is "ineffective to protect the rights of the applicant," many courts have instead excused a petitioner's failure to exhaust where the petitioner shows an "inordinate delay" in the state court's resolution of the petitioner's postconviction motion. Taken at face value, that standard arguably could lower the bar a petitioner must clear to excuse a failure to exhaust. Fairly understood, the term "inordinate" suggests that exhaustion may be excused if a federal court believes simply that the length of the state court process was "excessive" or "immoderate." But a lengthy proceeding, while in some instances lamentable, does not always leave a petitioner incapable of securing his rights—that is, in the words of the statute, does not necessarily imply that "circumstances" beyond the petitioner's control have rendered the "process ineffective to protect [his] rights," 28 U.S.C. § 2254(b)(1)(B)(ii).

*Johnson,* 27 F.4th at 391 (citations omitted).

The Sixth Circuit stated that its cases had made two things clear. First, "we have never held that a petitioner demonstrated 'inordinate delay' through delay alone." *Johnson,* 27 F.4th at 394. And second, "a failure to exhaust may be excused only if the state is responsible for the delay." *Id.* The court added that "[b]y requiring something more than mere delay, we seek to ensure that the underlying state court process was truly 'ineffective,' thereby excusing a failure to exhaust only in those historically 'rare cases where exceptional circumstances of peculiar urgency are shown to exist.'" *Id.* at 394-95 (quoting *Ex parte Hawk*, 321 U.S. 114, 117, 64 S.Ct. 448, 88 L.Ed. 572 (1944) (per curiam)).

With these principles in mind, the Sixth Circuit held that petitioner's request to excuse his failure to exhaust was meritless. To begin with, the delay alone was not enough to excuse exhaustion. And at most, less than four years elapsed between the date petitioner filed his initial postconviction motion in state court and the date he sought federal relief. Moreover, within this period, the state court had not been idle. Instead, it had set a hearing date, received a response from the prosecution that disputed many of the factual claims in the postconviction motion, and then granted petitioner's motion seeking discovery to develop his ineffective assistance of counsel claim.

**Thank you to Julie Hokans for her invaluable assistance.**

In that sense, the Sixth Circuit held, the relevant period in state court for purposes of measuring delay was roughly two years—the period between the state court's order granting petitioner's discovery motion and petitioner's habeas filing. Also, petitioner did not follow up after his discovery motion was granted, and there was no indication that the state and its courts were clearly responsible for the delay. "All things considered, [petitioner's] case is not the extreme instance in which circumstances beyond his control have left him 'incapable' of remedying the constitutional violations he alleges.'" *Johnson,* 27 F.4th at 397.

**Further research:** *Introduction to Habeas Corpus*, Chapter Ten (2022 ed.); *Postconviction Remedies*, § 23:21 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9C:49 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner's federal habeas petition was not rendered moot by his release from incarceration; and dismissal of the petition, without prejudice, for failure to exhaust state-court remedies was a final, appealable judgment.**

*Lauderdale-El v. Ind. Parole Bd.*, 35 F.4th 572 (7th Cir. 2022)

While imprisoned, petitioner filed a § 2254 petition challenging his loss of good-time credits resulting from a prison disciplinary conviction. The district court dismissed the habeas petition as unexhausted, and petitioner appealed. While the appeal was pending, petitioner was released from prison. Respondent argued that petitioner's release from prison during the appeal rendered the case moot.

The Seventh Circuit disagreed, stating: "A challenge to a petitioner's custody becomes moot when custody ends and no collateral consequences remain. Because parole is a form of custody, a case that could shorten a former prisoner's term is not moot." *Lauderdale-El v. Indiana Parole Bd.*, 35 F.4th 572, 575 (7th Cir. 2022). If petitioner prevailed on his claim that his good-time credits had been wrongly revoked, his release date from parole could be at least three months sooner.

Respondent further argued that the district court's judgment dismissing the petition without prejudice for failure to exhaust state-court remedies was not a final, appealable judgment under 28 U.S.C. § 1291. Respondent maintained this was the case here because petitioner could file a new petition asserting the same claim after exhausting state remedies. The Seventh Circuit again disagreed, overruling two precedents: *Gacho v. Butler*, 792 F.3d 732 (7th Cir. 2015), and *Moore v. Mote*, 386 F.3d 754 (7th Cir. 2004). The court agreed with the view taken by numerous other circuits that routinely treat dismissals of habeas corpus petitions for failure to exhaust as final, appealable judgments. *Lauderdale-El*, 35 F.4th at 578-79 (citing cases).

**Further research:** *Introduction to Habeas Corpus*, Chapter Ten (2022 ed.); *Postconviction Remedies*, § 23:22 n.61 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 1:68, 12:30 (Thomson Reuters 2023 ed.).

## SECOND AND SUCCESSIVE PETITIONS

Chapter 27 of *Postconviction Remedies*
Chapter 11 of *Federal Habeas Manual*
Chapter Nine of *Introduction to Habeas Corpus*

***Synopsis*: Petitioner did not establish by clear and convincing evidence that, but for collusion between prosecutor and state court judge, no reasonable factfinder would have found him guilty, so authorization to file a second or successive petition was not warranted.**

*In re Palacios*, 58 F.4th 189 (5th Cir. 2023) (per curiam).

Petitioner was one of many Texas prisoners who, after previously filing state habeas applications, learned that the state prosecutor who opposed their state habeas applications was also employed by one or more state judges to prepare findings of fact and conclusions of law in those same habeas cases. Upon learning of this fact, petitioner moved to file a second or successive 28 U.S.C. § 2254 petition, arguing that the shared work of the prosecutor and the state judge denied his constitutional right to an impartial judge.

The Fifth Circuit denied petitioner's application. The court explained that the facts underlying this claim did not establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found petitioner guilty of the underlying offenses. Petitioner argued that, but for the collusion, the presiding judge would have included his requested jury instructions. But, as was addressed on state-court direct appeal, these jury instructions were unavailable to petitioner because he did not admit to the conduct through his own testimony or through statements he made to other individuals, as required by the state-law doctrines. Petitioner therefore failed to make the requisite prima facie showing that, but for the collusion, no reasonable factfinder would have found him guilty of the underlying offenses. *In re Palacios*, 58 F.4th 189, 190 (5th Cir. 2023) (per curiam).

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, § 27:7 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 11:30 (Thomson Reuters 2023 ed.).

***Synopsis*: In determining whether a new rule of constitutional law was "previously unavailable" to petitioner, for purposes of determining whether the filing of a second or successive petition should be permitted, courts must apply a pragmatic approach, under which the petitioner must show that the real-world circumstances that he faced prevented him from asserting his claim earlier.**

*Munoz v. U.S.*, 28 F.4th 973 (9th Cir. 2022)

Petitioner moved the Ninth Circuit to file a second or successive petition for relief, asserting that his conviction was invalid based on a new rule of constitutional law that was announced in *U.S. v. Davis*, ___ U.S. ___, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). Where a petitioner's proposed claim is based on a new constitutional rule, leave to file a second or successive petition is given only if the petitioner makes a prima facie showing that the new rule was "made retroactive to cases on collateral review by the Supreme Court" and was "previously unavailable." 28 U.S.C. § 2255(h)(2). The government conceded that *Davis* announced a new constitutional rule that applied retroactively. Thus, the only issue was whether petitioner demonstrated that his new *Davis* argument related to his conviction was "unavailable" during his first habeas proceeding.

The Ninth Circuit noted that the Supreme Court has not interpreted § 2255(h)(2)'s "previously unavailable" requirement, nor did Congress define this term. But several other circuit courts have adopted a pragmatic approach when interpreting the "previously unavailable" requirement. For example, in *In re Cathey*, 857 F.3d 221, 229-30 (5th Cir. 2017), the Fifth Circuit refused to adopt a "strict rule" that a claim based on a new constitutional rule is available anytime the Supreme Court announces the rule before the inmate's initial habeas proceeding is concluded. Rather, the court recognized there is "a gray area of previous unavailability [of a new constitutional rule] despite technical availability," and it adopted a "rebuttable presumption that a new rule of constitutional law was previously available if published by the time a district court ruled on a petitioner's initial habeas

petition," which can be overcome by presenting "cogent arguments that [the claim] was previously unavailable" during the initial habeas proceedings. *Id.* (internal quotation marks and citation omitted).

The Eleventh Circuit has likewise rejected a "mechanistic test" for assessing whether a claim based on a new rule of constitutional law was previously available. In *In re Hill*, 113 F.3d 181 (11th Cir. 1997) (per curiam), the circuit court assessed the "previously unavailable" requirement "with reference to the availability of the claim at the time the first federal habeas application was filed." *Id.* at 182. But it also required an inmate to "demonstrate the infeasibility of amending" his request for habeas relief if it was still pending when a new rule that applied retroactively was announced. *Id.* at 183. Thus, the court held that the petitioner's new claim was not previously unavailable at the time he filed his initial habeas corpus petition because the new rule was announced by the Supreme Court while the petitioner's initial petition was still pending, and the petitioner failed to amend his petition to include the new claim. *Id.* at 183-84.

And the Eighth Circuit similarly applied a pragmatic approach to determining unavailability in *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005). The prisoner in *Davis* sought a new constitutional ruling by the Supreme Court in a second or successive petition. *Id.* at 878. Represented by counsel, the petitioner filed his first habeas petition after the case had been argued in the Supreme Court but before a decision was issued. *Id.* at 879. The district court held an evidentiary hearing on the habeas petition three months after the Supreme Court issued its decision and did not deny the petition until well over a year after that. *Id.* The evidence the petitioner relied on in making his later-presented constitutional claim was also available to him during the pendency of his initial habeas proceeding. *Id.* Under these circumstances, the Eighth Circuit held, the petitioner's new constitutional claim "was not previously unavailable" because he "could have raised [it] in the district court." *Id.*

The Ninth Circuit in the present case adopted this "pragmatic approach" for purposes of determining whether a claim based on a new constitutional rule was previously unavailable. "Under this approach, the prisoner seeking to file a second or successive request for habeas relief must show that the real-world circumstances that he faced prevented him, as a practical matter, from asserting his claim based on a new rule of law in his initial habeas proceeding." *Munoz v. U.S.*, 28 F.4th 973, 977 (9th Cir. 2022). Here, the Supreme Court issued its ruling in *Davis* shortly before petitioner filed his reply brief in support of his initial habeas motion and a few months before that motion was denied. Thus, purely as a matter of timing, the *Davis* rule argument was available during petitioner's initial habeas proceeding.

Nonetheless, petitioner asserted that his *Davis* argument was previously unavailable because it was "unreasonable to expect as a pro se prisoner with an eighth-grade education and no experience filing habeas applications to learn about a new rule of constitutional law and amend his habeas application to add a new claim in such a short time." *Munoz*, 28 F.4th at 978. But, the court responded, the difficulties that petitioner identified in and of themselves did not render a claim based on a new constitutional rule unavailable. "Instead, his difficulties largely mirrored the general challenges pro se prisoners face when preparing legal filings; they did not effectively create an external barrier to his ability to amend his petition, especially given his awareness of the recent [new constitutional rule] decision." *Id.*

The court explained that the focus is "on the real-world circumstances impacting whether a legal claim or remedy *can* be utilized or accessed by a prisoner." *Munoz*, 28 F.4th 978-79. The circumstances relevant to this inquiry relate to: "(1) the timing of the change in law, (2) whether the

prisoner had a factual basis for a claim based on the new law and when the prisoner learned of that factual basis, and (3) whether there is a procedural avenue for presenting the new claim that is generally accessible." *Id.* at 979 (citations omitted). "This analysis typically focuses on external barriers." *Id.* That is, the "availability" determination is made objectively, as opposed to "subjectively (whether a particular prisoner can use or access a claim given his unique characteristics and limitations)." *Id.* Based on these considerations, petitioner could not show that his *Davis* argument was unavailable during his initial habeas proceeding. *Id.* at 980.

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, §§ 27:4, 27:5 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 11:38 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner asserting a claim of actual innocence of the death penalty has to meet the requirements for filing a second or successive petition.**

*Atwood v. Shinn*, 36 F.4th 834 (9th Cir. 2022) (per curiam)

Petitioner sought leave in the Ninth Circuit to file a successive habeas petition alleging he was actually innocent of the death penalty because the use of a prior conviction as an aggravating circumstance to qualify him for the death penalty violated the Eighth and Fourteenth Amendments. Of importance here, he argued that he was not required to satisfy 28 U.S.C. § 2244(b)(2)(B), which authorizes second or successive petitions based on (i) the discovery of a factual predicate that could not have been discovered previously through the exercise of due diligence and (ii) that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

According to petitioner, he was excused from satisfying § 2244(b)(2)(B) under the equitable exception recognized in *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (articulating an "actual innocence exception" to the bar arising from the doctrine of "abuse of the writ" against bringing claims in a successive habeas petition, and holding that this exception requires that "one must show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law").

But the Ninth Circuit held that this argument was foreclosed by its prior decision in *Thompson v. Calderon,* 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc). In *Thompson*, the court held that the *Sawyer* exception was subsumed by § 2244(b)(2)(B). "Because *Sawyer* provides no equitable exception to § 2244(b)(2)(B) requirements, and because [petitioner] does not assert that his first claim otherwise meets those requirements, [petitioner's] first claim does not make a prima facie showing that it meets the requirements for an exception to the bar on second or successive petitions." *Atwood v. Shinn*, 36 F.4th 834, 837 (9th Cir. 2022) (per curiam). Moreover, the court went on to hold, petitioner could not meet the requirements of § 2244(b)(2)(B) because his claim was not based on facts or a factual predicate but instead was based on a new *legal* theory. *Id.*

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine; *Postconviction Remedies*, § 27:7 & n.59 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 11:27, 11:32 (Thomson Reuters 2023 ed.).

***Synopsis*: The gravamen of petitioner's claim in his second-in-time habeas petition—that a pretrial identification by eyewitness was unduly suggestive, violating his right to due process at capital murder trial—was presented in his first habeas petition, and thus, he was barred from raising the same claim in his second petition, even though the claim in the second petition was based on purportedly new evidence of the pretrial identification's unreliability; and the facts underlying petitioner's *Brady* and *Napue* claims accrued before his first habeas petition was filed.**

*Hooper v. Shinn*, 56 F.4th 627 (9th Cir. 2022) (per curiam)

Petitioner was convicted of capital murder and sentenced to death. The federal district court denied his § 2254 petition, and the Ninth Circuit affirmed.

Petitioner then filed postconviction review petitions in state court. He alleged violations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and a due process claim based on a victim's unreliable pretrial identification. All claims were based on a single piece of allegedly "new" evidence: a victim, contrary to her trial testimony and the testimony of officers, had been shown a photo lineup of petitioner and was unable to identify him before she identified him in a live lineup. The state court denied relief, finding no merit in the claims. Petitioner proceeded to file a second federal habeas petition, asserting these same three claims.

With regard to the due process claim based on the victim's supposed unreliable pretrial identification, the Ninth Circuit held the claim was barred because it had been presented in petitioner's first federal habeas petition. *Hooper v. Shinn*, 56 F.4th 627, 633 (9th Cir. 2022) (per curiam). Section 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The Ninth Circuit had previously held that "a claim 'is successive if the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments ... [or] proved by different factual allegations.' " *Gulbrandson v. Ryan*, 738 F.3d 976, 997 (9th Cir. 2013) (ellipsis and second alteration in original) (quoting *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999)).

Here, petitioner's first federal petition asserted that he "was denied due process of law in violation of the Fourteenth Amendment because the pretrial identification by [the victim] was unduly suggestive." *Hooper*, 56 F.4th at 633. The Ninth Circuit concluded that his present claim had the same basic thrust or gravamen: "[The victim's] pretrial identification was unduly suggestive, inadmissible, and tainted her in court identification of [petitioner] such that it should have been precluded." *Id.* The Ninth Circuit held that the fact that his present claim was based on new evidence was "irrelevant." *Id.* (citing *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) ("[W]e will not consider new factual grounds in support of the same legal claim that was previously presented.")).

The Ninth Circuit also concluded that petitioner's *Brady* and *Napue* claims were second or successive. "[A] federal habeas petition is second or successive if the facts underlying the claim occurred by the time of the initial petition, and if the petition challenges the same state court judgment as the initial petition." *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018) (citations omitted). "[A] factual predicate accrues at the time the constitutional claim ripens—i.e., when the constitutional violation occurs." *Id.* at 672.

Here, the factual predicate for petitioner's claims existed well before he filed his first federal petition, as did the alleged constitutional violations. The alleged *Brady* violation (the state's suppression of a photo lineup of petitioner) occurred before petitioner's trial. And the alleged *Napue* violation (the state's knowing use of false testimony) occurred during trial. Thus, the Ninth Circuit held, the *Brady* and *Napue* claims and the facts underlying them all accrued before petitioner filed his first federal petition. *Hooper*, 56 F.4th at 634 (citing *Brown*, 889 F.3d at 672-73 (rejecting argument that factual predicate accrues at the time the petitioner becomes aware of it)). Thus, that petitioner had only recently become aware of the fact was "irrelevant." *Hooper*, 56 F.4th at 634 n.10.

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, §§ 27:4, 27:7 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 11:23, 11:27, 11:53 (Thomson Reuters 2023 ed.).

***Synopsis*: State pretrial detainee failed to exhaust his Sixth Amendment speedy trial claim even though he had filed a demand for a speedy trial in state court; petitioner had grounded his argument solely on the state's speedy-trial rule and made only one reference to the Sixth Amendment in his state court filings, and the state courts never discussed the Sixth Amendment claim.**

*Johnson v. Florida*, 32 F.4th 1092 (11th Cir. 2022)

While awaiting trial on state criminal charges, petitioner filed a 28 U.S.C. § 2241 petition alleging his Sixth Amendment right to a speedy trial had been violated as a result of temporary measures suspending criminal jury trials in response to the COVID-19 pandemic. The federal district court dismissed the petition for lack of exhaustion, and petitioner appealed.

The Eleventh Circuit affirmed. In state court, petitioner never pressed a Sixth Amendment speedy-trial claim and never cited the U.S. Constitution or the Sixth Amendment. Instead, he based his argument solely on Florida's speedy-trial rule. The only reference to the Sixth Amendment came in a single sentence of a 14-page motion seeking to proceed pro se that made the passing observation that if he could not proceed pro se, then, perhaps, his Sixth Amendment rights would be harmed. The circuit court held that this "contingent claim" did not adequately state the particular Sixth Amendment basis he was pursuing. Furthermore, there was no indication that the state courts somehow surmised that petitioner had raised a federal constitutional claim, never discussing the Sixth Amendment claim, even implicitly.

The Eleventh Circuit rejected petitioner's claim that exhaustion would be futile. Petitioner was unable to complain about the state courts' delay in considering his Sixth Amendment claim since he never presented it to them. Petitioner had "not shown that the state courts could not, nor that they would not have acted on his Sixth Amendment speedy-trial claim, had he raised it." *Johnson v. Florida*, 32 F.4th 1092, 1098 (11th Cir. 2022).

The Eleventh Circuit further concluded that petitioner's claim was barred under the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The court recognized that an attempt to force the state to go to trial may assert a valid federal claim, *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 489-90, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), but that an attempt to dismiss an indictment or otherwise prevent a prosecution, as petitioner was doing here, was not a sufficient ground to enjoin the state

proceeding. *Johnson*, 32 F.4th at 1099; *accord Gates v. Strain*, 885 F.3d 874, 882 (5th Cir. 2018) ("the alleged denial of a speedy trial is not itself a legitimate basis on which to enjoin a state criminal proceeding"); *Brown v. Ahern*, 676 F.3d 899, 902-03 (9th Cir. 2012) (holding that federal courts may not enjoin state criminal prosecution on basis of alleged speedy-trial violation absent an independent showing of bad faith or other extraordinary circumstances); *Moore v. DeYoung*, 515 F.2d 437, 449 (3d Cir. 1975) (holding that the petitioner's "claim of alleged denial of the right to a speedy trial [by the state court] does not fall within the extraordinary circumstances envisioned in *Younger*").

**Further research:** *Introduction to Habeas Corpus*, Chapter Ten (2022 ed.); *Postconviction Remedies*, §§ 10:3, 23:17 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 1:111, 9C:46 (Thomson Reuters 2023 ed.).

***Synopsis*: Intervening change in law holding that district court had jurisdiction to consider requests to conduct additional discovery brought in a Rule 60(b)(6) motion did not amount to an "extraordinary circumstance" sufficient to support a Rule 60(b)(6) motion seeking additional discovery to develop potential constitutional claims; change in law did not change the substantive law governing petitioner's discovery requests.**

*Martinez v. Shinn*, 33 F.4th 1254 (9th Cir. 2022) (per curiam).

Petitioner was convicted of first-degree murder. After the Ninth Circuit affirmed the district court's denial of his § 2254 petition, petitioner moved under Rule 60(b)(6) for additional discovery to develop two potential claims that he purported would show he was actually innocent of first-degree murder. Petitioner argued that the Ninth Circuit's earlier decision in *Mitchell v. U.S.*, 958 F.3d 775 (9th Cir. 2020), was a change in law constituting an "extraordinary circumstance," permitting him to reopen his final judgment and obtain the requested discovery.

In *Mitchell*, the petitioner moved for relief from final judgment under Rule 60(b)(6) following the denial of § 2255 relief. 958 F.3d at 780, 783. Mitchell challenged the court's earlier procedural rulings denying him authorization to interview the jurors at his criminal trial to investigate juror misconduct. *Id.* at 779. In 2009, the district court found that Mitchell did not show good cause for the requested interviews because he identified no evidence of juror misconduct. *Id.* In 2018, Mitchell moved for relief from the district court's 2009 ruling, arguing that the Supreme Court's intervening decision in *Peña-Rodriguez v. Colorado*, ___ U.S. ___, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017), significantly changed the law governing requests to interview jurors for racial bias and therefore constituted an "extraordinary circumstance" justifying the reopening of his habeas proceeding under Rule 60(b)(6). *Mitchell*, 958 F.3d at 779. The Court in *Peña-Rodriguez* held that juror statements demonstrating racial animus could be admissible as evidence notwithstanding the longstanding no-impeachment rule barring juror testimony about deliberations and Rule 606(b) of the Federal Rules of Evidence. 137 S.Ct. at 869-70.

The court in *Mitchell* first considered the district court's jurisdiction to entertain Mitchell's Rule 60(b)(6) motion. The court held that a prisoner's request to develop evidence for a potential new claim does not qualify as a "claim" under *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed. 2d 480 (2005), if it does not assert a federal basis for relief from the prisoner's

conviction or sentence, but rather simply gives a prisoner the opportunity to attempt to develop a claim that might entitle him to relief. Therefore, such a request for discovery brought under Rule 60(b) was not barred as a disguised second or successive habeas application.

The court in *Mitchell* then turned to the question of whether Mitchell had established "extraordinary circumstances" that would justify the reopening of his case under Rule 60(b)(6). The court explained that "a mere development in jurisprudence, as opposed to an unexpected change, does not constitute an extraordinary circumstance for purposes of Rule 60(b)(6)." 958 F.3d at 787. The court stated that "only [legal rulings] that may have affected the outcome of the judgment the petitioner seeks to review should weigh toward a finding of extraordinary circumstances." *Id.* at 786. "[W]e consider . . . whether the change in law affects an issue dispositive to the outcome of the case." *Id.*

In the present case, petitioner relied on *Mitchell* in his Rule 60(b)(6) motion for two propositions: first, that the district court had jurisdiction to consider his motion requesting discovery to develop his two potential claims because it was not a disguised second or successive petition; and second, that *Mitchell* constituted an extraordinary change in law governing post-judgment requests for discovery and therefore authorized the district court to grant his motion under Rule 60(b)(6).

The Ninth Circuit agreed with the first proposition. Under *Mitchell*, the district court had jurisdiction to consider petitioner's Rule 60(b)(6) motion for discovery to develop potential claims. His Rule 60(b)(6) motion was not a disguised second or successive motion. *Martinez v. Shinn*, 33 F.4th 1254, 1264 (9th Cir. 2022) (per curiam).

But the Ninth Circuit disagreed with petitioner's second position, holding that *Mitchell* fell short of satisfying the "extraordinary circumstances" requirement:

> There is no question that *Mitchell* established new law in this circuit as to the district court's jurisdiction to hear Rule 60 (b) motions for post-judgment discovery in habeas cases. Our new holding in *Mitchell* was that a district court has jurisdiction to consider discovery requests brought pursuant to Rule 60(b). But there was no new law with respect to the discovery request itself. . . . [¶] Because *Mitchell* did not change the substantive law governing [petitioner's] discovery requests, it does not constitute an extraordinary circumstance justifying relief from final judgment under Rule 60(b)(6).

*Martinez*, 33 F.4th at 1264.

In other words, *Mitchell* did not substantially affect either petitioner's underlying case or his request for discovery. The only effect of *Mitchell* was to make clear that the district court had jurisdiction to consider petitioner's Rule 60(b)(6) request. Accordingly, the district court properly denied petitioner's Rule 60(b)(6) motion. *Martinez*, 33 F.4th at 1265.

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, § 27:12 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 11:63, 12:14 (Thomson Reuters 2023 ed.).

***Synopsis*: Petitioner who receives relief as to his sentence in federal habeas petition is not barred from raising, in second-in-time federal habeas petition, challenge to undisturbed conviction.**

*Lesko v. Sec'y Penn. Dep't of Corr.*, 34 F.4th 211 (3d Cir. 2022)

In 1981, petitioner was convicted of multiple murders and sentenced to death. Later, he obtained federal habeas relief requiring a new sentencing trial. The resentencing trial was conducted in 1995, and petitioner was again sentenced to death. Petitioner then filed his second federal habeas petition. This second federal petition presented the first opportunity in which petitioner could challenge his resentencing. However, he had previously contested the guilt-phase proceedings in his first federal petition. The question raised was whether the guilt phase challenges in petitioner's second federal petition constituted a second or successive petition.

Deciding an issue of first impression, the Third Circuit held that "a prisoner who receives relief as to his sentence is not barred from raising, in a second-in-time habeas petition, a challenge to an undisturbed conviction." *Lesko v. Sec'y Penn. Dep't of Corr.*, 34 F.4th 211, 224 (3d Cir. 2022). The court said its decision was compelled by *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010).

The court distinguished its prior decision in *Romansky v. Superintendent Greene SCI*, 933 F.3d 293, 300-01 (3d Cir. 2019), holding that a habeas petitioner's resentencing as to one count of conviction "did not impose a new judgment" as to other counts for which both the conviction and sentence remained undisturbed, and each count of conviction for which a separate sentence was imposed authorized its own confinement, each constituting a distinct "judgment" for purposes of AEDPA. Thus, under *Romansky*, "a resentencing as to one count of a conviction that makes no changes to the confinements authorized by the other undisturbed counts does not affect the 'judgment' as to those courts and, hence, does not reset the habeas counter." *Lesko*, 34 F.4th at 225.

But where, as here, the petitioner was *resentenced as to all counts* of his conviction, his guilt-phase claims are not barred as second-or-successive. "Resentencing creates a new judgment as to each count of conviction for which a new or altered sentence is imposed, while leaving undisturbed the judgments for any counts of conviction for which neither the sentence nor the conviction is changed." *Lesko*, 34 F.4th at 225.

The court observed that the Fifth Circuit has adopted a similar approach, holding that, because vacating a conviction and sentence for a lesser included offense did not disturb either the conviction or sentence for the greater offense, it did not constitute a new judgment. *In re Lampton*, 667 F.3d 585, 588-89 (5th Cir. 2012). In contrast, the Second and Ninth Circuits treat the convictions and sentences for multiple counts as "components" of a single judgment, such that a change to any of them resets the habeas counter for all. *See Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012); *Johnson v. U.S.*, 623 F.3d 41, 46 (2d Cir. 2010). The Third Circuit saw no reason "to treat separate counts of conviction and sentences imposing separate confinements as components of a single judgment merely because they were handed down at the same time; rather, ... we will treat these as separate and distinct judgments for purposes of AEDPA." *Lesko*, 34 F.4th at 225 n.8.

The Third Circuit found a second and independent reason why one of petitioner's guilt-phase claims was not barred as successive. Petitioner alleged that his attorney rendered ineffective assistance by preventing him from

exercising his constitutional right to testify at the 1981 guilt-phase trial. That same lawyer represented petitioner at the first guilt and sentencing trials, first direct appeal, first state collateral review proceedings, and first federal habeas proceedings, along with his 1995 resentencing and ensuing direct appeal. It was only after counsel withdrew in 1999 that petitioner, with new counsel, for the first time raised the ineffectiveness claim involving prior counsel. Petitioner then sought to advance this ineffectiveness claim in his second round of federal habeas review.

The Third Circuit pointed out that lawyers cannot be expected to argue their own ineffectiveness. *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (stating that "[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"); *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 690 (11th Cir. 2017) (observing that a lawyer's "personal interest in not being found to have performed ineffectively ... conflicts with the interests of a client asserting a claim based on his lawyer's ineffectiveness") (internal quotation marks omitted); *Combs v. Coyle*, 205 F.3d 269, 276 (6th Cir. 2000) ("[C]ounsel cannot be expected to raise his own ineffectiveness on appeal"); *U.S. v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (agreeing that "forcing trial counsel to prove his own ineffectiveness" creates a conflict of interest); *Ciak v. U.S.*, 59 F.3d 296, 303 (2d Cir. 1995) ("We cannot expect ineffective assistance claims to be raised on direct appeal—and therefore we should not penalize a petitioner for failing to raise them—when a petitioner's counsel on direct appeal also represented him at trial."); *accord U.S. v. Cocivera*, 104 F.3d 566, 570 (3d Cir. 1996).

Here, prior counsel operated under a conflict of interest, which effectively prevented him in both the state postconviction review and the initial federal habeas proceedings from raising a claim that he interfered with his client's right to testify. "Advancing such a claim would have required [counsel] to denigrate [his] own performance"—something he "cannot reasonably be expected to" do, as it would "threaten[ ] [his] professional reputation and livelihood." *Christeson v. Roper*, 574 U.S. 373, 378, 135 S.Ct. 891, 190 L.Ed.2d 763 (2015); *see also Maples v. Thomas*, 565 U.S. 266, 285 n.8, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012) (explaining that a "significant conflict of interest" arises when a lawyer's "interest in avoiding damage to [his] own reputation" is at odds with the petitioner's "strongest argument").

Because prior counsel was operating under a conflict of interest when he filed petitioner's first habeas petition, the ineffectiveness claim could not have been raised at that time, and petitioner's first opportunity to raise his counsel's ineffectiveness was in his second-in-time petition. *Lesko*, 34 F.4th at 227. The court "decline[d] to interpret § 2244(b) in a way that allows for an ineffective assistance counsel claim to completely evade federal habeas review." *Id.* Instead, it held "that a second-in-time habeas petition is not second or successive to the extent it raises an ineffective assistance of counsel claim that the prisoner lacked opportunity to raise because the same counsel represented him both at trial and in his first round of habeas proceedings." *Id.*

**Further research:** *Introduction to Habeas Corpus*, Chapter Nine (2022 ed.); *Postconviction Remedies*, §§ 25:13, 27:10, 27:11 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 9A:18, 11:47; 11:74 (Thomson Reuters 2023 ed.).

# INEFFECTIVE ASSISTANCE OF COUNSEL

Chapter 35 of *Postconviction Remedies*

***Synopsis*: Determination that petitioner was not denied effective assistance of counsel as a result of counsel's failure to procure a *Farretta* hearing was not unreasonable.**

*Barney v. Admin. N.J. State Prisons*, 48 F.4th 162 (3d Cir. 2022)

Petitioner contended that his attorney failed to assist him in asserting his right to represent himself, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Petitioner presented this claim to a state habeas court, which stated only that petitioner's "communication with his attorney to make such a request on his behalf was not clearly and equivocally made." *Barney v. Admin. N.J. State Prisons*, 48 F.4th 162, 164 (3d Cir. 2022). The Third Circuit said that, because neither party had shown otherwise, it was presumed that this finding amounted to a denial of petitioner's ineffectiveness claim on the merits. *Id.* (citing *Johnson v. Williams*, 568 U.S. 289, 301, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013)).

And applying AEDPA deference, the Third Circuit found that petitioner failed to demonstrate prejudice. Initially, petitioner argued that prejudice should be presumed because he was abandoned by counsel. The court recognized that prejudice is presumed when a defendant is actually or constructively denied the assistance of counsel altogether at a critical stage of trial. *Barney*, 48 F.4th at 165 (citing *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Although petitioner argued that counsel completely failed to help him by not getting him a *Faretta* hearing, the Third Circuit held this was

> a far cry from cases where the Supreme Court has found constructive denial of counsel. In one case, for instance, the lawyer forgot to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In another, the lawyer left his client "completely without representation" on appeal. *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988). But [counsel] actively defended [petitioner] at trial. Thus, [petitioner] cannot claim abandonment.

*Barney*, 48 F.4th at 165.

Alternatively, petitioner argued that, because *Faretta* error is structural, no showing of prejudice was required. The court disagreed, stating that, while that proposition is true for a *Faretta* claim raised on direct appeal, the same is not true when it is raised on federal habeas corpus through an ineffective assistance of counsel claim. "A court cannot presume prejudice if a structural error does not 'always lead to a fundamentally unfair trial' and does not 'deprieve[ ] the defendant of a reasonable probability of a different outcome.'" *Barney*, 48 F.4th at 165 (quoting *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 1912, 198 L.Ed.2d 420 (2017)).

The Third Circuit held that "[a] defendant's right to represent himself fits that bill." *Barney*, 48 F.4th at 165. The *Farretta* right is not designed to protect the defendant from erroneous conviction, but rather to protect his autonomy and his right to make his own choices about his defense. Likewise, violations of *Faretta* do not necessarily cast doubt on the reliability of the verdict or sentence. "On the contrary, when a defendant is denied the right, it usually works in his favor." *Barney*, 48 F.4th at 165. Thus, petitioner was required to prove prejudice, and since he conceded he could not, he was not entitled to relief.

**Further research:** *Introduction to Habeas Corpus*, Chapter Fourteen (2022 ed.); *Postconviction Remedies*, §§ 29:8, 35:4 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:10, 3:12; 13:3 (Thomson Reuters 2023 ed.).

# *Briefly stated . . .*

## JURISDICTION AND SIMILAR ISSUES

The Eighth Circuit held that the district court did not abuse its discretion by employing the concurrent sentencing doctrine to deny petitioner's motion to reduce his sentence where even a ruling in petitioner's favor would not reduce the time he was required to serve or otherwise prejudice him in any way. *U.S. v. Jefferson*, 60 F.4th 433, 436 (8th Cir. 2023); *see Postconviction Remedies*, § 7:9 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 1:13 (Thomson Reuters 2023 ed.).

The Fifth Circuit held that a certificate of appealability stating it was granted, "in part, as to the district court's procedural dismissal of the petition as time barred" and stating that the petition reflected "facially valid constitutional claims," was defective. The court held that while the certificate identified a debatable procedural ruling, it did not indicate a claim on which petitioner had made a substantial showing of the denial of a constitutional right. *Pierre v. Hooper*, 51 F.4th 135, 137 (5th Cir. 2022) (per curiam); *see Federal Habeas Manual*, § 12:80 (Thomson Reuters 2023 ed.).

The Fourth Circuit held that a district court lacks discretion to relieve the state from strict compliance with the mandatory requirements to attach to the answer parts of the transcript that the state considers relevant and to file with the answer a copy of any brief that the petitioner submitted in a state appellate court contesting the conviction or sentence. *Sanford v. Clarke*, 52 F.4th 582, 586-87 (4th Cir. 2022); *see Federal Habeas Manual*, §§ 8:27, 8:28, 8:33 (Thomson Reuters 2023 ed.).

The Fifth Circuit held that 18 U.S.C. § 3599's authorization for funding does not imply an additional grant of jurisdiction to directly oversee the provision of counsel and related services. *Beatty v. Lumpkin*, 52 F.4th 632, 635-36 (5th Cir. 2022) (§ 3599, authorizing counsel "to obtain" experts reasonably necessary for postconviction claims, does not create an independent enforcement mechanism or grant federal courts authority to oversee the scope and nature of federally-funded expert services); *see also Baze v. Parker*, 632 F.3d 338, 345 (6th Cir. 2011); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012); *see Rhines v. Young*, 941 F.3d 894, 895 (8th Cir. 2019) (addressing in dicta); *see Federal Habeas Manual*, § 8:21 (Thomson Reuters 2023 ed.).

The Eighth Circuit vacated the district court's orders directing state officials to transport or facilitate medical testing for purposes of petitioner's clemency case, ruling that 18 U.S.C. "§ 3599's authorization for funding neither confers nor implies an additional grant of jurisdiction to order state officials to act to facilitate an inmate's clemency application." *Tisius v. Vandergriff*, 55 F.4th 1153, 1155 (8th Cir. 2022); *see*

*Federal Habeas Manual*, § 8:21 (Thomson Reuters 2023 ed.).

## *HECK* BAR

The Tenth Circuit held that plaintiff's 42 U.S.C. § 1983 Fourth Amendment excessive force claim against an arresting officer was not barred by *Heck*, where the claim did not imply the invalidity of plaintiff's underlying Colorado convictions for resisting arrest and obstructing the officer. Plaintiff alleged that the officer used unreasonable force to subdue her by throwing her to the ground, causing her to sustain a concussion and other injuries, when she was unarmed and was almost half the size of the officer. These allegations were not inconsistent with the requirements for the resisting arrest conviction, including proof that plaintiff knowingly prevented or attempted to prevent the officer from effecting the arrest by use of force or other means, or the requirements for the obstructing conviction, which included the use or threatened use of violence to hinder enforcement of law by the officer. *Surat v. Klamser*, 52 F.4th 1261, 1273 (10th Cir. 2022); *see Postconviction Remedies*, § 11:11 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:14 (Thomson Reuters 2023 ed.).

As a matter of first impression, the Ninth Circuit held that *Heck* does not apply when criminal charges were dismissed after entry of a plea that was held in abeyance pending the defendant's compliance with various conditions. *Duarte v. City of Stockton*, 60 F.4th 566, 572 (9th Cir. 2023). The court said that its conclusion was consistent with the majority of circuits to consider *Heck* in the context of pretrial diversion agreements. *See Mitchell v. Kirchmeier*, 28 F.4th 888, 895-96 (8th Cir. 2022); *Vaaquez Arroyo v. Starks*, 589 F.3d 1091, 1093-96 10th Cir. 2009); *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 637-39 (6th Cir. 2008); *McClish v. Nugent*, 483 F.3d 1231, 1250-52 (11th Cir. 2007). *But see Gilles v. Davis*, 427 F.3d 197, 208-12 (3d Cir. 2005) (plaintiff's civil rights claims were *Heck*-barred even though he had never been formally convicted in state criminal proceedings); *DeLeon v. City of Corpus Christi*, 488 F.3 649, 655-56 (5th Cir. 2007) ("a deferred adjudication order is a conviction for the purposes of *Heck*'s favorable termination rule" because it is "a judicial finding that the evidence substantiates the defendant's guilt," although declining to decide how it would apply *Heck* for a plaintiff who satisfied the terms of the deferred adjudication agreement); *see Postconviction Remedies*, § 11:5 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 2:4 (Thomson Reuters 2023 ed.).

## AEDPA REVIEW STANDARDS

The Ninth Circuit rejected petitioner's argument that the application of AEDPA was unconstitutionally retroactive in violation of his due process rights. The Supreme Court has stated that a statutory provision's application is considered retroactive only if "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. v. USI Film Products*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994). Petitioner argued that the relevant legal "event" to which legal consequences attached was the automatic appeal of his capital sentence in state court, which occurred before AEDPA's effective date. But the Ninth Circuit pointed out that nothing in AEDPA affected the automatic appeal: "AEDPA attached new legal consequences to petitions for federal habeas relief, not to [petitioner's] state court litigation. That litigation was resolved on state law

grounds and substantive rules of constitutional law, both unaffected by AEDPA." *Michaels v. Davis*, 51 F.4th 904, 918 (9th Cir. 2022) (per curiam); *see Postconviction Remedies*, § 29:3 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 3:72 (Thomson Reuters 2023 ed.).

The Supreme Court has instructed that when a state court decision is unaccompanied by an explanation, a federal habeas court "must determine what arguments or theories … *could have supported*[ ] the state court's decision; and then [it] must ask whether it is possible that fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The Fifth Circuit stated that in applying this language, "we imagine the reasons that Story, Brandeis, and Frankfurter could've dreamt up to support that state court's decision, and then ask whether every reasonable jurist would conclude that all those hypothetical reasons violate the relitigation bar. That makes § 2254(d) very close to a *res judicata* provision." *Crawford v. Cain*, 55 F.4th 981, 989 (5th Cir. 2022); *see Postconviction Remedies*, §§ 29:4, 29:7, 29:38, 29:48 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 3:9, 3:24, 3:53, 3:70 (Thomson Reuters 2023 ed.).

## PROCEDURAL DEFAULT

The Ninth Circuit held that the third requirement for excusing a procedural default under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012)—that the state collateral review proceeding was the "initial" review proceeding with respect to the ineffective-assistance-of-trial-counsel claim—was satisfied in cases originating out of California courts. *Michaels v. Davis*, 51 F.4th 904, 929 (9th Cir. 2022) (per curiam); *see Postconviction Remedies*, §§ 27:13 nn.34, 88 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, §§ 9B:63, 9B:65 (Thomson Reuters 2023 ed.).

The Seventh Circuit held that a witness's testimony that petitioner was not the actual shooter was insufficient to satisfy the actual innocence standard for the miscarriage-of-justice exception to apply to petitioner's procedurally defaulted claim. It was undisputed that the witness's testimony was both new and credible. (It was new because it was not presented at petitioner's trial, and it was credible because the state appellate court found that the witness's testimony was generally worth believing.)

But the court held that the new evidence was not so compelling and unequivocal that no reasonable juror would have convicted petitioner in light of it. The court stated that the new evidence "just adds a new voice to a highly complex, and often inculpatory, evidentiary record." For instance, two other witnesses unequivocally identified petitioner as the gunman and described him emerging from an alleyway and opening fire. "A reasonable juror could credit their testimony as honest and compelling—especially since a detective testified that the location of the .40 bullet casings was generally consistent with a shooter coming from the alleyway."

Moreover, there were considerable discrepancies in the testimony. Witnesses provided varied accounts of the shooting and the shooter, including the gunman's height, hair, and clothing. "Reasonable jurors could draw different conclusions from this evidence." Even factoring in the new testimony, the court stated it was left with a series of competing eyewitness accounts. Although a state court found the new witness's

testimony to be credible, that finding did not mean that a reasonable juror would necessarily credit this new account of the shooting over that of any other witness. "A conflict between trial testimony remains, notwithstanding [the new witness's] credibility, and we cannot say that it is more likely than not that no reasonable juror would have convicted [petitioner] in the light of the new evidence." *Wilson v. Cromwell*, 69 F.4th 410, 422-24 (7th Cir. 2023); *see Postconviction Remedies*, § 24:19 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9B:80 (Thomson Reuters 2023 ed.).

## STATUTE OF LIMITATIONS

The Tenth Circuit held that the district court's restitution order was part of defendant's sentence. Therefore, defendant's judgment of conviction was not final—and AEDPA's one-year limitations period did not commence—until resolution of his direct appeal of the district court's restitution order. This was true even though the district court had sentenced defendant to a custodial sentence shortly after trial, defendant failed to file a timely appeal of his conviction and sentence, and defendant's motion to vacate challenged his conviction and sentence. *U.S. v. Anthony*, 25 F.4th 792, 796-804 (10th Cir. 2022); *see Postconviction Remedies*, § 25:13 n.3 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 9A:13 (Thomson Reuters 2023 ed.).

## APPOINTMENT OF COUNSEL

The Sixth Circuit held that the district court did not abuse its discretion in declining to appoint petitioner, who was seeking federal habeas relief in a capital case, an additional attorney to litigate his motion to substitute counsel or to advocate for him to proceed pro se. *Jones v. Bradshaw*, 46 F.4th 459, 471-72 (6th Cir. 2022); *see Postconviction Remedies*, § 14:2 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 8:21 (Thomson Reuters 2023 ed.).

## *ROOKER-FELDMAN*

The Ninth Circuit held that under the *Rooker-Feldman* doctrine, the district court lacked subject-matter jurisdiction to rule on petitioner's request for a preliminary injunction prohibiting the state from executing his death sentence until he obtained the relief requested in his 42 U.S.C. § 1983 action. In the § 1983 action, petitioner sought a declaratory judgment that the state's statutes providing for forensic testing of DNA and other evidence were unconstitutional as applied to him and an injunction ordering state officials to permit him to conduct the forensic testing. The circuit court explained that the relief sought would have effectively reversed the state court's decision that petitioner was not entitled to the forensic testing. *Hooper v. Brnovich*, 56 F.4th 619, 625-26 (9th Cir. 2022); *see Federal Habeas Manual*, § 1:117 (Thomson Reuters 2023 ed.).

## SPEEDY TRIAL RIGHT

The Sixth Circuit held that a nearly eight-year delay in bringing petitioner to trial on capital murder charges did not violate his right to a speedy trial, despite his contentions that two witnesses at trial had poor memories of events underlying his crimes due to the passage of time, and that the delay prevented him from receiving a

more timely psychological evaluation. Petitioner did not allege additional factual information forgotten by his witnesses that would have been pertinent to his defense or demonstrate a manner in which a more timely psychological evaluation would have been valuable. *Haight v. Jordan*, 59 F.4th 817, 869 (6th Cir. 2023); *see Postconviction Remedies*, § 38:12 (Thomson Reuters 2023 ed.).

## MISCELLANEOUS

The Fourth Circuit held that Fed. R. Civ. P. 60(b)(3)'s one-year time limit cannot be equitably tolled. *U.S. v. Williams*, 56 F.4th 366, 371-72 (4th Cir. 2023); *accord Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) (stating that Rule 60(b)'s time limit is "absolute" (citation omitted)); *In re G.A.D., Inc.*, 340 F.3d 331, 334 (6th Cir. 2003) ("Regardless of circumstances, no court can consider a motion brought under Rule 60(b)(1), (2), or (3) a year after judgment."); *In re Cook Med., Inc.*, 27 F.4th 539, 543 (7th Cir. 2022) (refusing to allow an extension of Rule 60(b)'s one-year time limit for equitable reasons "[n]o matter the potential merits of the plaintiffs' excusable neglect arguments," because it was a mandatory claim-processing rule); *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1277 (10th Cir. 2019) (Rule 60(b)'s time limit is absolute and "not subject to tolling"); *see Federal Habeas Manual*, §§ 12:11, 12:16 (Thomson Reuters 2023 ed.).

The Third Circuit held that trial counsel's decision not to object to the trial court's omission of a no-adverse-inference instruction the court had previously agreed to give was reasonable trial strategy, even if the omission of the instruction violated state law. Trial counsel testified that he decided not to object in order to avoid calling attention to the fact that petitioner chose not to testify, and there was reasonable disagreement as to the instruction's effectiveness. *Gaines v. Sup't Benner Township*, 33 F.4th 705, 713 (3d Cir. 2022); *see Postconviction Remedies*, § 34:4 nn.90-99 (Thomson Reuters 2023 ed.).

The Eighth Circuit held that 18 U.S.C. § 3599, which authorizes funding for legal, investigative, expert, or other reasonably necessary services to indigent prisoners sentenced to death, did not grant federal courts the authority to compel state officials to act in furtherance of clemency proceedings. Therefore, the court vacated the district court's order directing state officials to transport or facilitate testing for purposes of petitioner's clemency case. *Tisius v. Vandergriff*, 55 F.4th 1153, 1155 (8th Cir. 2022) (citing *Beatty v. Lumpkin*, 52 F.4th 632, 634 (5th Cir. 2022) (noting § 3599 does not allow a district court to "oversee the implementation of 'reasonably necessary' services by ordering state officials to comply with prisoners' requests related to such services"); *Bowles v. Desantis*, 934 F.3d 1230, 1242-44 (11th Cir. 2019) (explaining there is no federal constitutional right to state clemency and federal judges have no general supervisory power over state officials except when necessary to assure compliance with the United States Constitution); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012) (stating § 3599 provides nothing beyond funding power and does not empower the court to order third-party compliance); *Baze v. Parker*, 632 F.3d 338, 342-43 (6th Cir. 2011) (same); *see Postconviction Remedies*, § 14:1 (Thomson Reuters 2023 ed.); *Federal Habeas Manual*, § 8:21 (Thomson Reuters 2023 ed.).

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proceedings into an "aimless and chaotic exercise in futility," Justice Jackson invited "Congress to step in and fix this problem."

*Cruz v. Arizona*, 143 S.Ct. 650, 214 L.Ed.2d 391 (2023). By a 5-4 vote, the Court held that the Arizona Supreme Court's decision denying petitioner John Cruz's successive postconviction motion as procedurally barred is not an adequate state-law ground for the judgment. In 2005, a jury found Cruz guilty of killing a Tucson police officer. During the aggravation/mitigation stage of his capital trial, Cruz argued that under *Simmons v. South Carolina*, 512 U.S. 154 (1994), he was entitled to inform the jury that a life sentence carried no possibility of parole. The trial court disagreed, reasoning that *Simmons* did not apply to Arizona's capital sentencing scheme. The judge wrongly instructed the jury that one possible penalty was life imprisonment with parole eligibility after 25 years, and the jury sentenced Cruz to death. Four jurors later reported that they would have voted for life without the possibility of parole if that had been an option. Cruz then advanced his *Simmons* claim on direct appeal, and the Arizona Supreme Court denied relief. Like the trial court, the court determined that *Simmons* did not apply at Cruz's trial. After Cruz's conviction became final, the Court decided *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam), making it clear that *Simmons* applies in Arizona. That prompted Cruz to file a successive postconviction motion under Arizona Rule of Criminal Procedure 32.1(g). Under that rule, a successive petition for postconviction relief is permitted if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Cruz argued that *Lynch* was a significant change in the law because it overruled Arizona precedent that prevented capital defendants from informing the jury of their parole ineligibility. The Arizona Supreme Court denied relief, holding that *Lynch* was not a significant change in the law because "the law relied upon by the Supreme Court in [*Lynch*]—*Simmons*—was clearly established at the time of Cruz's trial . . . despite the misapplication of that law by the Arizona courts." The court explained that Rule 32.1(g) requires "a significant change in the law, whether state or federal—not a significant change in the application of the law." In an opinion by Justice Sotomayor, the Court vacated and remanded.

The question before the Court was "whether the Arizona Supreme Court's holding that Rule 32.1(g) precluded postconviction relief is an adequate and independent state law ground for the judgment." The general rule is that the Court will not address a question of federal law in a case where the state-court decision rests on a state-law ground that is independent of the federal question and adequate to support the judgment. Focusing on the adequacy requirement, the Court noted that a violation of a state procedural rule that is firmly established and regularly followed will typically be adequate to support the judgment. But in exceptional cases, the Court explained, a "generally sound rule" might be applied in a manner that "renders the state ground inadequate to stop consideration of the federal question." In particular, "an unforeseeable and unsupported state-court decision on a question of state procedure" is inadequate.

The Court concluded that the Arizona Supreme Court's decision denying Cruz's postconviction motion is inadequate because the court applied Rule 32.1(g) in an unforeseeable and unsupported way. Arizona courts have interpreted Rule 32.1(g)'s significant-change-in-the-law phrase to require a

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"transformative event," such as an appellate court overruling binding precedent. Given that "*Lynch* overruled binding Arizona precedent," the Court determined that the Arizona Supreme Court's application of Rule 32.1(g) should have been "[s]traightforward." "Before *Lynch*," the court explained, "Arizona courts held that capital defendants were not entitled to inform the jury of their parole ineligibility." After *Lynch*, "Arizona courts recognize that capital defendants have a due process right to provide the jury with that information when future dangerousness is at issue." The Court said, "It is hard to imagine a clearer break from the past." Yet the Arizona Supreme Court "disregard[ed] the effect of *Lynch* on the law in Arizona" and instead "considered only whether there had been a significant change in federal law." For the Court, that approach toward applying Rule 32.1(g) is "entirely new and in conflict with prior Arizona case law" and "thus the opposite of [a] firmly established and regularly followed" practice.

The Court noted that the state's position created a "catch-22" because, under the Arizona Supreme Court's approach, "it is impossible for Cruz and similarly situated capital defendants to obtain relief. To show retroactivity, Cruz argued before the Arizona Supreme Court that *Lynch* applied 'settled' federal law. Under the decision below, however, that same argument implies that *Lynch* was not a 'significant change in the law.'" And the Court responded to the dissent's contention "that this case did present a new context because the Arizona Supreme Court had never before applied Rule 32.1(g) to a summary reversal." The Court found that this "was no reason . . . to treat this case any differently than past cases. Whereas the Arizona Supreme Court had previously looked to the effect of an intervening federal or state decision on Arizona law, here it focused exclusively on whether there had been a change in federal law. The court thus disregarded that *Lynch* overruled 'previously binding case law' in Arizona, the 'archetype' of a significant change in the law." (Citations omitted.)

Justice Barrett filed a dissenting opinion, which Justices Thomas, Alito, and Gorsuch joined. Justice Barrett argued that "[c]ases of inadequacy are extremely rare, and this is not one." Justice Barrett noted that "the bar for finding inadequacy is extraordinarily high," and when "the argument is based on the state court's inconsistent or novel application of its law, the bar is met only by a decision so blatantly disingenuous that it reveals hostility to federal rights or those asserting them." Justice Barrett found that the Arizona Supreme Court's decision does not demonstrate "a purpose or pattern to evade constitutional guarantees" because the court confronted a novel question and "gave an answer reasonably consistent with its precedent." For support, Justice Barrett pointed to two Arizona Supreme Court decisions addressing Rule 32.1(g)'s significant-change-in-the-law requirement, both of which focused on changes in the content of federal law, as the court did in Cruz's case. As for the novelty of the Arizona Supreme Court's "law versus application-of-law distinction," Justice Barrett submitted that "[n]ovelty does not mean that a rule is inadequate merely because a state court announced it for the first time in the decision under review." Justice Barrett also maintained that federal habeas draws the same "distinction between a change in the law and a change in the application of the law," so "we should not be surprised that Arizona has made a similar choice." At bottom, Justice Barrett found the Arizona Supreme Court's decision defensible and therefore adequate to support the judgment.